

# Central Coast

## Local Planning Panel

Central Coast  
Local Planning Panel Meeting  
Business Paper  
**31 October 2024**



# Meeting Notice

**The Local Planning Panel Meeting  
of Central Coast  
will be held by Electronic Determination,  
Thursday 31 October 2024 at 9:00am,  
for the transaction of the business listed below:**

**1 Procedural Items**

1.1 Disclosures of Interest.....2

**2 Planning Reports- Outside of Public Meeting**

2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean  
Parade, The Entrance - Residential Flat Building and Demolition of Existing  
Structures (Amended Application) ..... 4

**Item No:** 1.1  
**Title:** Disclosures of Interest  
**Department:** Governance

**Central Coast**  
Local Planning Panel

31 October 2024 Local Planning Panel Meeting

Reference: F2020/02502 - D14205789

The NSW Local Planning Panel Code of Conduct states that all panel members must sign a declaration of interest in relation to each matter on the agenda before or at the beginning of each meeting.

### **Recommendation**

***That Panel Members now confirm that they have signed a declaration of interest in relation to each matter on the agenda for this meeting and will take any management measures identified.***

**Item No:** 2.1

**Title:** Supplementary Report - DA/1849/2005/B - 2-6  
Fairport Avenue & 46-48 Ocean Parade, The  
Entrance - Residential Flat Building and Demolition  
of Existing Structures (Amended Application)

**Central Coast**  
Local Planning Panel

**Department:** Environment and Planning

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31 October 2024 Local Planning Panel Meeting

Reference: DA/1849/2005/B - D16478646

Author: Rebecca Samways, Development Planner. Employment and Urban Release

Unit Manager: Andrew Roach, Unit Manager. Development Assessment

## Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to 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 Local Planning Panel considered the matter at its meeting of 23 September 2021 (report included as *Attachment 2*). The matter was deferred at the meeting pending the submission of supplementary information regarding:

- a. Physical commencement
- b. Suitability of the proposed species and height, in consideration of potential view loss within the north eastern corner of the lot

A Supplementary Report was provided to the Panel on 18 July 2022 (report included as *Attachment 3*) addressing the matters raised in the meeting minutes from the 23 September 2021 meeting. Upon review of the supplementary report and the submission of further legal correspondence prepared by Mills Oakley on behalf of the applicant, the Chair of the LPP requested a further round of legal advice be obtained in relation to the legal advice received from Mills Oakley, specifically in relation to physical commencement.

A second Supplementary Report was considered at a Panel meeting on 22 August 2024 (report included as *Attachment 4*) which provided further information regarding the correspondence prepared by Mills Oakley which was received since the preparation of the first Supplementary Report and included comments from a Landscape Architect.



**2.1                      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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The matter was deferred at the meeting pending further legal advice regarding:

- a. Whether physical commencement of the development consent DA/1849/2005, granted on 19 June 2006, has been established in accordance with section 95(4) (now section 4.53) of the *Environmental Planning and Assessment Act 1979*.
- b. Whether estoppel by representation arises from the letter provided by Council dated 29 September 2009.
- c. Whether the proposed modification will result in substantially the same development as the development for which the consent was originally granted, within the meaning of s4.55(1A) of the *Environmental Planning and Assessment Act 1979*.

This Supplementary Report provides a summary of the legal advice. The legal advice, obtained by Council to address the matters requested by the Panel, is included in full as *Confidential Attachment 1*)

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**Recommendation**

- 1        *That the additional information be considered in the Panel's determination of the application.***
- 2        *In the event that the Local Planning Panel are of the view that sufficient evidence has been provided that Development Consent DA/1849/2005 has physically commenced and is substantially the same, the Panel approve the modifications to***

**2.1            Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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***Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE in accordance with the recommendation included in the initial report on the matter (23 September 2021) subject to the amendments detailed in the schedule attached to that report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.***

**3        *That Council advise those who made written submissions of the Panel's decision.***

**Precis**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyong Local Environmental Plan 2013</i> (WLEP). A residential flat building is permissible in the zone.
<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	<ul style="list-style-type: none"><li>• 25 submissions original LPP report</li><li>• 11 submissions latest notification period for the first Supplementary Report</li></ul>

**Background**

The Panel considered a Supplementary Report on the matter at its meeting on 22 August 2024 and resolved as follows:

- Panel Decision            1        *The Council obtain an advice from suitably experienced counsel, within 21 days, as to whether:***
- a. physical commencement of the development consent DA/1849/2005, granted on 19 June 2006, has been established in accordance with section 95(4) (now section 4.53) of the Environmental Planning and Assessment Act 1979,***
- b. estoppel by representation arises from the letter provided by Council dated 29 September 2009, and***

*c. the proposed modification will result in substantially the same development as the development for which the consent was originally granted, within the meaning of s4.55(1A) of the Environmental Planning and Assessment Act 1979.*

**2      *That the Local Planning Panel defer this matter for electronic determination, pending provision of the advice referred to in item 1.***

**3      *The Council advise those who made written submissions of the Panel's decision***

**Reasons**

*1      The Panel has received conflicting legal advice on the physical commencement and estoppel issues.*

*2      The Panel has not received written legal advice on the question of whether the development as modified is substantially the same as the originally approved development.*

Council sought further legal advice from senior counsel in relation to the matters raised in the Panel's decision. The legal advice is attached in *Confidential Attachment 1* and is summarised below.

**ISSUE A - Physical Commencement**

The legal advice provided in *Confidential Attachment 1*, advises that there is sufficient evidence to demonstrate that partial demolition of the dwellings at 2 and 4 Fairport Avenue were physically commenced on the land prior to the lapse date. However, there is insufficient evidence to demonstrate that the relevant demolition works carried out on the site prior to the lapse date were carried out in accordance with the relevant conditions of the consent.

As the relevant prior to commencement of demolition works conditions are required to be complied with in order to establish physical commencement, it was concluded in this instance that the consent has lapsed and there is no power for the LPP to approve the modification application.

## **ISSUE B - Estoppel**

The legal advice provided in *Confidential Attachment 1*, advises that there are substantial obstacles for the applicant to succeed in claiming damages based on estoppel.

Notwithstanding this, it is also noted that this is irrelevant for consideration in the Panels determination of the section 4.55(2) application.

## **ISSUE C - Substantially the Same Development**

The legal advice provided in *Confidential Attachment 1*, advises that while the modifications proposed are numerous and, in many cases, not insignificant, the proposed modifications appear to retain the same essential or material features. The changes are not so significant that the proposed development is not substantially the same as the development to which consent was originally granted.

## **Other Matters**

### *Contributions*

Condition 2 which levied the payment of contributions was recommended to be updated in the original report to the Local Planning Panel on 23 September 2021. Since the application was reported to the Local Planning Panel, contribution rates have been indexed. Accordingly, condition 2 has been updated in the modified conditions of consent in *Attachment 5* in the event the application is approved.

## **Conclusion**

This supplementary report and the previous supplementary reports, along with the report considered by the Panel on 23 September 2021, has been prepared and assessed against the matters for consideration of Sections 4.15 and 4.55 of the *Environmental Planning & Assessment Act 1979* and all relevant instruments, plans and policies.






Council has sought its own further legal advice in relation physical commencement, estoppel and substantially the same development per the Panel's decision at its 22 August 2024 meeting.

It is a matter for the LPP to decide whether they are satisfied physical commencement has occurred and whether the proposed modified development is substantially the same. The LPP should have regard to all information included in the attachments to this Report, a number of which are confidential documents and are, therefore, not addressed in detail in this public document.

**2.1                    Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48  
Ocean Parade, The Entrance - Residential Flat Building and Demolition  
of Existing Structures (Amended Application) (cont'd)**

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**Attachments**

<b>1</b>	Confidential Attachment dated 25 September 2024 -	Provided Under Separate Cover	D16478698
<b>2</b> 	Original Assessment Report - 23 September 2021 LPP Meeting	Provided Under Separate Cover	D14810016
<b>3</b> 	First Supplementary Report distributed to LPP on 18 July 2022		D15327792
<b>4</b> 	Third Supplementary Report - 22 August 2024 LPP Meeting		D16288819
<b>5</b> 	Updated Modified Conditions of Consent		D15037217
<b>6</b> 	DA 1849 2005 B - 2-6 Fairport Avenue & 46-48 ~ Residential Flat Building and Demolition of Existing Structures (Amended Application)_Redacted		D16480099

**Item No:** 0.0

**Title:** Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application)

**Central Coast**  
Local Planning Panel

**Department:** Environment and Planning

31 December 2022 Supplementary Local Planning Panel

Reference: DA/1849/2005/B - D15327792

Author: Rebecca Samways, Development Planner

Section Manager: Emily Goodworth, Section Manager Development Assessment North

Unit Manager: Andrew Roach, Unit Manager, Development Assessment

Executive: Alice Howe, Director Environment and Planning

### Recommendation

- 1 That the additional information be considered in the Panel's determination of the application.**
- 2 That the Local Planning Panel approve the modifications to Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE subject to the amendments detailed in the schedule attached to the report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.**
- 3 That Council advise those who made written submissions of the Panel's decision.**  
[Click here to enter text.](#)

### Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to 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 Local Planning Panel considered the matter at its meeting of 23 September 2021. The matter was deferred at the meeting pending the submission of supplementary information regarding:

- a. Physical commencement
- b. Suitability of the proposed species and height, in consideration of potential view loss within the north eastern corner of the lot

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**Precis:**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyang Local Environmental Plan 2013</i> (WLEP). A residential flat building is permissible in the zone.
<b>Relevant Legislation</b>	<ul style="list-style-type: none"> <li>• <i>Environmental Planning &amp; Assessment Act 1979</i> (EP&amp;A Act)</li> <li>• <i>Environmental Planning &amp; Assessment Regulation 2000</i> (EP&amp;A Regulation)</li> <li>• <i>State Environmental Planning Policy No. 65</i> (SEPP 65)</li> <li>• Apartment Design Guide (ADG)</li> <li>• <i>State Environmental Planning Policy (Coastal Management) 2018</i></li> <li>• <i>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</i> (BASIX)</li> <li>• <i>State Environmental Planning Policy No.55 – Remediation of Land</i> (SEPP 55)</li> <li>• <i>Wyang Local Environmental Plan 1991</i></li> <li>• <i>Wyang Local Environmental Plan 2013</i></li> <li>• <i>Draft Central Coast Local Environmental Plan 2018</i></li> <li>• <i>Wyang Development Control Plan 2005</i></li> <li>• <i>Wyang Development Control Plan 2013</i></li> </ul>

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	<ul style="list-style-type: none"> <li>• 25 submissions original LPP report</li> <li>• 11 submissions latest notification period for supplementary report</li> </ul>

**Background**

The Panel considered a Planning Report on the matter at its meeting on 23 September 2021 and resolved as follows:

- Panel Decision**
- 1      *That the Local Planning Panel defer this matter for electronic determination, pending provision of detailed evidence from the applicant within the next 28 days demonstrating the consent has physical commencement and therefore not lapsed.***
  - 2      *Matters to be addressed as part of the above include, but are not limited to:***
    - *Copy of the deposited plan of the plan of consolidation required.***
    - *Evidence from surveyor as to any physical work they undertook on site required.***
    - *Evidence that the demolition took place prior to the lapse of consent, including copies of receipts and dated aerial photos showing demolition before consent lapsed required.***
  - 3      *That Council's Landscape Officer review the proposed landscaping within the north eastern corner of the lot to confirm the suitability of the proposed species and height, in consideration of potential view loss issue raised by adjoining resident.***
  - 4      *Upon receipt of the additional material requested, that Council make this information available on their website and notify those who previously made submissions.***

- Reasons**
- 1      The applicant has not adequately demonstrated that the consent has physical commencement. In this regard the Panel**



**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

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does not rely on the letter provided by Council dated 29 September 2009.

- 2      To minimise any adverse impacts on the amenity of adjoining residents.

**Additional Information**

In response to the outcome of the Panel meeting of 23 September 2021, the following additional information has been submitted:

20 October 2021:

- Received legal advice prepared by Mills Oakley, dated 19 October 2021 demonstrating physical commencement of the consent.

22 October 2021:

- Received amended landscape plans (dated 18 October 2021) and correspondence from the applicant's landscape architect (dated 12 October 2021) prepared by Narelle Sonter Botanica.

23 November 2021

- Received further legal advice prepared by Mills Oakley, dated 23 November 2021 in response to submissions (Attachment 2).

16 December 2021

- Received further legal advice prepared by Mills Oakley, dated 16 December 2021 to provide further information in relation to demolition on site.

**RESPONSE TO PANEL DECISION**

The applicant has addressed the decision of the Panel as follows:

- 1      *That the Local Planning Panel defer this matter for electronic determination, pending provision of detailed evidence from the applicant within the next 28 days demonstrating the consent has physical commencement and therefore not lapsed.***

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

The applicant provided additional legal advice in relation to physical commencement within 28 days from the request of the Panel. Additional information was provided subsequent to the 28 days e.g., amended landscape plan and information from the landscape architect. It is also noted a GIPA request was lodged during this time.

**2      *Matters to be addressed as part of the above include, but are not limited to:***

- ***Copy of the deposited plan of the plan of consolidation required.***
- ***Evidence from surveyor as to any physical work they undertook on site required.***
- ***Evidence that the demolition took place prior to the lapse of consent, including copies of receipts and dated aerial photos showing demolition before consent lapsed required.***

The applicant has submitted legal advice providing opinion that the consent has physically commenced. A copy of the applicant's legal advice is provided in **Attachment 1** and a summary provided below:

- *A development consent may be operational, even after its lapse date, if:*
  - *work is physically commenced before the lapse date;*
  - *that work is 'building, engineering or construction work';*
  - *that work relates to the work that is the subject of the development consent; and*
  - *that work is on the site.*
- *Demolition work was physically commenced on the site sometime between 3 June 2009 and 12 June 2009.*
- *Half of the demolition work was completed by or on 12 June 2009.*
- *This work was carried out before the lapse date of 19 June 2009.*
- *It is plain that the partial demolition of the existing dwellings on the site was 'building, engineering or construction work'.*
- *It is plain that the demolition of the existing structures was authorised and required by the development consent.*
- *The contemporaneous letter of the Council (issued in 2009) indicates that the demolition work was carried out in accordance with the development consent. No construction certificate was required for this work.*
- *The demolition plainly took place on the site.*
- *The development consent was physically commenced before its lapse date and now cannot lapse.*

The original consent was granted on 19 June 2006 and the notice of determination identified the nominated lapse date of the consent was 19 June 2008. On 26 September 2007 the development consent lapse date was extended by Council until 19 June 2009 in accordance

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

with the provisions of (former) Section 95A of the *Environmental Planning and Assessment Act 1979*.

The following documents have been provided with the legal advice to demonstrate that physical commencement of the development consent occurred before the lapse date of 19 June 2009:

- A tax invoice from BFW Constructions Pty Ltd (BFW) dated 3 June 2009
- A tax invoice from BFW dated 12 June 2009
- A letter to the Council from 'DMPS' signed by Daniel McNamara, dated 23 June 2009. The letter states demolition of the existing dwellings has commenced and will soon be completed and refers to the receipts for demolition and two of the dwellings having been demolished.

The information also included the following Google Street View images of the site showing the demolition of the buildings.

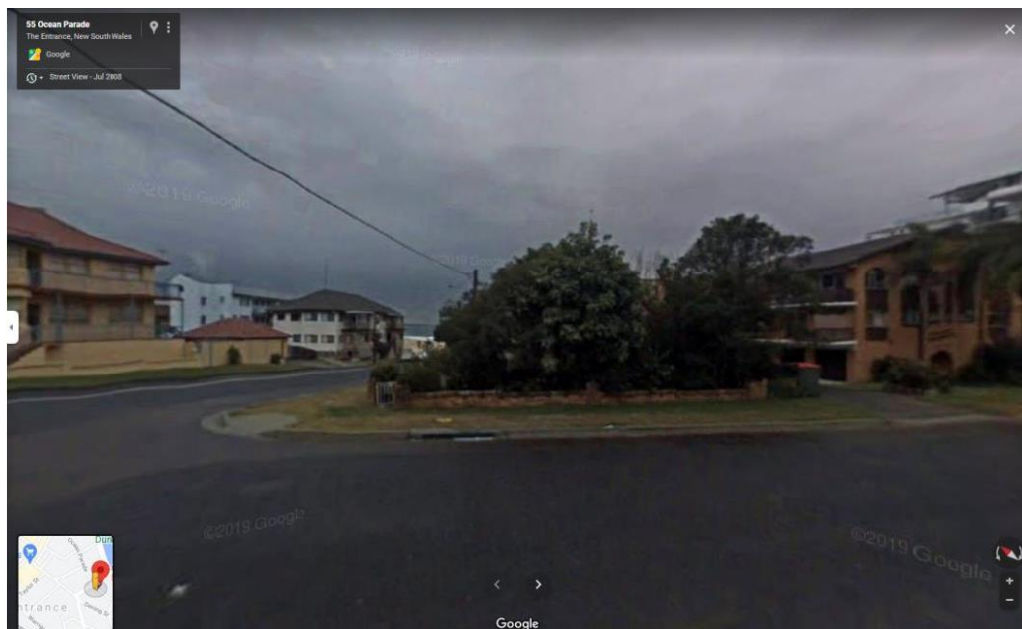


**Figure 1. Google Street View from Fairport Avenue in July 2008**

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**



**Figure 2. Google Street View from Fairport Avenue in July 2010**



**Figure 3. Google Street View from Ocean Parade in July 2008**

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**



**Figure 4. Google Street View from Ocean Parade in July 2010**

Based on the tax invoices from BFW, the letter from DMPS and the Google Street Views the legal advice concludes the following:

**2.6** *Based on the above, we conclude the following:*

- (a) *BFW was a contractor engaged to carry out the demolition of three dwellings.*
- (b) *These dwellings were located on the land that is the subject of the development consent.*
- (c) *BFW was engaged, on the payment of a deposit on 3 June 2009.*
- (d) *The demolition work was 50 per cent complete on 12 June 2009 (seven days before the lapse date).*

**2.7** *In our opinion:*

- (a) *demolition work was physically commenced on the site sometime between 3 June 2009 and 12 June 2009;*
- (b) *half of the demolition work was completed by or on 12 June 2009; and*
- (c) *this work was carried out before the lapse date.*

The applicant's legal advice concluded that that the partial demolition of the existing dwellings on the site was 'building, engineering or construction work' for the purpose of former section 95(4) of the EP&A Act and that the demolition of the existing structures was authorised and required by the development consent and was carried out lawfully on the site.

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

The applicant has provided further legal advice (**Attachment 3**) with regard to whether the demolition works have been carried out in accordance with the consent:

**1. Partial demolition of an existing dwelling is capable of physically commencing a development consent**

- 1.1 *The commencement of work is evidenced in the payment of the invoice issued by BFW for payment of '50% completion of [the] balance of [the] contract' dated 12 June 2021 (7 days before the lapsing date). This is consistent with half the labour involved in the demolition being completed.*
- 1.2 *Paragraph 2 of our letter dated 19 October 2021 outlines with sufficient detail that work was physically commenced before the lapse date (19 June 2009). This is evidenced by contemporaneous documentation, namely:*
  - (a) the invoice for demolition works dated 12 June 2021; and*
  - (b) the letter from 'DMPS' signed by the Daniel McNamara (the then proponent's town planner), dated 30 June 2009.*
- 1.3 *The **partial** demolition of an existing dwelling (as a step towards the construction of a new dwelling) has been held to be 'building, engineering or construction works': Sharp v Hunters Hill Council [2002] NSWLEC 27 at [35] and [40] and is capable of physically commencing a development consent.*
- 1.4 *In our view, it is plain that the **partial** demolition of the existing dwellings on the site was 'building, engineering or construction work' for the purpose of the former section 95(4) of the Environmental Planning and Assessment Act 1979 (**EP&A Act**).*

**2. The development consent has been lawfully physically commenced**

- 2.1 *For works to be regarded as physically commencing the consent, it is necessary for those works to be lawfully carried out: Iron Gates Developments v Richmond-Evans Environmental Society (1992) 81 LGERA 132. This means that it was necessary for the work to be carried out in accordance with the conditions of the development consent.*
- 2.2 *We have no reason to believe that the conditions of the development consent were not satisfied in the carrying out of the demolition work. Furthermore, on 29 September 2009 Mr Martin Johnson 'Manager Planning Legal and Policy' for the Council wrote to DMPS.*
- 2.3 *In that letter the Council officer said:*

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

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*I confirm my earlier verbal advice, that based on preparatory works undertaken and having regard to current case law, physical comment in accordance with Section 95(4) has been established.*

- 2.4 *This contemporaneous letter of the Council indicates that the demolition work was carried out in accordance with the development consent. A copy of this letter is enclosed.*

***In short***

- 3.1 *The level of information available, in our view, is typical of the extent of documentation that is generally available to establish historical physical commencement.*
- 3.2 *The consent authority should rely on:*
- (a) the contemporaneous invoice for works completed as issued by BFW Constructions Pty Ltd; and*
  - (b) the contemporaneous letter of the then proponent's town planner dated 23 June 2009 as evidence establishing physical commencement.*

Conditions 33, 34 and 35 of the consent have been imposed for the carrying out of demolition work and state:

- 33 *Building demolition work is to be carried out in accordance with the requirements/provisions of the AS 2601 - 2001 - The Demolition of Structures.*
- 34 *Prior to the demolition and / or removal of existing structures on site, all existing services are to be disconnected, sealed and made safe. The sewer and water service is to be disconnected by a licensed plumber and drainer. It is an offence to remove the water meter from the site. A Start Work Docket must be submitted to Council and Council's Plumbing and Drainage Inspector must certify that the works have been undertaken to the satisfaction of Council.*
- 35 *The disposal of any asbestos materials in accordance with the requirements of Workcover NSW and AS 2601 - 2001 - The Demolition of Structures.*

Condition 33 states the way the demolition must be carried out and in accordance with the relevant Australian Standards (relevant at the time of the granting of consent). No evidence was required to be provided to Council in this regard and it is anticipated BFW, who carried out the demolition, were aware of the requirements of AS 2601-2001, being a licensed building/construction company.

Condition 34 requires all existing services to be disconnected, sealed, and made safe and Council's Plumbing and Drainage Inspector must certify that the works have been undertaken to Council's satisfaction. A review of Council's records shows that Council's Plumbing and

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

Drainage Inspector carried out an inspection on 22 July 2009 and was satisfied sewer had been capped correctly and by a licensed plumber. The inspection report relates to all properties associated with the development consent, that is, No.s 2 and 4 Fairport Avenue, No. 44 Ocean Parade and 46-48 Ocean Parade, The Entrance.

The inspection record does not indicate which specific property and demolition it relates to, noting the correspondence from DMPS dated 23 June 2009 states *"two of the dwellings have now been completely demolished, and with good weather, the final dwelling will be removed within the next few days..."*. A search of Council's records has not provided any further information, such as the dated certification from the licensed plumber who carried out the work. There is no definitive information to verify whether the inspection was carried out upon completion of the demolition of all dwelling houses associated with the consent.

The requirements of condition 35 are similar to that of condition 33, requiring the works to be carried out in accordance with the Australian Standards. It is considered BFW, being a licensed building/construction company, would have been aware of the requirements for disposal of asbestos materials.

Having regard for the details above it is evident that works were being undertaken in or around the lapse date, notwithstanding the absence of a photo of the subject site on the lapse date. There is no evidence that demolition did not occur and a letter from a reputable planning consultant has been provided (DMPS dated 23 June 2009) confirming demolition had occurred prior to the lapse date of the consent.

It can be assumed that in the review of the file and evidence relating to works carried out on site, and the subsequent issuing of the letter by Council dated 29 September 2009 confirming physical commencement, that the relevant staff were satisfied that commencement of the consent had taken place prior to the lapsing date. This point of view is formed on the basis that the letter contains the following words *"...based on preparatory works and having regard to current caselaw..."*.

The applicant's legal advice prepared by Mills Oakley, and the legal advice prepared by PJ Donellan that was provided as a public submission, was reviewed by Council's Legal Section. In this regard, Council's Legal Counsel agreed with the points made in the Mills Oakley advice in place of those in the PJ Donellan letter, that is, that the consent had not lapsed. They disagreed with PJ Donellan that a Construction Certificate needed to be obtained prior to commencement of any works, in this instance specifically demolition works.

Council's Legal Counsel highlights the need for the application to have prevented the consent from lapsing pursuant to conditions 33, 34 & 35 and any other conditions associated with demolition. It was also noted that assertions made in public submissions about first-hand memory of certain dates of demolition occurring/not occurring are not matters in which Council should be involved. Based on the information provided, there appears to be enough



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evidence to indicate that physical commencement by way of demolition (partial) had occurred as per the Mills Oakley letters, prior to the lapsing date.

**3      *That Council's Landscape Officer review the proposed landscaping within the north eastern corner of the lot to confirm the suitability of the proposed species and height, in consideration of potential view loss issue raised by adjoining resident.***

The panel has requested that the landscape plans be reviewed by Council's Landscape Officer, however as Council does not have a Landscape Officer, Council requested the applicant provide additional information from a suitably qualified landscape professional, to confirm the suitability of the proposed species and height within the north eastern corner of the lot. In response to point 3 of the panel's decision, the applicant provided amended landscape plans, dated 18 October 2021 (**Attachment 4**) and correspondence from the applicant's landscape architect, Narelle Sonter from Botanica, dated 12 October 2021 (**Attachment 5**).

Botanica stated the following in response to the height of the proposed landscaping within the north eastern corner of the site:

*The buildings surrounding the north-eastern corner of the site currently experience considerable existing view restrictions. Depending on the specific remaining views, such as a possible view corridor between 30 & 31 Marine Parade, the boundary screening species may present some view encroachment.*

*As is the convention in the preparation of landscape plans, the heights noted in the landscape plan may be generally the maximum possible heights that these tree species may achieve. The individual plants may achieve a lesser height of some 10-25% of that given, in any particular exposed coastal location, such as this site. The wind-swept environment tends to cause trees to have suppressed vertical growth.*

*There are three *Eleocarpus reticulatus* and a *Banksia integrifolia* proposed in the north eastern corner of the site. The *Banksia integrifolia* often has a sparse and open canopy in exposed coastal situations, allowing filtered views to be retained. Despite the likely shorter mature form of both of these species, they do have the potential to obscure or partially obscure some existing views. In order to retain existing views from adjoining properties one or two of the *Eleocarpus* could be replaced with smaller shrub species. Alternatively, the preferred height of vegetation on the north eastern corner of the proposed development could become a condition of consent, so that the landscape plan could be amended to ensure retention of views, as required.*

Given the identified potential to impact views between 30 and 31 Marine Parade from 50-54 Ocean Parade, the applicant has submitted amended landscape plans and have replaced the Illawarra Flame Tree (mature height 16m), four Blueberry Ash trees (mature height 10m) and

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one Coastal Banksia (mature height 10m) with NSW Christmas Bush (mature height 3-5m), four Coastal Tea Trees (mature height 6m) and one Silver Banksia (mature height 2-4m). The amended landscape plan has reduced the maximum height of the planting in the north eastern corner of the site from 16m to a maximum of 6m.

The proposed amendments to the landscape plans will allow for a view corridor from 50-54 Ocean Parade compared to the original approved development, which had landscaping up to 10m in height in the north eastern corner of the site. Views from 50-54 Ocean Parade will be restricted on the ground level and level 1 compared to the original approved development, which restricted views at ground level, level 1 and level 2.

In addition to the further information regarding view loss from the landscaping, the applicant has also provided further information from Botanica addressing the suitability of the proposed rooftop landscape species having regard for the coastal environment and windy conditions. The following information has been provided in relation to rooftop landscaping:

*In regards to the suitability of rooftop species, the tree species - Leptospermum laevigatum (common name Coastal Tea Tree) is prolific in coastal vegetation communities and adapts very well to high wind environments, with contained vertical growth and a form typically aligned with prevailing wind direction. It is highly suited to this location in planters, on the rooftop.*

*Again, one would anticipate a significantly reduced height for these trees given the restricted soil volume of the planters, and the exposed coastal conditions. The shrubs, grasses and groundcovers are all specifically coastal species with the exception of Dianella 'Little Rev' and Phormium tenax 'Purpureum', both of which are varieties of hardy plants with distributions across a diverse range of landscapes. Both of these species are common in gardens in exposed coastal locations.*

*All of the selected species are highly suitable to their coastal rooftop position. An automatic irrigation system is proposed to ensure adequate watering of all species, thereby compensating for the challenging conditions of a coastal rooftop location.*

Although, the coastal tea trees are considered suitable for rooftop planting, to alleviate the concerns of objectors, the applicant has amended the rooftop landscape plan to remove all coastal tea trees, and replaced the species with lower species, 'miss muffed' and 'dwarf coast rosemary' which grow up to 1m and 0.5m in height respectively. All other species on the rooftop are considered suitable for the coastal and high wind environments.

**4      Upon receipt of the additional material requested, that Council make this information available on their website and notify those who previously made submissions.**

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The additional information was notified to those who previously made submissions from 28 October 2021 to 18 November 2021 and the information made available on Council's website.

During the notification period a total of 11 submissions were received.

A summary of the issues in the submissions in relation to the proposal from the latest notification period are detailed below.

<b>Submission</b>	<b>Comment</b>
Wind funnelling	The modified development will generally have the same building footprint. The only reduction in setbacks is on the ground floor where private open space courtyards are proposed which will not create wind funnelling. The balconies proposed on the south eastern façade are recessed and will not encroach further into the originally approved setback. As discussed in the LPP report dated 23 September 2021 it is considered that the generous building separation will not result in wind funnelling.
Cannot access documents online	The additional information regarding physical commencement and the landscaping was made available online from the beginning of the notification period and has remained available beyond the notification period for the information of interested parties.
Views over landscaping in communal open space in the north eastern corner of site.	The landscaping proposed within the north eastern corner originally had planting up to 16m. A condition of consent (condition 29A) was recommended when the application was originally reported to the LPP on 23 September 2021 restricting the maximum height of the landscaping in the north eastern corner to 10m which was consistent with the landscaping originally approved. The amended landscape plans have replaced the Illawarra Flame Tree (16m mature height) with NSW Christmas Bush (3-5m mature height) and four Blueberry Ash trees (10m mature height) along the eastern side boundary with four Coastal Tea Trees (6m mature height) and one coastal Banksia (10m mature height) in the north eastern corner with a Silver Banksia (2-4m mature height).

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	<p>The maximum height of the landscaping proposed in the north eastern corner of the site is now proposed to be 6m which is 4m lower than the landscaping originally approved within that part of the site. It is considered the amendment to the landscape plan to reduce the height of the planting is reasonable to provide maintain views to the north east between the buildings at 30 and 31 Marine Parade.</p>
<p>Height of development exceed Wyong LEP 2013 maximum permissible height.</p> <p>A maximum height of 18m was permissible when the application was originally approved and the building height was approved at 17.8m. In the amended DA the height is now 23.2m which is an increase of 5.4m (30%).</p>	<p>The application is for a section 4.55(2) modification to the original development consent granted which was approved under the provisions of Wyong LEP 1991 which provided a different height limit. As such a merit assessment has been undertaken and considered with regard to Section 4.55, in particular, whether the development is substantially the same to that which was originally granted development consent.</p> <p>The definition of building height under Wyong LEP 1991 was as follows: <b>building height</b> is the vertical distance from natural ground level at any point within a building to the top-most ceiling of the building directly above that point. WLEP 2013 defines building height as follows: <b>building height</b> (or <b>height of building</b>) means— in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.</p> <p>The difference being height was measured to the topmost ceiling under WLEP 1991 and it is now measured to the highest point of the building under Wyong LEP 2013. The approved building had a height measured to the ceiling of 17.8m and a height of 22.47m approved to the highest point of the building (shade structures on the rooftop).</p>

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	<p>The modified development has a building height of 23.7m measured to the highest point of the building (lift overrun) which is an increase in height of 1.23m. This matter was discussed in the assessment report that was considered by the Panel on 23 September 2021.</p>
<p>Consideration of the environmental impacts of carrying out the modified development compared to the originally approved development is also relevant to a modification.</p> <p>In terms of amenity impact, the rooftop terrace is likely to have an impact on the privacy and acoustic amenity of occupants of adjoining developments and the new balconies on the eastern corner of the building will impact the iconic views of sunsets, the bridge and ferris wheel.</p>	<p>Consideration of the environmental impacts of the carrying out of the modified development has been considered in the original report to the LPP dated 23 September 2021 and was found to be satisfactory.</p> <p>The increased density is not expected to result in any undue acoustic impacts. Given the approved development contained 5 rooftop private pools it is considered that the deletion of the pools and the provision of communal open space with BBQ facilities and seating will have no greater adverse acoustic impacts than those envisaged under the original application.</p> <p>The reconfiguration of the balconies on the eastern corner of the building on levels 1, 2 and 3 are within the existing approved building footprint.</p> <p>The level 4 and level 5 balconies on the eastern corner have been reconfigured and protrude slightly beyond the 9m approved setback but will be in line with the lower floors and the rest of the building along this property boundary adjacent to 30 Marine Parade.</p> <p>Views towards the bridge, ferris wheel and sunset were not provided for under the approved development. The modification does not change this.</p>
<p>The proposal is now for 56 dwellings instead of 45, with the consequent increased demand for car parking, yet the proposal is to decrease car parking spaces from 82 down to 74.</p>	<p>The original development provided in excess of the required parking spaces by 5 resident parking spaces and 2 visitor parking spaces. The proposed modifications have reduced the number of larger 3 bedroom apartments from 25 to 8 units while the number of 2 bedroom and 1 bedroom units have increased.</p> <p>The proposed modified apartment mix requires the provision of 68 resident parking spaces and 12 visitor</p>

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

	<p>parking spaces to be provided. The proposed modification only includes the provision of 64 resident parking spaces and 10 visitor spaces. Furthermore, Council's Traffic Engineer has advised that parking space number 15 on basement level 1 and parking space number 1 on basement level 2 are required to be deleted to provide a turning area as they are at the end of blind aisles (<b>new condition 24A</b>). This will reduce the number of parking spaces provided to 62 resident parking spaces, which is a shortfall of 6 resident parking spaces and 2 visitor parking spaces.</p> <p>The proposed parking numbers will enable at least one space per unit to be provided and the shortfall in parking is minor (6 resident and 2 visitor spaces). It is considered that the parking proposed under this modification provides parking in an efficient manner that has little impact to neighbouring properties or the street. This issue was discussed in the LPP report that was considered by the Panel on 23 September 2021.</p>
Overshadowing	<p>The shadow diagrams indicate the minor increase in building height and greater articulation on the northern and south western façade will result in some additional overshadowing to adjoining properties. As discussed in the LPP report dated 23 September 2021, the original approved building overshadows the south eastern side of the adjoining property at 50-54 Ocean Parade. The overshadowing impacts resulting from the modified proposal are generally the same as that which was originally approved with some minor increases and decreases in overshadowing due to the modified roof structures and height.</p>
Physical commencement - The LPP requested detailed evidence from the applicant that the demolition of houses had commenced prior to the DA lapsing on 19 June 2009. The information supplied by the applicant is scant and questionable and certainly lacking in any detail.	<p>The applicant has provided legal advice and other information to demonstrate physical commencement of the development consent took place before the lapsing of the consent. This information has been provided to the Panel and discussed in the report to enable them to form an opinion on the matter.</p>

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

<p>An ASIC Report as to affairs into the then applicant, Beach Views (NSW) Pty Ltd ACN 110 357 312 (the Company), made by Liquidator Bruce Gleeson for the period up to 26 June 2009 (Form 507), indicates at page 3 of 8 that as at 26 June 2009 the Company had an interest in the land at 2-4 Fairport Avenue and 46-48 Ocean Parade The Entrance but that it had "NIL" works in progress. This appears to indicate that no works were being undertaken on the site by the Company in the period up to 26 June 2009.</p>	<p>It is not clear what the 'works in progress' is referring to in the ASIC Report. The works in progress may have been referring to construction works relating to the erection of the development. This report is not definitive.</p> <p>It is noted that BFW, who undertook the demolition of the dwellings on site, do not form part of the debtors and accordingly, it could be assumed that the invoices for the demolition dated 3 June 2009 and 12 June 2009 had been paid for the works that had been undertaken (before the lapsing date of 19 June 2009).</p>
<p>A number of preconditions in the conditions of consent were required to be met before demolition could take place and there is no evidence that these preconditions had been met prior to 19 June 2009.</p> <p>By way of example, condition 2 required a Construction Certificate prior to commencement of any works and condition 7 required that a dilapidation report be provided prior to commencement of works.</p> <p>No evidence has been provided that conditions 33 to 35 of the development consent were met.</p> <p>Accordingly, even if the applicant can establish that demolition works had started by 19 June 2009 unless evidence is available that all the preconditions were met prior to the demolition works taking place, then the demolition works cannot form the basis of 'physical</p>	<p>Conditions 2 and 7 are conditions required to be met prior to the issue of a Construction Certificate. The Courts have held that demolition may be carried out without first obtaining a Construction Certificate (<i>Sharp v Hunters Hill Council</i> [2002] NSWLEC 27 at [58]-[62]; <i>Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd</i> [2016] NSWLEC 122 at [33] and [71]-[74].</p> <p>Whether conditions 33, 34 and 35 have been satisfied has been addressed previously in the report and it is considered that there is no reason to believe that the conditions of the development consent were not satisfied in the carrying out of the demolition work.</p> <p>Legal advice has been provided by the applicant which states that based on the information available, physical commencement has occurred. Council's own legal advice is satisfied there is enough information available to indicate physical commencement by way of demolition (partial).</p>

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

commencement' within the meaning of the EPA Act and the 2005 consent has lapsed.	
Street planting size and scale additional bulk	The trees are considered to improve the streetscape and soften the built form of the development. Substantial landscaping has been proposed within the deep soil zones to provide improved amenity to the development and street.
In the LPP report Council stated that the only new balconies faced Ocean Parade. This is incorrect as they are at the back of the block facing Marine Parade.	<p>That is not correct. The assessment report did not state that "only" new balconies faced Ocean Parade. Notwithstanding, they are the only new balconies proposed under the modification. Some balconies have changed in size, but they are not new.</p> <p>Balconies were provided on all levels of the approved plans to the units on the north eastern corner of the building. The approved plans included various configurations to the balconies.</p> <p>The modified plans result in changes to the configuration of the balconies; however, they will be orientated towards the south-east and will not result in any additional privacy impacts to the north.</p> <p>The eastern side elevation also indicates profiled precast concrete panels is proposed along the side of the balconies orientating the balconies to the south-east and it is noted that all the balconies on all levels originally approved in the north eastern part of the site were either entirely or partially orientated towards the south east and as such will not result in any additional privacy impacts to the adjoining properties to the south east.</p>
Balconies outside approved building footprint	<p>The proposed modification is generally within the approved building footprint. There are some minor projections outside of the building footprint for articulation to the building façade, balconies and private open space courtyards to the ground floor units on the eastern side of the building.</p> <p>All the new upper- level balconies within the southern corner of the building will remain within the approved footprint. The reconfigured balconies on levels 3-5 in the north eastern corner of the</p>



**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

	building have been extended further north east to have the same setback as the approved footprint of the ground level. The extension of the balconies will maintain sufficient separation distance between the proposed development and the building at 30 Marine Parade and will not result in privacy impacts as profiled precast concrete panels is proposed along the side of the balconies facing 30 Marine Parade.
Potential for structural damage to adjoining buildings	<p>A condition of consent (<b>condition 7</b>) was imposed on the original development consent requiring the applicant to submit a dilapidation report for the adjoining properties to Council prior to the issue of a Construction Certificate. <b>Condition 56</b> was also included in the consent requiring any damage not shown in the dilapidation report to be rectified prior to the issue of an Occupation Certificate.</p> <p>In addition to the dilapidation report conditions, <b>condition 30</b> was imposed prior to the commencement of works to ensure the preservation and protection of buildings on adjoining allotments during excavation.</p> <p>The modified proposal would not involve the deletion of these conditions.</p>
No proposed completion date for construction potential disruption may be for months/years.	The timing for the completion of the construction is a matter for the developer and is not a planning consideration.
The Harriot building was constructed after the original development was approved and as such the impacts of the approved building have not been properly considered.	The approved building cannot be re-assessed under this application. The assessment of the current modification application can only assess the scope of works proposed under the modification and any impacts to adjoining properties that may result from the amendments proposed. However, while it is acknowledged the Harriot was not constructed at the time the original consent was granted in 2006, it should be noted that the consent was granted for The Harriot in 2002 and as such would have been considered in the granting of the original development consent of the subject development.
Non-compliance with current LEP and DCP	The original development consent was granted in 2006 and was approved under the provisions of Wyong LEP 1991 and Wyong DCP 2005. Since the

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

	original approval Wyong LEP 1991 and Wyong DCP 2005 have been repealed and replaced by Wyong LEP 2013 and Wyong DCP 2013. A merits assessment of this modification has been undertaken accordingly.
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**Modified conditions**

The following modified conditions that were recommended in the report and attachments that were considered by the Panel on 23 September 2021, will need to be amended to reflect the revised plans as follows:

1    Proposed condition 29A -no longer required.

A new condition was recommended in the original LPP report (23 September 2021) to restrict the landscaping to maximum height of 10m to prevent any further impact to the views to that which was originally approved. Condition 29A was recommended to read as follows:

**29A    The landscape plan is to be amended to replace the Illawarra flame tree with an alternative species which grows to a mature height of up to 10 metres.**

As the latest amended plans have replaced the species within the north eastern corner of the site with species with a lower mature height (up to 6m) condition 29A is no longer required and has been deleted from the recommended modified conditions of consent in **Attachment 7**.

2    Amend proposed condition 60

Condition 60 was recommended to be amended to reflect the modified landscape plans submitted with the application upon lodgement. As the proposed landscape plans has been revised on 18 October 2021, condition 60 is required to be amended to reflect the current landscape plans. Furthermore, as discussed above, condition 29A is no longer required and as such reference to condition 29A within this condition is to be deleted. Condition 60 has been updated in **Attachment 7** and is recommended to read as follows:

60    The provision of landscaping in accordance with the plans prepared by **Narelle Sonter, Botanica, dated 18/10/2021**, including the engagement of an approved landscape consultant and contractor to undertake the design and construction of the landscaping.

**Written certification from a qualified landscape designer certifying that landscaping has been implemented in accordance with the landscape plan is**

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

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to be provided to the Principal Certifier prior to issue of the Occupation Certificate.

**3    Condition 94**

Condition 94 was recommended to be amended to reflect the modified landscape plans and to include reference to condition 29A. As discussed above condition 29A is no longer required and as such reference to condition 29A is to be deleted. Condition 94 has been updated in **Attachment 7** and is recommended to read as follows:

- 94      The approved landscape design prepared by **Narelle Sonter, Botanica**, including the private front courtyards, is to be maintained to maturity with watering and mulch. Any trees that die are to be replaced.

**Other Matters**

Condition 2 which levied the payment of contributions was recommended to be updated in the original report to the Local Planning Panel on 23 September 2021. Since the application was reported to the Local Planning Panel, contribution rates have been indexed. Accordingly, condition 2 has been updated in the recommended modified conditions of consent in **Attachment 7**.

**Conclusion**

The applicant has submitted the additional information requested by the Panel to demonstrate the consent has not lapsed and that the proposed landscaping will be satisfactory regarding height, species, and location. The additional information was notified as per the request of the Panel.

This supplementary report and the previous report considered by the Panel on 23 September 2021 has been prepared and assessed against the matters for consideration of Sections 4.15 and 4.55 of the *Environmental Planning & Assessment Act 1979* and all relevant instruments, plans and policies. Information has been provided by a planning consultant confirming demolition works had been carried out on site prior to the lapsing date and there is no substantial evidence to the contrary to prove otherwise. In this regard it is considered that in the issuing of a letter in September 2009, confirming commencement of the consent, Council staff at the time had the necessary evidence before them that works had occurred on the site prior to the lapsing date and they were satisfied the development consent had commenced.

The potential constraints of the site have been assessed and it is considered that the site is suitable for the proposed modified development. Subject to the imposition of appropriate conditions, the proposed modifications are considered reasonable and therefore it is

**0.0      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

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recommended that the Local Planning Panel approve the modifications to

DA/1849/2005/B in accordance with the recommended conditions of consent in **Attachment**

**7.**

**Attachments**

<b>1</b>	Physical commencement legal advice prepared by Mills Oakley, dated 19 October 2021	D15036682
<b>2</b>	Response to submissions legal advice prepared by Mills Oakley, dated 23 November 2021	D15036685
<b>3</b>	Further physical commencement legal advice prepared by Mills Oakley, dated 16 December 2021	D15036689
<b>4</b>	Amended landscape plans dated 18 October 2021	D15036695
<b>5</b>	Correspondence from Landscape Architect, Narelle Sonter Botanica, dated 12 October 2021	D15036704
<b>6</b>	Local Planning Panel minutes – agenda item 3.2 – 23 September 2021	D15036781
<b>7</b>	Updated recommended modified conditions of consent	D15037217

**Item No:** 2.2

**Title:** Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application)

**Central Coast**  
Local Planning Panel

**Department:** Environment and Planning

22 August 2024 Local Planning Panel Meeting

Reference: DA/1849/2005/B - D16288819

Author: Rebecca Samways, Development Planner. Employment and Urban Release

Manager: Emily Goodworth, Section Manager Employment and Urban Release

Executive: Andrew Roach, Unit Manager. Development Assessment

### Recommendation

- 1** *That the additional information be considered in the Panel's determination of the application.*
- 2** *In the event that the Local Planning Panel are of the view that sufficient evidence has been provided that Development Consent DA/1849/2005 has physically commenced, the Panel approve the modifications to Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE in accordance with the recommendation included in the initial report on the matter (23 September 2021) subject to the amendments detailed in the schedule attached to that report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.*
- 3** *That Council advise those who made written submissions of the Panel's decision.*

### Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to 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 Local Planning Panel considered the matter at its meeting of 23 September 2021 (report included as Attachment 1). The matter was deferred at the meeting pending the submission of supplementary information regarding:

- a. Physical commencement
- b. Suitability of the proposed species and height, in consideration of potential view loss within the north eastern corner of the lot

**2.2            Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

A Supplementary Report was provided to the Panel on 18 July 2022 (report included as Attachment 2) addressing the matters raised in the meeting minutes from the 23 September 2021 meeting. Upon review of the supplementary report and the submission of further legal correspondence prepared by Mills Oakley on behalf of the applicant, the Chair of the LPP requested further round of legal advice be obtained in relation to the legal advice received from Mills Oakley, specifically in relation to physical commencement.

This Supplementary report provides further information regarding the correspondence prepared by Mills Oakley which has been received since the preparation of the first Supplementary Report and includes comments from a Landscape Architect who worked for council recently.

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**2.2 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

**Precis**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyang Local Environmental Plan 2013</i> (WLEP). A residential flat building is permissible in the zone.
<b>Relevant Legislation</b>	<ul style="list-style-type: none"> <li>• <i>Environmental Planning &amp; Assessment Act 1979</i> (EP&amp;A Act)</li> <li>• <i>Environmental Planning &amp; Assessment Regulation 2000</i> (EP&amp;A Regulation)</li> <li>• <i>State Environmental Planning Policy No. 65</i> (SEPP 65)</li> <li>• Apartment Design Guide (ADG)</li> <li>• <i>State Environmental Planning Policy (Coastal Management) 2018</i></li> <li>• <i>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</i> (BASIX)</li> <li>• <i>State Environmental Planning Policy No.55 – Remediation of Land</i> (SEPP 55)</li> <li>• <i>Wyang Local Environmental Plan 1991</i></li> <li>• <i>Wyang Local Environmental Plan 2013</i></li> <li>• <i>Draft Central Coast Local Environmental Plan 2018</i></li> <li>• <i>Wyang Development Control Plan 2005</i></li> <li>• <i>Wyang Development Control Plan 2013</i></li> </ul>
<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	<ul style="list-style-type: none"> <li>• 25 submissions original LPP report</li> <li>• 11 submissions latest notification period for supplementary report</li> </ul>

**Background**

The Panel considered a Planning Report on the matter at its meeting on 23 September 2021 and resolved as follows:

**Panel Decision**                      **1**    ***That the Local Planning Panel defer this matter for electronic determination, pending provision of detailed evidence from the applicant within the next 28 days demonstrating the consent has physical commencement and therefore not lapsed.***

**2.2      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- 2      *Matters to be addressed as part of the above include, but are not limited to:***
  - *Copy of the deposited plan of the plan of consolidation required.*
  - *Evidence from surveyor as to any physical work they undertook on site required.*
  - *Evidence that the demolition took place prior to the lapse of consent, including copies of receipts and dated aerial photos showing demolition before consent lapsed required.*
- 3      *That Council's Landscape Officer review the proposed landscaping within the north eastern corner of the lot to confirm the suitability of the proposed species and height, in consideration of potential view loss issue raised by adjoining resident.***
- 4      *Upon receipt of the additional material requested, that Council make this information available on their website and notify those who previously made submissions.***

**Reasons**

- 1      *The applicant has not adequately demonstrated that the consent has physical commencement. In this regard the Panel does not rely on the letter provided by Council dated 29 September 2009.***
- 2      *To minimise any adverse impacts on the amenity of adjoining residents.***

In response to the outcome of the Panel meeting of 23 September 2021, additional information was received from the applicant. A Supplementary Report was prepared for the Panel to address the matters raised in the Panel's decision on 23 September 2021.

On 29 June 2022, the Chair of Central Coast Local Planning Panel (LPP) requested a briefing meeting between the Panel members and Council staff prior to arranging a date for determination. Council arranged a briefing meeting scheduled for 21 July 2022 and circulated the Supplementary Report on 18 July 2022 to the Panel. However, on 20 July 2022 the meeting was cancelled and was to be rescheduled for a later date as not all Panel members were available.



**2.2            Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

On 21 July 2022 the Chair requested a meeting with the Director of Environment and Planning to discuss the Supplementary Report.

Since the Supplementary Report was prepared and sent to the Panel on 18 July 2022, Council has received further legal correspondence prepared by Mills Oakley on 20 October 2022 and 11 April 2023 (Attachments 3 and 4).

Having regard for the complexity of the matter regarding physical commencement, the LPP Chair requested Council obtain further legal advice to respond to the more recent Mills Oakley advice, to assist the Panel in making an informed decision on the matter of physical commencement.

Additional information for the Panel's consideration is attached in (Confidential Attachment 5).

**Physical Commencement**

The legal advice prepared by Mills Oakley on behalf of the applicant asserts that physical commencement has occurred. As a result of the additional legal advice received from Mills Oakley dated 20 October 2022 and 11 April 2023, post the preparation of the Supplementary report, Council has sought further assistance on behalf of the Chair of the LPP.

The only evidence provided in respect of physical commencement are the documents referred to in the Supplementary Report dated 31 December 2022. The tax invoices supplied do not detail the date or nature of the works undertaken. No further evidence has been provided since December 2022 to substantiate the assertions of physical commencement. It is a matter for the LPP to decide whether they are satisfied if physical commencement has occurred. The options for determination of the modification are:

- refuse on the basis that physical commencement has not occurred, or
- approve the modification based on the facts provided by Mills Oakley and satisfaction physical commencement has occurred; or
- defer the decision for further information to be obtained by the Applicant.

Notwithstanding the question of physical commencement, Council must still complete a merit assessment of the proposed modification if it is determined that physical commencement has been achieved. An assessment of the proposed modification was undertaken in the report considered by the Panel on 23 September 2021 and the supplementary report sent to the Panel on 18 July 2022. Those assessment reports remain relevant for the merit assessment.

**2.2            Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**Other Matters**

*Landscaping*

Since the previous supplementary report, Council has obtained comments from a landscape architect that was working with Council. The following comments are made in relation to the landscaping.

The Panel raised concerns with the suitability of the proposed species and height in the north eastern corner of the site with regard to potential view loss. The landscape plans provided at the LPP meeting on 23 September 2021 detailed the provision of an Illawarra Flame Tree in the north eastern corner of the site which grows up to 16m in height. The original landscaping also included Coastal Banksia and Blueberry Ash which both grow up to 10m in height in the north eastern corner.

The applicant submitted amended landscape plans, dated 18 October 2021 which reduced the maximum height of the landscaping to 6m in the north eastern corner of the site. The amended landscape plans included Coastal Tea Tree (maximum 6m), NSW Christmas Bush (maximum 3-5m) and Silver Banksia (maximum 2-4m). It is estimated that maximum tree height and widths in planting to the north eastern precinct, predominantly Coastal Tea Tree, are unlikely to be reached due to the confined soil depths in the planter box structure (over basement), and therefore unlikely to have a major impact on associated view loss.

The plant selections are all hardy species suitable for use in planter boxes and coastal conditions with rooftop planting to be irrigated. The proposed Roof Plan planting consist of predominantly native shrubs, low growing groundcovers and texture grasses that are drought tolerant species suitable for use in coastal conditions and high wind environments. The Landscape Response states that an automatic irrigation system is proposed which will ensure a greater success in plant growth and establishment.

As per the previous assessment report and supplementary report which discussed the landscaping on the roof and the landscaping in the north eastern corner of the site, the landscaping is considered satisfactory.

*Contributions*

Condition 2 which levied the payment of contributions was recommended to be updated in the original report to the Local Planning Panel on 23 September 2021. Since the application was reported to the Local Planning Panel, contribution rates have been indexed. Accordingly, condition 2 has been updated in the modified conditions of consent in (Attachment 6).

**2.2            Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**Merit assessment**

As per the original report for the modification application (considered by the Panel 23 September 2021), the proposed modifications are considered to result in a proposal that is substantially the same development for which consent was originally granted. Having regard for the statutory approach to the consideration of what constitutes substantially the same development, a quantitative and qualitative analysis of the proposed development has identified there will be no radical changes to the original approved built form and the impacts assessed in the granting of the original consent will remain relatively the same under the proposed modified built form.

Having regard for the provisions of Sections 4.55(2) and 4.15 of the *Environmental Planning & Assessment Act 1979*, as set out in the original report, and the additional landscaping information, the proposed modification to the original approved development is considered reasonable and warranted in this instance.

**Conclusion**

This supplementary report and the previous supplementary report, along with the report considered by the Panel on 23 September 2021, has been prepared and assessed against the matters for consideration of Sections 4.15 and 4.55 of the *Environmental Planning & Assessment Act 1979* and all relevant instruments, plans and policies.

The applicant has provided further legal advice post consideration of the Supplementary Report sent to the Panel on 18 July 2022 and Council has sought its own further analysis in relation physical commencement at the request of the Chair. It is a matter for the LPP to decide whether they are satisfied physical commencement has occurred. The LPP should have regard to all information included in the attachments to this Report, a number of which are confidential documents and not addressed in detail in this public document.

The proposed landscaping is considered suitable. A merit assessment of the application was undertaken under the original report that went before the Panel on 23 September 2021 which found that the proposed modification was substantially the same development to that which was originally granted consent. Subject to the imposition of appropriate amended and new conditions, the proposed modifications are considered reasonable. It is a matter for the LPP to be satisfied that the proposed modification to the approved development is considered reasonable and warranted having regard for the merits of the proposal.

**2.2      Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**Attachments**

<b>1</b>	Original Assessment Report - 23 Septemeber 2021 LPP Meeting		D14810016
<b>2</b>	First Supplementary Report distributed to LPP on 18 July 2022		D15327792
<b>3</b>	Mills Oakley legal advice dated 20 October 2022 -	Provided Under Separate Cover	D15723655
<b>4</b>	Mills Oakley Legal Advice dated 11 April 2023 -	Provided Under Separate Cover	D15723658
<b>5</b>	Confidential Attachment dated 27 March 2023 -	Provided Under Separate Cover	D15723660
<b>6</b>	Updated Modified Conditions of Consent		D15037217

**Attachment 1 - Recommended Modified conditions of consent**

1. Modify description of land as follows:

~~Lots 16 and 17 DP 18810, Lot A DP 364571, Lot O SP 18493~~  
~~Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571~~  
~~Nos 2-4 Fairport Avenue & 44 46-48 Ocean Parade THE ENTRANCE~~

2. Modify description of proposal as follows:

~~Residential Flat Building comprising 45 56 units and Demolition of Existing Structures~~

3. Modify conditions 1, 5, 14, 15, 16, 17, 18, 19 and 20 as follows:

- 1 ~~The development taking place in accordance with the approved development plans reference number DA0501C, DA1101B as amended by DA1101C, DA1102B as amended by DA1102C, DA1201C as amended by DA1201D, DA1202C, DA1301C, DA1302C, DA1303C, DA1304C, DA1305D, DA1401D, DA1451C, DA1501C, DA1502C, DA1601B, DA1602C and DA1603A, DA1604A and DA1605B, except as modified by any conditions of this consent, and any amendments in red.~~

~~Implement the development substantially in accordance with the plans and supporting documents listed below as submitted by the applicant and to which is affixed a Council stamp "Development Consent" unless modified by any following condition.~~

**Architectural Plans by: RJS & CE Price**

Drawing	Description	Issue	Date
S4.55 - 1100	Site Plan	C	7/04/2021
S4.55 - 1101	Basement 2 Floor Plan	C	7/04/2021
S4.55 - 1102	Basement 1 Floor Plan	B	23/02/2021
S4.55 - 1103	Ground Floor Plan	C	7/04/2021
S4.55 - 1104	Level 1-4 Floor Plans	C	7/04/2021
S4.55 - 1105	Level 5 Floor Plan	C	7/04/2021
S4.55 - 1106	Roof Plan	C	7/04/2021
S4.55 - 1201	Section	C	7/04/2021
S4.55 - 1301	Elevation - North	C	7/04/2021
S4.55 - 1302	Elevation - East	C	7/04/2021
S4.55 - 1303	Elevation - South	C	7/04/2021
S4.55 - 1304	Elevation - West	C	7/04/2021

- 5 ~~The payment to Council of contributions (as contained in the attached Schedule) under Section 94 of the Environmental Planning and Assessment Act and Council's Contribution Plan. Council's contributions are adjusted on the~~

~~first day of February, May, August and November. The amount of the contributions will be adjusted to the amount applicable at the date of payment.~~

Pursuant to Section 7.11 of the *Environmental Planning and Assessment Act 1979* pay to Council a total contribution amount of **\$534,814.47** that may require adjustment at the time of payment, in accordance with The Entrance District Development Contributions Plan with the applicable amounts as follows:

THE ENTRANCE/LONG JETTY ROADS	\$ 283,760.46
THE ENTRANCE/LONG JETTY OPEN SPACE LAND	\$ 12,326.40
THE ENTRANCE/LONG JETTY OPEN SPACE WORKS	\$ 88,993.95
THE ENTRANCE COMMUNITY FACILITIES LAND	\$ 58,004.70
THE ENTRANCE COMMUNITY FACILITIES WORKS	\$ 91,728.96
<b>Total</b>	<b>\$ 534,814.47</b>

The contributions amount must be indexed each quarter in accordance with the Consumer Price Index (All Groups Index) for Sydney issued by the Australian Statistician as outlined in the contributions plan.

Contact Council on 1300 463 954 for an up-to-date contribution payment amount.

Any Construction Certificate must not be issued until the developer has provided the Certifier with a copy of a receipt issued by Council that verifies that the contributions have been paid. A copy of this receipt must accompany the documents submitted by the certifying authority to Council under Clause 104/Clause 160(2) of the *Environmental Planning and Assessment Regulation 2000*.

A copy of the Contribution Plan may be inspected at the offices of Central Coast Council, 2 Hely Street Wyong or 49 Mann Street Gosford or on Council's website: [Development Contributions](#)

*'Section 7.11 contributions may be satisfied by the value of works as part of a "Works in Kind" agreement with Council. Works in kind to be carried out shall be agreed to by Council in writing prior to the payment of the contributions and issue of a construction certificate (related to the works in kind). All such agreements shall be in accordance with Council's policies.'*

- 14 The provision of a footpath and gutter crossing in accordance with Council's ~~Development Control Plan 2005 Chapter No 67 – Engineering Requirements for Development~~ current Civil Works Design Specification. The design plans must be approved by Council prior to the issue of a Construction Certificate.
- 15 The provision at no cost to Council of concrete footpaving for the full street frontage of the development in Ocean Parade and Fairport Avenue ~~and the connection to pram ramps at the roundabout intersection~~. The footpath design is to be ~~1.2~~ 1.5 metres wide and is to include a minimum 100mm concrete path with SL72 reinforcement and is to be constructed on 75mm compacted roadbase and on compacted subgrade. All other details are to be in accordance

with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development Civil Works Design Specification~~. The design plans must be approved by Council under the *Roads Act 1993* prior to issue of the Construction Certificate.

- 16 Design Plans to be submitted to Council for approval under the Roads Act need to include the relocation of the existing raised pedestrian crossing in Fairport Avenue at the front of the development, and in the vicinity of the proposed access to the development. All works associated with the relocation of this crossing including all design and construction related costs including restoration of road pavements and kerb and gutter, and extensions of footpaths to suit the relocated crossing will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council and the Local Traffic Committee prior to the issue of a Construction Certificate, and prepared in accordance with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development Civil Works Design Specification~~.
- 17 The submission to and approval by Council of stormwater drainage details with water quality control facilities in accordance with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development Civil Works Design Specification~~ prior to issue of the Construction Certificate.
- 18 Stormwater drainage works discharging from the site into a public system or public land require approval from Council under Section 68 of the Local Government Act. The extent of work must be determined by Council prior to issue of a Construction Certificate. All works are to be designed and constructed in accordance with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development Civil Works Design Specification~~. Design plans must be approved by Council prior to issue of the Construction Certificate.
- 19 Stormwater generated from roofed areas is to be collected and stored for re-use within the development site for ~~landscaping, pools and car washing for~~ irrigation of landscaped areas and other non-potable purposes as required by BASIX. Details indicating the balance between the projected water usage and the capacity for collection are to be submitted to and approved by Council. A minimum storage of ~~25,000L~~ 23,000L will be required.
- 20 The applicant will be responsible for maintaining the flow conveyance of the existing 450mm Council stormwater pipeline within the development site via maintaining the existing pipeline or replacing it with an alternate pipeline. All works associated in satisfying this condition including all design and construction related costs including restoration of land, road pavements and kerb and gutter will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council prior to the issue of a Construction Certificate, and prepared in accordance with Council's

~~Development Control Plan 2005 Chapter No 67 – Engineering Requirements for Development current Civil Works Design Specification.~~

4. Add new condition 24A as follows:

- 24A Turning areas are to be provided for all blind aisles on both basement levels 1 and 2. Carparking spaces identified as basement 1, number 15 and basement 2, number 1 are to be amended to provide turning areas for vehicles to manoeuvre and circulate in a forward direction.

5. Modify conditions 25 and 26 as follows:

- 25 All water and sewer services necessary to service the development must be provided in accordance with Council's requirements. All services are to be designed and constructed in accordance with Council's ~~Development Control Plan 2005 Chapter 67 – Engineering Requirements for Development~~ water and sewer specification and Council's Policy: Building Over and Adjacent to Sewer Mains. The design plans for the required services must be approved by Council prior to the issue of the Construction Certificate.
- 26 The developer will be fully responsible for the funding, design and relocation of the existing sewer line between MH A14/1 and MH A14/2. The design and construction of the sewer relocation are to be in accordance with Council's ~~Engineering Requirements for Development – Sewerage~~ Sewer Specifications. Design plans are to be submitted to Council for approval prior to the approval of the Construction Certificate.

6. Add new condition 27A as follows:

- 27A A suitably qualified acoustic consultant shall be engaged to provide recommendations on how to appropriately attenuate the temporary bin holding area so that any noise impact associated with the temporary storage of waste bins is adequately mitigated. The Construction Certificate plans shall detail the recommended attenuation measures and the holding area constructed accordingly.

7. Modify conditions 51 and 60 as follows:

- 51 To encourage the use of alternate transport modes, secure bicycle parking/storage must be provided to accommodate ~~15~~ 19 bicycles. The facility must be located in close proximity to the building entrances and be highly visible and well illuminated to minimise the likelihood of theft and vandalism. The installation and dimensions of the facility shall be in accordance with AS 2890.3-1993 – Parking Facilities – bicycle parking facilities.
- 60 The provision of landscaping in accordance with the plans prepared by Narelle Sonter Botanica dated 18/10/2021, including the engagement of an approved



landscape consultant and contractor to undertake the design and construction of the landscaping.

Written certification from a qualified landscape designer certifying that landscaping has been implemented in accordance with the landscape plan is to be provided to the Principal Certifier prior to issue of the Occupation Certificate.

8. Delete conditions 76, 77, 78 and 79 as follows:

**Swimming Pools**

76 Deleted

77 Deleted

78 Deleted

79 Deleted

9. Modify conditions 81, 83 and 86 as follows:

81 The provision of a minimum number of ~~70~~ 72 carparking spaces (with minimum dimensions of 5.5 metres x 2.5 metres) generally in accordance with the layout shown on the approved plans, amended in red and in accordance with Council's Development Control Plan 2005 Chapter No 61 - Carparking. The carparking spaces and any off-street loading and unloading area must be constructed, sealed, marked, drained and maintained in accordance with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development~~ Civil Works Design Specification. All work must be completed prior to occupation/use of the development.

83 The restoration of any vehicle access rendered redundant by the development, to standard kerb and footpath formation at no cost to Council, in accordance with Council's ~~Development Control Plan 2005 Chapter No 67—Engineering Requirements for Development~~ Civil Works Design and Construction Specification. All works must be approved by Council.

86 For safety, amenity and maintenance reasons, the waste storage area must be constructed to the following standards:

- Floors must be constructed of concrete, graded and drained to an approved drainage outlet connected to the sewer and finished to a smooth even trowelled surface;
- Walls must be constructed with solid impervious material and shall be cement rendered internally to a smooth even steel trowelled surface;
- All intersections between the walls and floors shall be coved with coving having a minimum radius of 25mm;

- All entry points into the room must be banded to prevent the escape of liquid waste. Banding shall be for 110% of the likely liquid storage waste and constructed in such a manner that does not obstruct the removal of waste receptacles from the room or create a safety risk to users;
- Adequate ventilation shall be provided;
- Adequate lighting shall be provided;
- The ceiling must have a minimum height of 2.1m from floor level and be finished with a smooth faced non-absorbent material capable of being easily cleaned;
- Waste storage areas shall prevent the access of vermin;
- Waste receptacles used shall be compatible with Wyong Council's waste collection service;
- The door to the storage area shall be weatherproof and shall be openable from the inside at all times;
- Hot and cold water hose cocks shall be located inside or within close proximity to the waste storage areas to facilitate cleaning.
- A maximum 3% grade in the temporary bin holding area and waste truck servicing at the front of the temporary bin holding area.

10. Add new condition 87A and 93A as follows:

- 87A Prior to the release of any Occupation Certificate, a certificate of compliance, prepared by a suitably qualified acoustic consultant, must be submitted to Council certifying the attenuation measures recommended for the temporary bin holding area have been implemented.
- 93A The waste bins are to be moved to the temporary bin holding area no earlier than the day before waste collection and are to be moved back to the basement waste storage room no later than the day of waste collection.

11. Modify conditions 94 as follows:

Original condition 94:

- 94 The approved landscape design prepared by Narelle Sonter Botanica, including the private front courtyards, is to be maintained to maturity with watering and mulch. Any trees that die are to be replaced.

12. Add new condition 95 as follows:

- 95 Furniture on the rooftop communal open space is to be safely secured and/or stored during high wind events to prevent the furniture from being blown off the building.

**Item No:** 3.2  
**Title:** DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application)

**Central Coast**  
Local Planning Panel

**Department:** Environment and Planning

23 September 2021 Local Planning Panel Meeting

Reference: DA/1849/2005/B - D14810016  
 Author: Rebecca Samways, Development Planner  
 Manager: Emily Goodworth, Section Manager Development Assessment North  
 Approver: Andrew Roach, Unit Manager, Development Assessment

### Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to 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 with the issues requiring attention and consideration being addressed in the report.

The application is required to be determined by the Local Planning Panel because it has received 25 submissions of objection.

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

**Recommendation**

- 1 That the Local Planning Panel approve the modifications to Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE subject to the amendments detailed in the schedule attached to the report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.**
- 2 That Council advise those who made written submissions of the Panel's decision.**

**Key Issues**

- Consent was granted for a residential flat building comprising of 45 units and demolition of existing structures on 19 June 2006.
- Physical commencement was confirmed by Council on 23 September 2009.
- The original development was approved under Wyong LEP 1991 which permitted a maximum building height 18 metres. The current Wyong LEP 2013 identifies a maximum permitted building height of 12 metres.
- An increase in building height of the southern building section by 500mm and southern lift overrun by 1.23 metres is proposed.
- The original development was approved under Wyong LEP 1991 which permitted a maximum FSR of 2:1. The current Wyong LEP 2013 identifies a maximum permitted FSR of 0.9:1.
- The proposal remains compliant with SEPP 65 and Apartment Design Guide.
- The development will result in substantially the same development to that which was originally granted consent.
- The proposed modification remains consistent with the objectives of the zone.
- It is considered there will be no additional amenity impacts to those that were considered upon the granting of the original development consent.
- 25 submissions of objection to the section 4.55(2) application were received

**Precis:**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyong Local Environmental Plan 2013</i> (WLEP). A residential flat building is permissible in the zone.
<b>Relevant Legislation</b>	<ul style="list-style-type: none"> <li>• <i>Environmental Planning &amp; Assessment Act 1979</i> (EP&amp;A Act)</li> <li>• <i>Environmental Planning &amp; Assessment Regulation 2000</i> (EP&amp;A Regulation)</li> <li>• <i>State Environmental Planning Policy No. 65</i> (SEPP 65)</li> </ul>

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

	<ul style="list-style-type: none"> <li>• Apartment Design Guide (ADG)</li> <li>• State Environmental Planning Policy (Coastal Management) 2018</li> <li>• State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX)</li> <li>• State Environmental Planning Policy No.55 – Remediation of Land (SEPP 55)</li> <li>• Wyong Local Environmental Plan 1991</li> <li>• Wyong Local Environmental Plan 2013</li> <li>• Draft Central Coast Local Environmental Plan 2018</li> <li>• Wyong Development Control Plan 2005</li> <li>• Wyong Development Control Plan 2013</li> </ul>
<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	25 submissions

**Variations to Policies**

There are no variations to report.

**The Site**

The subject site (figures 1 and 2) is irregular shaped and comprises three lots. The site is located on the corner of Fairport Avenue and Ocean Parade. The site has a 69.6m frontage to Fairport Avenue and a 41.5m frontage to Ocean Parade with an area of 3258m<sup>2</sup>.

The site has a fall of approximately 4.5m towards the north eastern side boundary. No. 2-4 Fairport Avenue is currently vacant while No. 44-48 Ocean Parade currently has two 3-storey residential apartment buildings known as the 'Paradise Apartments'. The site has previously been used for residential development.

**Surrounding Development**

The surrounding development is predominantly medium density residential development. Buildings vary from low scale one and two storey single residential dwellings to residential flat buildings of up to nine storeys as shown in figure 3.

Adjoining the site to the east is a seven storey residential flat building known as 'The Harriot' and a three storey residential flat building known as 'Blue Pacific'. Directly adjoining the site to the north-east is a seven storey residential flat building known as the 'Tasman Towers'.

Opposite the site on Fairport Avenue is a mix of two and three storey residential developments. Directly opposite the site to the west on the corner of Fairport Avenue and Ocean Parade is a vacant site which currently has an approved seven storey residential flat

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

building under DA/95/2003 which has been commenced. Opposite the site to the south west on Ocean Parade are two residential apartment buildings known 'Fairport Court' and 'Scenic Court', both four storeys in height.



**Figure 1: Aerial photo showing the subject site and surrounding development**



**Figure 2: Site as viewed from the corner of Fairport Avenue and Ocean Parade**



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**30 Marine Parade ('Tasman Tower')**



**50-54 Ocean Parade ('The Harriot')**



**26-28 Fairport Avenue**



**44 Ocean Parade**



**43-49 Ocean Parade (artist's render approved 7 storey RFB, DA/95/2003)**



**55 Ocean Parade ('Fairport Court')**



**57-59 Ocean Parade ('Scenic Court')**



**30 Marine Parade ('Blue Pacific')**

**Figure 3: Existing and approved surrounding development**

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

The site is currently zoned R3 Medium Density Residential under Wyong LEP 2013 as shown in figure 4. The B2 Local Centre land of The Entrance Town Centre is located further to the west of the site. RE1 Public Recreation zoned land is to the north and east of the site along The Entrance Beach and foreshore and further west of the site at Shore Park and Taylor Park.



**Figure 4: Land zoning of subject site and surrounding locality**

**The Proposed Modification**

Under the provisions of Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, approval is sought to modify development consent 1849/2005 for a residential flat building comprising 45 units and demolition of existing structures. The proposed modification includes the following:

**Basement**

- Removal of Basement 3
- Relocation of the southern outer wall to the boundary to increase the parking area floorplate and the north-western and south-western basement walls away from the boundary
- Reduction in the provision of car parking spaces from the approved 84 to 72 (62 resident spaces + 10 visitor spaces)
- Inclusion of 16 bicycle and 2 motorbike parking spaces on Basement Level 2



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Ground Floor

- Rearrangement of unit layouts resulting in an amended unit mix from 4 x one bedroom units, 2 x two bedroom units and 1 x three bedroom units to:
  - 1 x Studio
  - 1 x one bedroom unit
  - 5 x two bedroom units
  - 1 x three bedroom unit
- Provision of three "cross through" lobbies with three principle access gates on Fairport Avenue and secondary single access from Ocean Parade
- Deletion of communal cinema and gym in the north western part of the building.
- Inclusion of new ground level courtyards on the south eastern elevation to provide private open space to the units
- Reconfiguration of driveway area at the north-western corner of the property to provide a paved hardstand for waste truck manoeuvring and accommodate on-site waste collection
- General reconfiguration of landscape design of private courtyards and common area gardens including the removal of the communal swimming pool

Level 1 to Level 4

- Rearrangement of unit layouts resulting in an amended unit mix from 3 x two bedroom units and 5 x three bedroom units to:
  - 2 x one bedroom unit
  - 7 x two bedroom units (1 adaptable)
  - 1 x three bedroom unit (adaptable)
- Inclusion of new balconies to units on the southern corner of the building.

Level 5

- Rearrangement of unit layouts resulting in an amended unit mix from 2 x two bedroom units and 4 x three bedroom units to:
  - 5 x two bedroom units
  - 3 x three bedroom unit
- Reduction of balcony area to north-eastern elevation and south-western elevation and the inclusion of new balconies to the units on the southern corner of the building.

Roof Level

- Removal of approved private terraces including swimming pools and operable shade structures
- Provision of communal open space with BBQ are and shaded seating zones

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

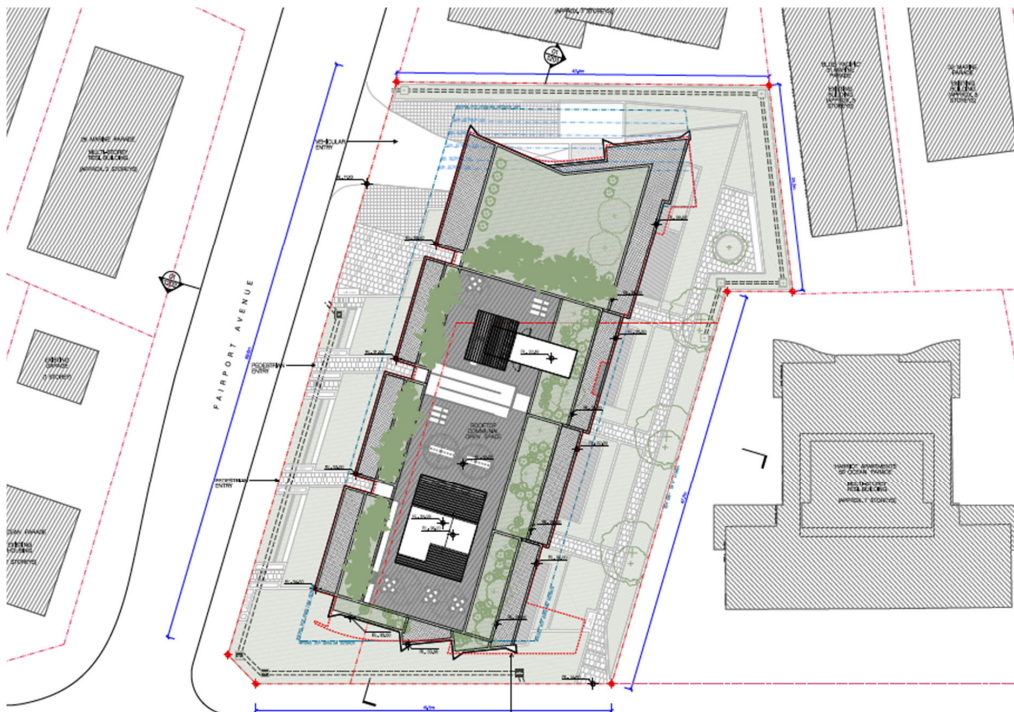
- New lift access to communal terrace
- Inclusion of extensive soft landscaping and planting

Exterior

- Amendments to the approved building facades, including:
  - Incorporation of off form concrete, precast concrete elements, façade recesses and articulate openings
  - Use of materials which are considered more appropriate for the local climate, are durable and require low maintenance
  - Higher levels of articulation to the east and west façades

General

- Reduction of the building's circulation cores from 4 to 3
- Increase in finished floor levels to have a minimum 300mm freeboard from the 1% AEP flood levels.
- Increase in building height due to the increased floor levels and the southern lift overrun to access the rooftop communal open space.
- Change to waste servicing arrangements from kerbside pickup to on-site collection in the northern corner of the site.

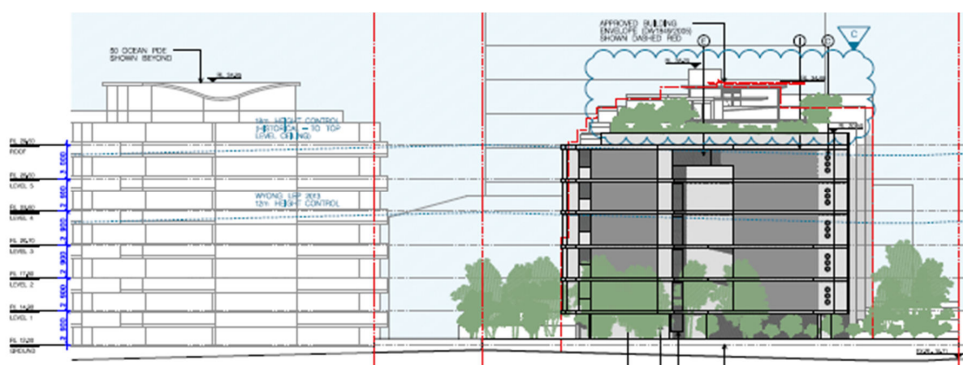


**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

**Figure 5: Site plan of proposed development**



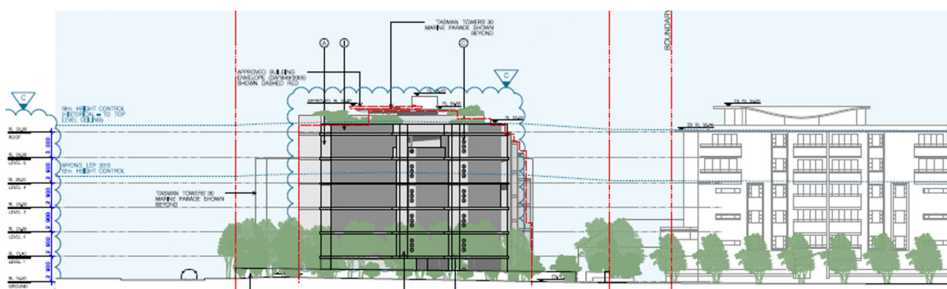
**Figure 6: North-western (Fairport Avenue) front elevation**



**Figure 7: North-eastern elevation side elevation**



**Figure 8: South-eastern rear elevation**



**Figure 9: south-western (Ocean Parade) side elevation**

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

The Section 4.55(2) modification will involve the following modifications to the consent (modifications shown in red text on the following pages).

1 Modify description of land

Original description of land:

Lots 16 and 17 DP 18810, Lot A DP 364571, Lot 0 SP 18493  
Nos 2-4 Fairport Avenue & 44-48 Ocean Parade THE ENTRANCE

Amend description of land to read:

Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571  
Nos 2-6 Fairport Avenue & 46 – 48 Ocean Parade, THE ENTRANCE NSW 2261

Comment:

As part of the physical commencement of the consent lots 16 and 17 in DP 18810 and lot A in DP 364571 were consolidated to partially satisfy condition 54. Subsequently, the description of land has changed since the original granting of the consent and is required to be modified to reflect the current description of the land.

2 Modify description of proposal

Original description of proposal:

Residential Flat Building comprising 45 units and Demolition of Existing Structures

Amend description of proposal to read:

Residential Flat Building comprising 56 units and Demolition of Existing Structures

Comment:

The proposed modification includes changes to the apartment mix from 45 units to 56 units. To reflect the changes to the number of units, the description of proposal is required to be updated to describe the correct number of units proposed in the modification.

3 The modification of condition 1

Original condition 1:

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- 1 The development taking place in accordance with the approved development plans reference number DA0501C, DA1101B as amended by DA1101C, DA1102B as amended by DA1102C, DA1201C as amended by DA1201D, DA1202C, DA1301C, DA1302C, DA1303C, DA1304C, DA1305D, DA1401D, DA1451C, DA1501C, DA1502C, DA1601B, DA1602C and DA1603A, DA1604A and DA1605B, except as modified by any conditions of this consent, and any amendments in red.

Amend condition 1 to read:

- 1 Implement the development substantially in accordance with the plans and supporting documents listed below as submitted by the applicant and to which is affixed a Council stamp "Development Consent" unless modified by any following condition.

**Architectural Plans by:** RJS & CE Price

Drawing	Description	Issue	Date
S4.55 - 1100	Site Plan	C	7/04/2021
S4.55 - 1101	Basement 2 Floor Plan	C	7/04/2021
S4.55 - 1102	Basement 1 Floor Plan	B	23/02/2021
S4.55 - 1103	Ground Floor Plan	C	7/04/2021
S4.55 - 1104	Level 1-4 Floor Plans	C	7/04/2021
S4.55 - 1105	Level 5 Floor Plan	C	7/04/2021
S4.55 - 1106	Roof Plan	C	7/04/2021
S4.55 - 1201	Section	C	7/04/2021
S4.55 - 1301	Elevation - North	C	7/04/2021
S4.55 - 1302	Elevation - East	C	7/04/2021
S4.55 - 1303	Elevation - South	C	7/04/2021
S4.55 - 1304	Elevation - West	C	7/04/2021

Comment:

The plans are to be updated to reflect the modified development subject to this section 4.55(2) application.

**4 The modification of condition 5**

Original condition 5:

- 5 The payment to Council of contributions (as contained in the attached Schedule) under Section 94 of the Environmental Planning and Assessment Act

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

and Council's Contribution Plan. Council's contributions are adjusted on the first day of February, May, August and November. The amount of the contributions will be adjusted to the amount applicable at the date of payment.

Amend condition 5 to read:

- 5 Pursuant to Section 7.11 of the *Environmental Planning and Assessment Act 1979* pay to Council a total contribution amount of **\$526,945.14** that may require adjustment at the time of payment, in accordance with The Entrance District Development Contributions Plan with the applicable amounts as follows:

THE ENTRANCE/LONG JETTY ROADS	\$ 278,626.63
THE ENTRANCE/LONG JETTY OPEN SPACE LAND	\$ 12,420.02
THE ENTRANCE/LONG JETTY OPEN SPACE WORKS	\$ 87,383.85
THE ENTRANCE COMMUNITY FACILITIES LAND	\$ 58,445.24
THE ENTRANCE COMMUNITY FACILITIES WORKS	\$ 90,069.40
<b>Total</b>	<b>\$ 526,945.14</b>

The contributions amount must be indexed each quarter in accordance with the Consumer Price Index (All Groups Index) for Sydney issued by the Australian Statistician as outlined in the contributions plan.

Contact Council on 1300 463 954 for an up-to-date contribution payment amount.

Any Construction Certificate must not be issued until the developer has provided the Certifier with a copy of a receipt issued by Council that verifies that the contributions have been paid. A copy of this receipt must accompany the documents submitted by the certifying authority to Council under Clause 104/Clause 160(2) of the *Environmental Planning and Assessment Regulation 2000*.

A copy of the Contribution Plan may be inspected at the offices of Central Coast Council, 2 Hely Street Wyong or 49 Mann Street Gosford or on Council's website: [Development Contributions](#)

*'Section 7.11 contributions may be satisfied by the value of works as part of a "Works in Kind" agreement with Council. Works in kind to be carried out shall be agreed to by Council in writing prior to the payment of the contributions and issue of a construction certificate (related to the works in kind). All such agreements shall be in accordance with Council's policies.'*



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Comment:

Section 7.11 contributions are applicable to the proposed development. As the proposed modification involves changes to the number of units proposed, condition 5 is required to be updated to reflect the updated contributions applicable to the modified development.

5 The modification of condition 14

Original condition 14:

- 14 The provision of a footpath and gutter crossing in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development. The design plans must be approved by Council prior to the issue of a Construction Certificate.

Amend condition 14 to read:

- 14 The provision of a footpath and gutter crossing in accordance with Council's **current Civil Works Design Specification**. The design plans must be approved by Council prior to the issue of a Construction Certificate.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification.

6 The modification of condition 15

Original condition 15:

- 15 The provision at no cost to Council of concrete footpaving for the full street frontage of the development in Ocean Parade and Fairport Avenue. The footpath design is to be 1.2 metres wide and is to include a minimum 100mm concrete path with SL72 reinforcement and is to be constructed on 75mm compacted roadbase and on compacted subgrade. All other details are to be in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development. The design plans must be approved by Council under the *Roads Act 1993* prior to issue of the Construction Certificate.

Amend condition 15 to read:

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- 15 The provision at no cost to Council of concrete footpaving for the full street frontage of the development in Ocean Parade and Fairport Avenue **and the connection to pram ramps at the roundabout intersection**. The footpath design is to be 1.5 metres wide and is to include a minimum 100mm concrete path with SL72 reinforcement and is to be constructed on 75mm compacted roadbase and on compacted subgrade. All other details are to be in accordance with Council's **Civil Works Design Specification**. The design plans must be approved by Council under the *Roads Act 1993* prior to issue of the Construction Certificate.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification and appropriate 'tie-in' works are carried out.

**7 The modification of condition 16**

Original condition 16:

- 16 Design Plans to be submitted to Council for approval under the Roads Act need to include the relocation of the existing raised pedestrian crossing in Fairport Avenue at the front of the development, and in the vicinity of the proposed access to the development. All works associated with the relocation of this crossing including all design and construction related costs including restoration of road pavements and kerb and gutter, and extensions of footpaths to suit the relocated crossing will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council and the Local Traffic Committee prior to the issue of a Construction Certificate and prepared in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development.

Amend condition 16 to read:

- 16 Design Plans to be submitted to Council for approval under the Roads Act need to include the relocation of the existing raised pedestrian crossing in Fairport Avenue at the front of the development, and in the vicinity of the proposed access to the development. All works associated with the relocation of this crossing including all design and construction related costs including restoration of road pavements and kerb and gutter, and extensions of footpaths to suit the relocated crossing will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council and the Local Traffic Committee prior to the issue of a Construction Certificate and prepared in accordance with Council's **Civil Works Design Specification**.



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification.

**8 The modification of condition 17**

Original condition 17:

- 17 The submission to and approval by Council of stormwater drainage details with water quality control facilities in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development prior to issue of the Construction Certificate.

Amend condition 17 to read:

- 17 The submission to and approval by Council of stormwater drainage details with water quality control facilities in accordance with Council's **Civil Works Design Specification** prior to issue of the Construction Certificate.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification.

**9 The modification of condition 18**

Original condition 18:

- 18 Stormwater drainage works discharging from the site into a public system or public land require approval from Council under Section 68 of the Local Government Act. The extent of work must be determined by Council prior to issue of a Construction Certificate. All works are to be designed and constructed in accordance with Council's Development Control Plan 2005 Chapter 67 - Engineering Requirements for Development. Design plans must be approved by Council prior to issue of the Construction Certificate.

Amend condition 18 to read:

- 18 Stormwater drainage works discharging from the site into a public system or public land require approval from Council under Section 68 of the Local Government Act. The extent of work must be determined by Council prior to issue of a Construction Certificate. All works are to be designed and

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

constructed in accordance with Council's **Civil Works Design Specification**. Design plans must be approved by Council prior to issue of the Construction Certificate.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification.

10 The modification of condition 19

Original condition 19:

- 19 Stormwater generated from roofed areas is to be collected and stored for re-use within the development site for landscaping, pools and car washing. Details indicating the balance between the projected water usage and the capacity for collection are to be submitted to and approved by Council. A minimum storage of 25,000L will be required.

Amend condition 19 to read:

- 19 Stormwater generated from roofed areas is to be collected and stored for re-use within the development site **for irrigation of landscaped areas and other non-potable purposes as required by BASIX**. Details indicating the balance between the projected water usage and the capacity for collection are to be submitted to and approved by Council. A minimum storage of **23,000L** will be required.

Comment:

The modified development includes a stormwater tank with a total capacity of 23kL. The stormwater tank will collect runoff from the trafficable and non-trafficable areas of the site and water harvesting will be filtered and used for irrigation of landscaped areas and other non-potable purposes as required by BASIX. The condition is to be amended to reflect the revised stormwater management proposed on site and the updated BASIX certificate.

11 The modification of condition 20

Original condition 20:

- 20 The applicant will be responsible for maintaining the flow conveyance of the existing 450mm Council stormwater pipeline within the development site via maintaining the existing pipeline or replacing it with an alternate pipeline. All

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

works associated in satisfying this condition including all design and construction related costs including restoration of land, road pavements and kerb and gutter will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council prior to the issue of a Construction Certificate and prepared in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development.

Amend condition 20 to read:

- 20 The applicant will be responsible for maintaining the flow conveyance of the existing 450mm Council stormwater pipeline within the development site via maintaining the existing pipeline or replacing it with an alternate pipeline. All works associated in satisfying this condition including all design and construction related costs including restoration of land, road pavements and kerb and gutter will be at the full cost to the developer, and to Council's satisfaction. The design plans must be approved by Council prior to the issue of a Construction Certificate and prepared in accordance with Council's **current Civil Works Design Specification**.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification.

**12 Add new condition 24A**

Add new condition 24A which reads as follows:

- 24A Turning areas are to be provided for all blind aisles on both basement levels 1 and 2. Carparking spaces identified in basement 1, number 15 and basement 2, number 1, are to be amended to provide turning areas for vehicles to manoeuvre and circulate in a forward direction.**

Comment:

Council's Traffic Engineer has advised that parking space number 15 on basement level 1 and parking space number 1 on basement level 2 are required to be amended to provide turning areas as they are located at the end of blind aisles. This can be rectified as part of the detailed design plans that will be prepared at Construction Certificate stage.

**13 The modification of condition 25**

Original condition 25:

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- 25 All water and sewer services necessary to service the development must be provided in accordance with Council's requirements. All services are to be designed and constructed in accordance with Council's Development Control Plan 2005 Chapter 67 - Engineering Requirements for Development and Council's Policy: Building Over and Adjacent to Sewer Mains. The design plans for the required services must be approved by Council prior to the issue of the Construction Certificate.

Amend condition 25 to read:

- 25 All water and sewer services necessary to service the development must be provided in accordance with Council's requirements. All services are to be designed and constructed in accordance with Council's **water and sewer specification** and Council's Policy: Building Over and Adjacent to Sewer Mains. The design plans for the required services must be approved by Council prior to the issue of the Construction Certificate.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current water and sewer specification.

14 The modification of condition 26

Original condition 26:

- 26 The developer will be fully responsible for the funding, design and relocation of the existing sewer line between MH A14/1 and MH A14/2. The design and construction of the sewer relocation are to be in accordance with Council's Engineering Requirements for Development – Sewerage. Design plans are to be submitted to Council for approval prior to the approval of the Construction Certificate.

Amend condition 26 to read:

- 26 The developer will be fully responsible for the funding, design and relocation of the existing sewer line between MH A14/1 and MH A14/2. The design and construction of the sewer relocation are to be in accordance with Council's **Sewer Specifications**. Design plans are to be submitted to Council for approval prior to the approval of the Construction Certificate.

Comment:

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Condition required to be updated to ensure development is constructed in accordance with Council's current sewer specification.

15 Add new condition 27A

Add new condition 27A which reads as follows:

**27A A suitably qualified acoustic consultant shall be engaged to provide recommendations on how to appropriately attenuate the temporary bin holding area so that any noise impact associated with the temporary storage of waste bins is adequately mitigated. The Construction Certificate plans shall detail the recommended attenuation measures and the holding area constructed accordingly.**

Comment:

The proposed modification includes the provision of waste collection on-site in the side setback instead of kerb-side pickup as originally approved. The above condition is recommended to ensure that attenuation measures are implemented to minimize any potential unreasonable noise impacts associated with the temporary storage of the waste bins.

Any impacts associated with the modified waste collection location for bulk bin pickup is expected to be commensurate with the noise that would have been anticipated from kerb-side pickup. New conditions have been recommended for this modification which require the bins to be moved to the temporary bin holding area no earlier than the day before waste collection and a requirement for their relocation back to the permanent basement storage area no later than the day of collection.

16 Add new condition 29A

Add new condition 29A which reads as follows:

**29A The landscape plan is to be amended to replace the Illawarra flame tree with an alternative species which grows to a mature height of up to 10 metres.**

Comment:

The landscape plan submitted for the proposed modification includes an Illawarra flame tree located in the ground level communal open space in the eastern corner of the site. The mature height of the Illawarra flame tree is up to 16 metres which, if it achieves full height, has the potential to impact on views from adjoining properties towards Norah Head.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

This concern was raised in public submissions and it is considered reasonable to require a different species to be planted in this location. To limit the impact to views the above condition is recommended to reduce the height of any plantings in this location to a maximum of 10 metres, which is consistent with the mature height of the landscaping proposed within the communal open space of the original approval.

17 The modification of condition 51

Original condition 51:

- 51 To encourage the use of alternate transport modes, secure bicycle parking/storage must be provided to accommodate 15 bicycles. The facility must be located in close proximity to the building entrances and be highly visible and well illuminated to minimise the likelihood of theft and vandalism. The installation and dimensions of the facility shall be in accordance with AS 2890.3-1993 – Parking Facilities – bicycle parking facilities.

Amend condition 51 to read:

- 51 To encourage the use of alternate transport modes, secure bicycle parking/storage must be provided to accommodate 19 bicycles. The facility must be located in close proximity to the building entrances and be highly visible and well illuminated to minimise the likelihood of theft and vandalism. The installation and dimensions of the facility shall be in accordance with AS 2890.3-1993 – Parking Facilities – bicycle parking facilities.

Comment:

The increase in the number of units proposed under the modification will increase the required number of bicycle parking spaces from 15 to 19. The condition is to be amended to update the number of required bicycle parking spaces to 19.

18 The modification of condition 60

Original condition 60:

- 60 The provision and maintenance of landscaping in accordance with Council's Policy Number L1 - Landscape for Category 3 development and generally in accordance with the plans prepared by PBS dated 1/7/05, including the engagement of an approved landscape consultant and contractor to undertake the design and construction of the landscaping. All landscaping works are to be completed prior to issue of the Occupation Certificate.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Amend condition 60 to read:

- 60 The provision of landscaping in accordance with the plans prepared by Narelle Sonter Botanica dated 2/10/2020 and the amended landscape plan required under condition 29A, including the engagement of an approved landscape consultant and contractor to undertake the design and construction of the landscaping.

Written certification from a qualified landscape designer certifying that landscaping has been implemented in accordance with the landscape plan is to be provided to the Principal Certifier prior to issue of the Occupation Certificate.

Comment:

An updated landscape plan has been submitted with the modification which includes more substantial planting at ground level along the rear and side boundaries, changes to landscaping design within the front setback to Fairport Avenue and around the communal open space where the pool has been removed, and changes to the landscaping design on the rooftop to incorporate more substantial planting around the proposed communal open space. The condition is proposed to be amended to reference the updated landscape plans submitted with the current Section 4.55(2) application and the amended plan required under new condition 29A.

**19 Delete conditions 76, 77, 78 and 79**

Original conditions 76, 77, 78 and 79:

**Swimming Pools**

- 76 Prior to the pool being filled with water, the swimming pool, safety fences and gates being installed in accordance with the approved plans and specifications and the Swimming Pools Act 1992 and Regulations and AS 1926 - 1986 including the display of an approved sign regarding pool safety and resuscitation techniques.
- 77 Prior to the use of the swimming pool, the submission to Council of a Compliance Certificate to confirm the construction of the concrete shell in accordance with the design approved by a practicing professional engineer.
- 78 All swimming pool plant is to be sound insulated so as to minimise the noise to adjoining properties.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- 79 The disposal of filter backwash to the sewer in a manner that will not cause a nuisance or where sewer is not available, the disposal of filter backwash into a rubble absorption trench as identified on the approved development plan.

Comment:

The original development included a pool within the communal open space at ground level and four private pools within the rooftop private open space areas. All the swimming pools are proposed to be deleted under the subject modification application and subsequently conditions 76, 77, 78 and 79 relating to the swimming pools are no longer required.

20 The modification of condition 81

Original condition 81:

- 81 The provision of a minimum number of 70 carparking spaces (with minimum dimensions of 5.5 metres x 2.5 metres) generally in accordance with the layout shown on the approved plans, amended in red and in accordance with Council's Development Control Plan 2005 Chapter No 61 - Carparking. The carparking spaces and any off-street loading and unloading area must be constructed, sealed, marked, drained and maintained in accordance with Council's Development Control Plan 2005 Chapter No 67 – Engineering Requirements for Development. All work must be completed prior to occupation/use of the development.

Amend condition 81 to read:

- 81 The provision of a minimum number of 72 carparking spaces (with minimum dimensions of 5.5 metres x 2.5 metres) generally in accordance with the layout shown on the approved plans, amended in red and in accordance with Council's Development Control Plan 2005 Chapter No 61 - Carparking. The carparking spaces and any off-street loading and unloading area must be constructed, sealed, marked, drained and maintained in accordance with Council's **Civil Works Design Specification**. All work must be completed prior to occupation/use of the development.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design Specification and reflects the minimum number of car parking spaces now required as a result of the proposed change to the number of units within the development.



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21 The modification of condition 83

Original condition 83:

- 83 The restoration of any vehicle access rendered redundant by the development, to standard kerb and footpath formation at no cost to Council, in accordance with Council's Development Control Plan 2005 Chapter No 67 - Engineering Requirements for Development. All works must be approved by Council.

Amend condition 83 to read:

- 83 The restoration of any vehicle access rendered redundant by the development, to standard kerb and footpath formation at no cost to Council, in accordance with Council's **Civil Works Design and Construction Specification**. All works must be approved by Council.

Comment:

Condition required to be updated to ensure development is constructed in accordance with Council's current Civil Works Design and Construction Specification.

22 The modification of condition 86

Original condition 86:

- 86 For safety, amenity and maintenance reasons, the waste storage area must be constructed to the following standards:
- Floors must be constructed of concrete, graded and drained to an approved drainage outlet connected to the sewer and finished to a smooth even trowelled surface;
  - Walls must be constructed with solid impervious material and shall be cement rendered internally to a smooth even steel trowelled surface;
  - All intersections between the walls and floors shall be coved with coving having a minimum radius of 25mm;
  - All entry points into the room must be bunded to prevent the escape of liquid waste. Bunding shall be for 110% of the likely liquid storage waste and constructed in such a manner that does not obstruct the removal of waste receptacles from the room or create a safety risk to users;
  - Adequate ventilation shall be provided;
  - Adequate lighting shall be provided;

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- The ceiling must have a minimum height of 2.1m from floor level and be finished with a smooth faced non-absorbent material capable of being easily cleaned;
- Waste storage areas shall prevent the access of vermin;
- Waste receptacles used shall be compatible with Wyong Council's waste collection service;
- The door to the storage area shall be weatherproof and shall be openable from the inside at all times;
- Hot and cold water hose cocks shall be located inside or within close proximity to the waste storage areas to facilitate cleaning.

Amend condition 86 to read:

- 86 For safety, amenity and maintenance reasons, the waste storage area must be constructed to the following standards:
- Floors must be constructed of concrete, graded and drained to an approved drainage outlet connected to the sewer and finished to a smooth even trowelled surface;
  - Walls must be constructed with solid impervious material and shall be cement rendered internally to a smooth even steel trowelled surface;
  - All intersections between the walls and floors shall be coved with coving having a minimum radius of 25mm;
  - All entry points into the room must be bunded to prevent the escape of liquid waste. Bunding shall be for 110% of the likely liquid storage waste and constructed in such a manner that does not obstruct the removal of waste receptacles from the room or create a safety risk to users;
  - Adequate ventilation shall be provided;
  - Adequate lighting shall be provided;
  - The ceiling must have a minimum height of 2.1m from floor level and be finished with a smooth faced non-absorbent material capable of being easily cleaned;
  - Waste storage areas shall prevent the access of vermin;
  - Waste receptacles used shall be compatible with Wyong Council's waste collection service;
  - The door to the storage area shall be weatherproof and shall be openable from the inside at all times;
  - Hot and cold water hose cocks shall be located inside or within close proximity to the waste storage areas to facilitate cleaning.
  - **A maximum 3% grade in the temporary bin holding area and waste truck servicing at the front of the temporary bin holding area.**

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Comment:

A maximum 3% grade in the temporary bin holding area and waste truck servicing area is required to achieve safe and practical bulk bin waste storage and collection.

23 Add new condition 87A

Add new condition 87A which reads as follows:

**87A** Prior to the release of any Occupation Certificate, a certificate of compliance, prepared by a suitably qualified acoustic consultant, must be submitted to Council certifying the attenuation measures recommended for the temporary bin holding area have been implemented.

Comment:

The proposed modification includes provision of waste collection on-site in the side setback instead of bulk bin kerb-side pickup as originally approved. Proposed condition 87A requires certification that appropriate attenuation measures have been implemented in accordance with new condition 27A.

0

24 Add new condition 93A

Add new condition 93A which reads as follows:

**93A** The waste bins are to be moved to the temporary bin holding area no earlier than the day before waste collection and are to be moved back to the basement waste storage room no later than the day of waste collection.

The above condition is recommended to ensure the waste bins are moved within a reasonable time before and after the waste collection day to minimise any amenity impacts from waste servicing.

25 The modification of condition 94

Original condition 94:

**94** The approved landscape design prepared by PBS, including the private front courtyards, is to be maintained to maturity with watering and mulch. Any trees that die are to be replaced.

Amend condition 94 to read:

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- 94 The approved landscape design prepared by Narelle Sonter Botanica and the updated landscape plan required under condition 29A, including the private front courtyards, is to be maintained to maturity with watering and mulch. Any trees that die are to be replaced.

Comment:

The condition is proposed to be amended to reference the updated landscape plans submitted with the current Section 4.55(2) application.

26 Add new condition 95

Add new condition 95 which reads as follows:

- 95 Furniture on the rooftop communal open space is to be safely secured and/or stored during high wind events to prevent the furniture from being blown off the building.

Comment:

To ensure the safety of the residents of the development and adjoining properties a new ongoing condition is recommended requiring rooftop furniture to be safely secured during high wind events to prevent furniture from being blown from the rooftop.

### History

Development Application No. DA/1849/2005 was originally lodged 23 September 2005 and subsequently refused by council on 28 February 2006. A section 82A Review of the application was lodged 13 March 2006 with minor amendments to the application to address the reasons for refusal and was subsequently approved on 19 June 2006 for a residential flat building comprising 45 units and demolition of existing structures.

A Section 96(1A) application was lodged under DA/1849/2005/A on 11 March 2009 to modify the timing of payment of development contributions. The application was withdrawn 29 May 2009.

Council issued a letter on 23 September 2009 advising physical commencement has been achieved in relation to DA/1849/2005. As part of the physical commencement of the development, three dwellings located on lots 16 and 17 in DP 18810 and lot A in DP 364571 were demolished and the lots were consolidated.

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**ASSESSMENT**

Having regard for the matters for consideration detailed in Sections 4.15 and 4.55(2) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and other statutory requirements, Council's policies and Section 10.7 Certificate details, the assessment has identified the following key issues, which are elaborated upon for Council's information. Any tables relating to plans or policies are provided as an attachment.

***Environmental Planning and Assessment Act 1979 – Section 4.55***

The applicant is seeking an amendment to the original development under Section 4.55(2) of EP&A Act 1979. In accordance with Section 4.55(2), Council may consider a modification of development consent provided:

- (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.*

**Substantially the same development (s.4.55(2)(a))**

The proposed modifications include a number of internal and external changes to the originally approved built form. This has included changes to the dwelling mix, reconfiguration of unit arrangements, refinement of building's presentation and type of residential amenities provided based on detailed market advice. The resulting key driver has been to increase the number of smaller apartments, including the adoption of adaptable and liveable housing

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units and the removal of the private terraces on the rooftop and their replacement with a communal area.

A comparison of the modifications with the approved development has been summarised in the following table.

	<b>Approved</b>	<b>Modification Proposed</b>
Number of apartments	45	56
Apartment mix	4 x 1 bedroom 16 x 2 bedroom 25 x 3 bedroom	1 x studio 9 x 1 bedroom 38 x 2 bedroom 8 x 3 bedroom
Gross floor area (internal area as per WLEP 2013 definition)	6,661m <sup>2</sup>	6,463m <sup>2</sup>
Number of storeys	6 + 3 basement levels	6 + 2 basement levels
Building height (to top of building as per WLEP 2013 definition)	22.47m	23.7m
Number of lift cores/lobbies	4	3
Parking spaces	84 (74 resident spaces + 10 visitor space)	72 (62 resident spaces + 10 visitor space)
Communal open space	572m <sup>2</sup> ground level communal open space with pool  No communal open space provided on rooftop (rooftop POS provided)	348m <sup>2</sup> ground level communal open space  696m <sup>2</sup> communal open space on rooftop to replace approved rooftop POS
Waste servicing	Kerbside collection	On-site collection at ground level
Material palette	Expressed concrete grid (slabs and columns) with glass balustrades. Side walls masonry	Expressed concrete grid (slabs and columns) with masonry balustrades. Side walls in decorative precast concrete
Roof design	Private open space for four units located on roof with 4 separate pools and associated terraces and shade structures	Communal open space area with areas containing BBQ, seating, and landscape planting zones
Pools	5 pools (4 on roof floor and 1 on ground floor)	None

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The above changes maintain the approved building envelope and have retained the key design elements of the approved development. It is considered that nothing has materially changed and that there has been no increase in impacts from those considered under the original assessment. As such, the proposed modification is consistent with case law that the proposal is substantially the same development for which consent was originally granted i.e. the modified development is essentially or materially, or has the same essence, as that which was originally approved.

Chief Justice Preston reiterated the statutory approach, with reference to relevant case law, when assessing whether a modification application satisfies s4.55(2) 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.*

**Comment**

With regard to paragraphs 24 and 25 above, a comparison table has been prepared outlining the quantitative changes between the original approval and the proposed modified approval. The proposed modification would still result in a six storey residential flat building that occupies generally the same footprint and building envelope as the original development. The building will remain six storeys in height and the modifications will result in a minor decrease in gross floor area.

Only minor changes are proposed to be made to the height and setbacks of the building, which will result in minor changes to the bulk and scale, however, these would not result in a built form that is radically different to that which was originally approved. The changes to the apartment mix, communal open space, parking spaces and waste servicing will not alter the essential elements of the building or substantially alter the overall built form of the development.

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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].*
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].*

**Comment**

In relation to the points made in paragraphs 26-28, the proposed internal and external modifications will not significantly change the character of the development to which the original consent was granted. The proposed modifications will not materially alter the form or function of the building and will result in the building retaining the same use, generally the same building footprint, same number of levels of units and access arrangements. While the apartment mix, basement parking and the communal open space area will be changing, the proposed modifications will not materially alter the use as a residential flat building.

The consequences of carrying out the modified development, compared to the originally approved development, will be minimal, particularly in relation to environmental impacts. Whilst there is the potential to have a minor increase in noise that is associated with the temporary bin storage area and location of garbage pick-up area, the modified development



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does reduce some impacts compared to the original approval, including impact from overshadowing and views.

The impacts of the original approval have been considered with regard to the Section 4.55(2) application and the proposed modifications will generally result in the same impacts. Any additional impacts are not considered to adversely impact adjoining properties or the amenity of future occupants.

Having regard for the above, it is considered that the modified development is substantially the same development as the originally approved development.

**Consultation (s.4.55(2)(b))**

Concurrence was not required from the relevant Minister, public authority or approval body in relation to the originally approved development and as such there was no requirement to consult with the relevant Minister, public authority or approval body regarding the proposed modification.

**Notification (s.4.55.(2)(c)(d))**

The application was originally notified from 13 November 2020 to 4 December 2020. During the assessment of the application, it was identified that notification of one adjoining property has been missed in the original notification period and as such a notification letter was sent to the property to provide a notification period from 25 May 2021 to 15 June 2021. A request to extend the notification period was granted and notification concluded on 13 July 2021. 25 submissions were received during the notification period which have been considered further in the report.

**Section 4.55(3)**

Section 4.55(3) requires Council 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 satisfactory. These are discussed further in the report. Additionally, consideration must be given to the reasons for the granting of the original approval.

*Reasons for Decision*

When the consent was originally granted there was no statutory requirement to provide reasons for the decision and none have been recorded. As such, there are no reasons given as to the merits of the granting of consent to the originally approved development, only reasons as to why the decision is one that can be made in the proper exercise of the Council's functions. Accordingly, it is not possible to identify any essential element from the circumstances of the grant of consent.

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**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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Even though there were no formal 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 assessment have been taken into consideration as part of the assessment of the subject application.

**State Environmental Planning Policies (SEPP)**

**SEPP No. 65 – Design Quality of Residential Apartment Development**

The original development was assessed against the provisions of SEPP 65 and was considered by the Design Review Panel on 2 November 2005. The approved development was considered by the Design Review Panel with regard to the context, scale, built form, density, resource energy and water efficiency, landscape, amenity, safety, social dimensions and aesthetics in which it was considered that the originally approved development satisfactory addressed the design principles.

The applicant's architect provided a SEPP 65 Design Verification Statement with regard to the proposed modifications to the approved residential flat building and confirmed the proposal meets the requirements of SEPP 65 and the Apartment Design Guide (ADG).

The modifications have been assessed in accordance with Schedule 1 – Design Quality Principles of SEPP 65 as follows:

<b>Principle</b>	<b>Comment</b>
Context and neighbourhood character	The modifications are generally within the approved building footprint and will maintain the form and scale of development to Ocean Parade and Fairport Avenue as previously approved. The design is commensurate with both the current and future desired character of the area and is appropriately designed with regard to neighbouring developments to minimise overshadowing, privacy and acoustic impacts.
Built form and scale	The modifications are generally consistent with the form, scale and height of the approved development. The modifications create an articulated building that addresses Fairport Avenue as the primary road frontage and is appropriately articulated to the Ocean Parade frontage to positively contribute to the streetscape. The built form is consistent with the desired future character of the locality and suitable for the subject site.

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	The building appropriately responds to the slope of the site by stepping the building down the slope and the architectural treatment and proposed materials and finishes contribute to building articulation.
Density	The proposed modification will result in a decrease in the FSR, however an increase in the number of apartments is proposed. Suitable amenity has been achieved for each unit including provision of private open space on balconies, solar access and cross-ventilation. It is considered that the density of the development is appropriate for the site.
Sustainability	The modifications maintain the energy and water efficiency measures for the building with the modified plans supported by a BASIX certificate. The modification includes passive design strategies to reduce energy usage and other environment impacts including solar access to balconies and internal living areas, natural cross ventilation and selection of low maintenance, long life materials, having regard for the proximity of the site to the ocean.
Landscape	The landscape design surrounding the built form at ground level has been increased. More substantial tree planting has been provided along the south western boundary and in the south eastern corner of the site. Basement setbacks have been increased along the north eastern and south eastern boundaries to provide additional deep soil zones to the street. Setbacks to the south western side boundary to the basement have been reduced, however some deep soil zones have been retained, particularly around the main communal open space area in the eastern corner, and substantial planting has still been provided within the ground level setbacks. The private open space on the roof is to be converted to communal open space and the upper level setbacks to the rooftop terrace has been increased to allow for more substantial landscaping.
Amenity	Solar access and privacy afforded to each unit and to neighbouring residential development.

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	Each unit is afforded suitable private open space and communal open space is provided at both ground level and on the roof. The residential flat building is easily accessible from the street or via the basement carpark.
Safety	The modifications do not alter the ability of the development to provide safety and security measures within the building.
Housing diversity and social interaction	<p>The modifications propose a mix of 1, 2 and 3 bedrooms suitable for housing demand in the locality. The units have also been designed to accommodate dual key apartments to support the provision of larger apartments.</p> <p>Communal open space has been provided in two locations, at ground level and on the roof, to provide opportunities for social interaction among the residents.</p>
Aesthetics	The proposed modifications include upgrades to the façade of the building to create greater articulation and modernise the façade. The proposed architectural elements, materials and finishes of the building contribute to the articulation and disguise the bulk and scale of the building. The visual appearance of the development positively contributes to the streetscape and suitably responds to the existing and desired future character of the area.

The modifications have also been assessed, where relevant, in accordance with the Design Criteria contained in the Apartment Design Guide, as provided in Attachment 2.

As indicated above, the modifications to the development are acceptable when reviewed against the requirements of SEPP No. 65 – Design Quality of Residential Flat Buildings and the Apartment Design Guide.

*Modification to Communal Open Space*

Over 100m<sup>2</sup> of communal open space is provided to the residential flat building which is greater than 25% as required in the current ADG. The communal open space is provided on the rooftop (696m<sup>2</sup>) and at ground level (348m<sup>2</sup>). The proposed modification includes the removal of the pool in the ground level communal open space area located in the eastern corner of the site and replacement with a paved area with seating and landscaping.

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The communal open space is to be primarily located on the rooftop which contains barbeques, tables and seating with landscaping. All residents will have access to the communal open space via the western block lift core and centre block lift core and stairs. The original approval did not contain any communal open space on the rooftop.

While the ground level communal open space has limited functionality, given the size and terraced landscaping, it is considered to be sufficient ground level space in addition to the available communal open space on the rooftop. The modification will increase the overall area and functionality of the communal open space by providing the additional area at the rooftop. It is considered that the removal of the pool is reasonable given the location of the site near other areas for recreation including the beach and oval located within walking distance.

**State Environmental Planning Policy No 71 – Coastal Protection and State Environmental Planning Policy (Coastal Management) 2018**

The original application was assessed against clause 8 of *State Environmental Planning Policy No 71 – Coastal Protection*. The original assessment had regard for the following matters for consideration under clause 8 of SEPP 71:

- (a) the aims of this Policy set out in clause 2,
- (b) existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,
- (c) opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,
- (d) the suitability of development given its type, location and design and its relationship with the surrounding area,
- (e) any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,
- (f) the scenic qualities of the New South Wales coast, and means to protect and improve these qualities,
- (g) measures to conserve animals (within the meaning of the *Threatened Species Conservation Act 1995*) and plants (within the meaning of that Act), and their habitats,
- (h) measures to conserve fish (within the meaning of Part 7A of the *Fisheries Management Act 1994*) and marine vegetation (within the meaning of that Part), and their habitats
- (i) existing wildlife corridors and the impact of development on these corridors,
- (j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,
- (k) measures to reduce the potential for conflict between land-based and water-based coastal activities,

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- (l) *measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,*
- (m) *likely impacts of development on the water quality of coastal waterbodies,*
- (n) *the conservation and preservation of items of heritage, archaeological or historic significance,*
- (o) *only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,*
- (p) *only in cases in which a development application in relation to proposed development is determined:*
  - (i) *the cumulative impacts of the proposed development on the environment, and*
  - (ii) *measures to ensure that water and energy usage by the proposed development is efficient.*

The original assessment found the proposed development would have minimal impact on the coastal environment and foreshore and found the development to be suitable for the site having regard for the coastal location and the existing high-density residential buildings in the area. The proposed modification will retain substantially the same built form and footprint and will not result in any additional impacts to the coastal environment and foreshore as assessed under SEPP 71.

Since the assessment of the original development, SEPP 71 has been repealed and the provisions of SEPP 71 have been incorporated within *State Environmental Planning Policy (Coastal Management) 2018*. The site is identified as land to which SEPP (Coastal Management) applies, as it is within the *coastal zone*, which in accordance with Clause 6 is land that includes a coastal environment area and/or a coastal use area. Consideration of the proposed modification application has been given to the provisions of SEPP (Coastal Management) below.

The site is identified under the SEPP (Coastal Management) as being located within a coastal environment area. Any development on land identified as a coastal environment area is required to be in accordance with *Clause 13 – Development on land within the coastal environment area*. Clause 13(1) includes matters of consideration that the consent authority must take into account in order to grant consent:

- (1) *Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:*
  - (a) *the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,*
  - (b) *coastal environmental values and natural coastal processes,*

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- (c) *the water quality of the marine estate (within the meaning of the [Marine Estate Management Act 2014](#)), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,*
- (d) *marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,*
- (e) *existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
- (f) *Aboriginal cultural heritage, practices and places,*
- (g) *the use of the surf zone.*

The proposed modification will not result in an adverse impact on the environment, coastal environmental values and processes, the water quality of the lake, marine vegetation, public open space or Aboriginal cultural places. The applicant has submitted a stormwater quality management plan which has adequately addressed water quality measures to treat stormwater prior to entering Council's stormwater drainage system.

Clause 13(2) includes matters that the consent authority must be satisfied of in order to grant consent:

- (2) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:*
  - (a) *the development is designed, sited and will be managed to avoid an adverse impact referred to in subclause (1), or*
  - (b) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
  - (c) *if that impact cannot be minimised—the development will be managed to mitigate that impact.*

In relation to the above, Council, having undertaken a site inspection and having regard for information supplied with the application, is satisfied that the proposed modification will not result in an adverse impact in regard to any of the matters for consideration under Clause 13(1), and that impacts of the development will be appropriately managed. The proposed modification will not have an adverse impact upon the coastal environment and is therefore consistent with the requirements of Clause 13.

The site is also identified under SEPP (Coastal Management) as being located within a coastal use area. Any development on land identified as a coastal use area is required to be in accordance with *Clause 14 – Development on land within the coastal use area*. Clause 14(1)(a) includes matters for consideration that the consent authority must take into account in order to grant consent:

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- (1) *Development consent must not be granted to development on land that is within the coastal use area unless the consent authority:*
- (a) *has considered whether the proposed development is likely to cause an adverse impact on the following:*
    - (i) *existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,*
    - (ii) *overshadowing, wind funnelling and the loss of views from public places to foreshores,*
    - (iii) *the visual amenity and scenic qualities of the coast, including coastal headlands,*
    - (iv) *Aboriginal cultural heritage, practices and places,*
    - (v) *cultural and built environment heritage*

Having considered the above, the proposed modification will not result in any significant additional overshadowing or wind funneling which is discussed further in the report. The proposed modification will not result in an impact to views from public places and is considered acceptable in terms of visual amenity. The site is a disturbed site and will not impact any Aboriginal cultural heritage. The site is not identified as having any cultural or built environmental heritage.

Clause 14(1)(b) includes matters that the consent authority must be satisfied of in order to grant consent:

- (b) *is satisfied that:*
  - (i) *the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or*
  - (ii) *if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or*
  - (iii) *if that impact cannot be minimised—the development will be managed to mitigate that impact, and*
  - (iv) *has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.*

In relation to the above, the proposal is not considered to result in an adverse impact in regard to any of the matters for consideration under Clause 14(1), and that impacts of the development will be appropriately managed. The articulated facades of the building are consistent with the anticipated development outcomes for the area having regard for the coastal and built environment. The modified development is consistent with the requirements of Clause 14.



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

The proposed residential flat building constitutes 'BASIX affected development' as defined within the Regulations. A valid BASIX Certificate (as required by Schedule 1 of the *Environmental Planning and Assessment Regulation 2000*) has been submitted with the development application. The application has adequately demonstrated water conservation and energy efficiency measures to be adopted as part of the proposal in order to ensure the development will be energy and water efficient consistent with the NSW State Governments requirements.

***State Environmental Planning Policy No.55 – Remediation of Land***

Clause 7(1) of State Environmental Planning Policy No. 55 requires that the consent authority must not consent to the carrying out of any development on land unless it has considered whether the land is contaminated and if contaminated that the land is suitable in its contaminated state (or will be suitable, after remediation) for the development proposed to be carried out.

The site is unlikely to have contamination issues given the history of the site for residential uses. Furthermore, the original assessment found the approved development to be suitable for the proposed residential use. There are no proposed modifications that will render the site unsuitable for the residential development having for SEPP 55.

***Wyong Local Environmental Plan (WLEP)***

The original development application was lodged in 2005 and approved under the provisions of Wyong LEP 1991. An assessment has been provided with regard to the provisions of Wyong LEP 1991, with a comparative analysis provided in relation to the current Wyong LEP 2013 also being provided.

***Permissibility***

The subject site was zoned 2(c) *Medium Density Residential Zone* under the provisions of Wyong LEP 1991 and is currently zoned R3 *Medium Density Residential* under Wyong LEP 2013. The development is characterised as a *residential flat building* under both Wyong LEP 1991 and Wyong LEP 2013, however the definition of a residential flat building has changed since the original development consent was granted. Under Wyong LEP 1991 a *residential flat building* was defined as follows:

***residential flat building* means a building containing 3 or more dwellings.**

A *residential flat building* is currently defined under Wyong LEP 2013 as follows:

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**residential flat building** means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.

*Note—Residential flat buildings are a type of residential accommodation*

The development in its modified form remains consistent with the characterisation as a residential flat building and is permissible with consent.

*Zone objectives*

The objectives of the 2(c) *Medium Density Residential Zone* under the provisions of Wyong LEP 1991 are as follows:

- (a) *to cater primarily for residential flat buildings generally not exceeding a height of 3 storeys (except as otherwise provided for by clause 42B), and*
- (b) *to provide for other uses which:*
  - (i) *are compatible with the residential environment and afford services to residents at a local level, and*
  - (iii) *are unlikely to adversely affect residential amenity or place demands on services beyond the level reasonably required for residential uses, and*
- (c) *to provide home-based employment where such will not:*
  - (i) *involve exposure to view from any public place of any unsightly matter, or raw material, equipment, machinery, product or stored finished goods, or*
  - (ii) *have a material adverse impact on residents.*

The assessment of the approved development found it to be consistent with the objectives of the zone. The proposed modifications are considered to remain consistent with the objectives as the proposed modifications will remain compatible with the residential environment, are unlikely to adversely affect residential amenity or place demands on services beyond the level reasonably required for residential uses and will not result in any home based employment which will impact on the amenity of the local area.

The height of the building was originally approved in accordance with clause 42B which permitted a building height greater than 3 storeys in The Entrance on land zoned 2(c) Medium Density Residential. The building height is discussed further in the report.

For comparative purposes, the zone objectives of the current R3 – *Medium Density Residential* zoning of the site under Wyong LEP 2013 read as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*

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- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain and enhance the residential amenity of the surrounding area.*
- *To encourage amalgamation of existing lots to facilitate well designed medium density development and to avoid unnecessary isolation of lots.*

The proposed modification is found to be consistent with the stated zone objectives. In particular, the development maintains the residential amenity of the surrounding area and includes the amalgamation of lots in the original development consent to achieve a medium density development that is largely compliant with the Apartment Design Guide without resulting in the isolation of adjoining lots.

*Building Height*

The original development was approved under the provisions of Wyong LEP 1991 which permitted a maximum building height of 18 metres. Building height was defined under Wyong LEP 1991 as follows:

**building height** *is the vertical distance from natural ground level at any point within a building to the top-most ceiling of the building directly above that point.*

Under the provisions of Wyong LEP 2013 the site is mapped with a maximum permissible building height of 12 metres and building height is defined as follows:

**building height (or height of building)** *means—*

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The original application was assessed and approved under Wyong LEP 1991 with a building height of 17.8 metres (to the ceiling) which was compliant with the maximum permitted building height of 18 metres, measured to the ceiling. The building was approved with a height to the highest point of the building of 22.47 metres.

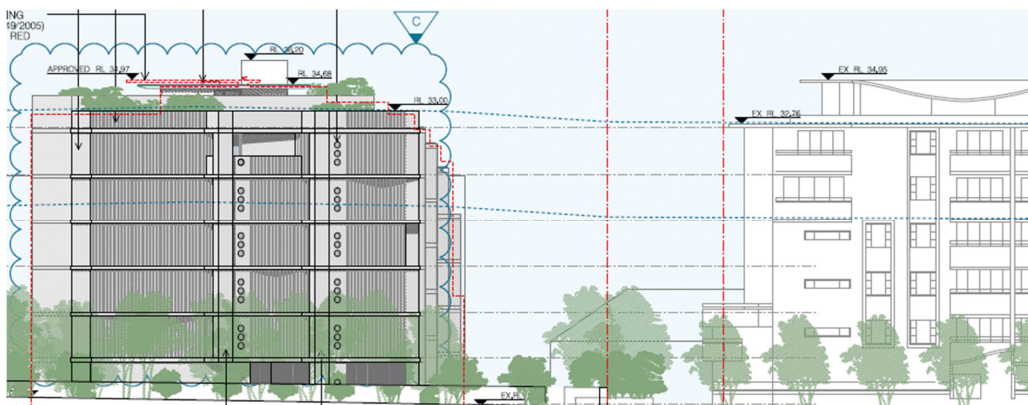
The proposed modified development proposes an increase to the building height to 23.7 metres, which is an increase in the overall building height of 1.23 metres. The increase in the building height is a result of the change in the number of lift cores (from four to three), the increase in height to the lift overrun to allow access to the rooftop communal open space area and for the southern section of the building (closest to Ocean Parade) to align with the floor levels of the remainder of the building section and to satisfy the requirements of **condition 21** of the development consent which requires the finished floor levels to have a minimum 300mm freeboard from the 1% AEP flood levels.

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While the zone objectives of the 2(c) zone included restricting residential flat buildings to generally not exceeding a height of 3 storeys, clause 42B of Wyong LEP 1991 provided development principles for the 2(c) zone within The Entrance, which permitted development on sites greater than 1,800 m<sup>2</sup> to exceed 3 storeys and 10 metres in height in order to facilitate the construction of larger scale buildings on amalgamated land parcels in a form that is consistent with the natural topography of the land, and where it could be demonstrated to the Council's satisfaction that the potential impacts associated with such development would be within acceptable limits. The subject site was identified on the Building Height Map as having a height limit of 18 metres under Wyong LEP 1991, which the proposal complied with.



**Figure 10: South elevation – originally approved building height shown in red**



**Figure 11: West elevation – originally approved building height shown in red and adjoining RFB 50-54 Ocean Parade (right)**

The contravention to a development standard can be approved under a modification and a clause 4.6 written request is not required. The relevant judgments (originating with *North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163) relevantly state that Section 4.55 is a 'free-standing provision': "a modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application". Clause 4.6 only regulates whether

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'development consent' may be granted, not whether an existing consent may be modified. As such, a clause 4.6 written request for the increase in the building height is not required

Section 4.55 is subject to its own stand-alone tests (such as the "substantially the same" test, and a requirement to consider all relevant Section 4.15 matters) and the merit assessment undertaken for the modification will have regard for these tests.

The applicant has provided the following justification for the non-compliance with the approved building height:

*The modification to the building's design retains the fundamental components of the development approved with DA/1849/2005. Its spatial characteristics are not significantly altered as the modified 6-storey building is contained within an almost identical envelope to the one previously approved.*

*When approval was granted to the original development application (19 June 2006), the maximum permissible building height was 18m and the development was, generally, compliant with the height control in force at the time (Note: Height was measured to the underside of the ceiling of the topmost apartment as per the building height definition in WLEP 1991). The modified building closely mirrors the original approved development in terms of floor levels and internal apartment height and, accordingly, it would comply with the former height control for the site.*

*Notwithstanding the above discussion, there are now substantially different planning circumstances than existed at the time of the DA/1849/2005 approval. A change in the planning controls of the site occurred when the new WLEP 2013 came into force on 23 December 2013 and both the Height and FSR standards contained in the repealed instrument were reduced significantly. Clause 4.3 Height of Buildings of the WLEP 2013 now applies to the proposal with the subject site nominated a maximum height of 12 m.*

*As noted earlier, the proposed building is largely consistent with the original development as it is generally contained within the confines of its external envelope, retains and/or increases the approved building setbacks and maintains the original number of storeys. The result is a building which does not produce any additional environmental impacts (i.e. overshadowing, acoustic and visual privacy and view disruptions) to the ones occasioned by the original development.*

*The proposal's exceedances do not result in any additional privacy impact on surrounding properties beyond the one caused by the original development. If anything, the design of the facades of the building has been modified to better respond to the surrounding context by carefully orienting the openings and using architectural elements to obstruct sightlines where the potential for overlooking has been identified, such as at the north elevation.*

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*Furthermore, significant planting is proposed around the perimeter of the building and the proposed rooftop terrace to provide an additional measure of visual screening between the subject development and the neighbouring apartment buildings.*

In consideration of the merits of the increase of the building height, the objectives of the current clause 4.3 of Wyong LEP 2013 have been considered. The objectives of clause 4.3 are as follows:

- (a) *to establish the maximum height limit for buildings to enable the achievement of appropriate development density,*
- (b) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (c) *to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.*

The proposed increase in building height is to accommodate the lift overrun to provide access to the communal open space area on the roof and to increase the finished floor levels to have a minimum 300mm freeboard from the 1% AEP flood level, as per the requirements of condition 21.

Two shade structures are proposed to be removed (one over the north section of the building and the other in the centre) which will result in a reduced maximum building height in some sections of the building. The building will generally retain the bulk and scale as previously approved.

Overshadowing as a result of the increase in the building height will generally remain the same, with some areas of overshadowing resulting in minor increases due to the increased articulation of the building on the northern façade and south western façade. The introduction of the lift overrun will result in negligible increased impact. The deletion of two of the originally approved roof shade structures has resulted in a slight decrease in overshadowing. The increase in building height will not result in any additional privacy impacts as it is to accommodate the lift overrun and will not create additional areas where overlooking can occur from habitable areas.

The original assessment report found the development would not have any unreasonable impact on views. A detailed assessment of the impact to views has been provided further in the report under section 4.15 matters. Additional impacts to views will be minor as a result of the proposed modification. The building height will be a similar number of storeys as existing surrounding developments (refer figure 12) and similar height to adjoining properties including 30 Marine Parade (north-east of the site) which has a building height of 23.6 metres (7 storeys) and 50-54 Ocean Parade (south-west of the site) which has a building height of 21 metres (6 storeys).

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Furthermore, when considering the RLs of the building height of the proposed modification with the adjoining properties they are generally similar heights as follows:

- Proposed modification - RL 36.20 (to lift overrun), RL 29.5 – RL 33.0 (to top of roof)
- 50-54 Ocean Parade - RL 34.95
- 30 Marine Parade –RL 33.48/RL 28.9

The increase in building height will not result in an unsympathetic development form in the context of the development of directly adjoining and nearby development sites. The increase in the building height will not result in any additional environmental impacts and will not be discernible from the street. As such, the proposed height of the modified development is considered acceptable.



**Figure 12: Number of storeys of adjoining buildings**

*Floor Space Ratio (FSR)*

There was no identified maximum permissible FSR on the site under Wyong LEP 1991, however a maximum permissible FSR was identified in Chapter 64 of Wyong DCP 2005 which permitted a maximum FSR of 2:1 (including bonus provisions as the site is over 3,000m<sup>2</sup> and was able to have a 15% increase to site area for the purpose of FSR calculations).



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The original application was assessed and approved with a gross floor area (GFA) of 7,565m<sup>2</sup> which was an FSR of 2.3:1. Chapter 64 of Wyong DCP 2005 defined the gross floor area as follows:

**gross Floor Area** means the sum of the areas of each floor of a dwelling, where the area of each floor is taken to be the area within the outer face of the external enclosing walls (as measured at a height of 1400 mm above each floor level), excluding:

- Awnings, columns, fin walls, or similar devices and any elements, projections or works outside the general line of the outer face of the external wall; and
- Garages or carports needed to meet the requirements of this plan.

For comparison, the site now has a maximum permissible FSR of 0.9:1 under clause 4.4 of the Wyong LEP 2013 and the definition of gross floor area is as follows:

**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- (a) the area of a mezzanine, and
  - (b) habitable rooms in a basement or an attic, and
  - (c) any shop, auditorium, cinema, and the like, in a basement or attic,
- but excludes—
- (d) any area for common vertical circulation, such as lifts and stairs, and
  - (e) any basement—
    - (i) storage, and
    - (ii) vehicular access, loading areas, garbage and services, and
  - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
  - (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
  - (h) any space used for the loading or unloading of goods (including access to it), and
  - (i) terraces and balconies with outer walls less than 1.4 metres high, and
  - (j) voids above a floor at the level of a storey or storey above.

The proposed modification involves a reduction in the originally approved gross floor area to 7237m<sup>2</sup> (measured as per old definition) which equates to an FSR of 2.2:1 which is less than the approved 2.3:1. The GFA has been reduced in the southern corner of the site and south western side of the building in units 01A, 01B, 07 on the ground floor, units 01A, 01B and 02 on floors 1-4 and units 01 and 02 on floor 5. The modified FSR is considered acceptable.



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*Acid Sulfate Soils*

The site was identified under Wyong LEP 1991 as potentially containing Class 5 Acid Sulfate Soils. The clause required the consideration of the need for an acid sulfate soils management plan.

The original assessment identified that an acid sulfate soils management plan was not required as the proposed works for the basement were unlikely to lower the watertable in any adjoining class 1, 2, 3 or 4 land in accordance with clause 15 of Wyong LEP 1991.

The proposed modification includes the deletion of basement level 3. The natural ground levels of the site range from 11 metres to 15 metres AHD. The watertable may need to be lowered during the construction of the development as modified, however will not result in the watertable being lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land and as such, an acid sulfate soils management plan is not required for the proposed modification.

*Flood Prone Land*

The land is identified as being affected by flood controls. The ground level is at 11 metres - 15 metres AHD. The flooding of the site is localised overland flooding due to a low point in Ocean Parade. Council's flood mapping for the 1% AEP is identified in figure 13 below.



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creation of overland flow paths and drainage easement. The development also includes on-site stormwater detention to attenuate stormwater runoff flows downstream.

The development has also been modified to increase the floor level of the ground floor 100mm to ensure that the floor levels offer a minimum 300mm freeboard from the 1% AEP flood level in accordance with **condition 21** of the development consent. In a flooding event the development provides for safe evacuation of the occupants to the south along Fairport Avenue. It is considered that the modified development is compatible with the flood hazard on the site.

*Essential Services*

The site will have access to all essential services for the development including water, electricity, management of sewage, drainage and suitable vehicular access.

A water service is available in Fairport Avenue and Ocean Parade as shown in figure 14. The applicant is required to replace the existing AC DN150mm water main for the extent of proposed development boundary along Fairport Avenue due to impact from proposed works. There is sufficient capacity to service the proposed development.

Any proposed adjustments to Council's water assets will require a detailed design to be prepared by the applicant to be submitted to Council for approval prior to the issue of the Construction Certificate. The design and construction of the water mains are to be in accordance with the WSAA Water Supply Code of Australia WSA – 02 Sydney Water Edition. These requirements will be issued under Section 306 of the *Water Management Act 2000*.



**Figure 14: Water servicing arrangements**

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An existing DN300mm gravity sewer main is traversing the site (figure 15) and the proposed building structure is proposed directly above this infrastructure. The applicant will be required to relocate the existing gravity sewer main around the proposed building footprint and connect back into Council's sewer network along Fairport Avenue. The design will need to satisfy WSA code Sydney Water Edition and Council's Building in Proximity to Sewer Pipeline policy.

Any proposed adjustments to Council's sewerage assets will require a detailed design to be prepared by the applicant prior to the issue of the Construction Certificate. These requirements will be issued under Section 306 of the *Water Management Act 2000*.



**Figure 15: Sewer servicing arrangements**

The applicant has submitted a stormwater management plan which is designed in accordance with AS3500.3 – Stormwater drainage and is considered adequate for the scale of the development. The proposed driveway profile will be required to have a 100mm freeboard to the 1% AEP flood level to prevent floodwaters entering the basement carpark.

The driveway profile is required to be compliant with the grade and transition requirements of AS/NZS 2890. Council's existing drainage pit in Fairport Avenue will be required to be upgraded to a heavy duty "V" grate pit to be constructed in the driveway layback to Council's specification. A 3.6 metre overland flowpath is to be constructed along the Ocean Parade and Fairport Avenue within the property boundary.

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**Draft Central Coast Local Environmental Plan 2018**

The Draft Central Coast Local Environmental Plan 2018 (Draft CCLEP) was exhibited from 2 December 2018 until 28 February 2019 and will replace Wyong Local Environmental Plan 2013 and Gosford Local Environmental Plan 2014. The Draft CCLEP was adopted by Council at its meeting on 14 December 2020. Under the provisions of Draft CCLEP, the site remains R3 Medium Density Residential zoning. There are no additional or amended clauses or provisions warranting further discussion.

**Wyong Development Control Plan 2005**

The original development application was lodged in 2005 and approved under the provisions of Wyong DCP 2005. An assessment has been provided with regard to the provisions of Wyong DCP 2005.

*Chapter 64 Multiple Dwelling Residential Development*

The original development was assessed having regard to the provisions of Wyong DCP 2005, Chapter 64. The provisions of Chapter 64 have since been repealed and replaced by Wyong DCP 2013 Chapter 2.4. A summary of compliance with the relevant controls are outlined under the attached table (Attachment 3). However, there are a number of requirements under the DCP that are relevant to the proposal but overridden by similar controls contained within the ADG. These DCP requirements include:

- communal open space (10m<sup>2</sup> per dwelling with a minimum dimension of five metres);
- private open space (a minimum area of 10m<sup>2</sup> and a minimum dimension of two metres);
- deep soil provision (12.5% site area), site coverage (soft landscaping 25%);
- solar access;
- building separation; and
- storage (3m<sup>2</sup> of floor area/1-2 bed dwelling).

The design of the proposed modification is substantially the same to that which was originally approved and generally complies with the controls. There are no major changes to what was required under Chapter 64 under the proposed modification.

*Parking and Access*

The proposed modification includes changes to the apartment mix and the deletion of the level 3 basement parking. The modified development proposes 56 units with the following apartment mix:

- 10 x one bedroom unit (including 1 x studio unit)



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- 38 x two bedroom units
- 8 x three bedroom unit

As part of the proposed modification the parking is proposed to be reduced from 84 parking spaces (74 residents parking spaces plus 10 visitor parking spaces) to a total of 74 parking spaces (64 residents parking spaces plus 10 visitor parking spaces). Wyong DCP 2005 - Chapter 64 Multiple Dwelling Residential required the following parking rates for residential flat buildings:

- 1 space per 1 bedroom unit
  - 1.2 spaces per 2 bedroom unit
  - 1.5 spaces per 3 (or more) bedroom unit
- Plus
- 1 space per 5 units for visitor parking (for over 15 units)

The required parking spaces have been calculated in accordance with the DCP as follows:

	<b>Resident parking spaces required</b>
10 x 1B units at 1 space/unit	10
38 x 2B units at 1.2 spaces/unit	45.6
8 x 3B units at 1.5 spaces/unit	12
<b>TOTAL</b>	67.6 (rounded to 68)

	<b>Visitor parking spaces required</b>
56 units at 1 visitor space/5 units	11.2 (rounded to 12)

The original development provided in excess of the required parking spaces by 5 resident parking spaces and 2 visitor parking spaces. The proposed modifications have reduced the number of larger 3 bedroom apartments from 25 units to 8 units while the number of 2 bedroom and 1 bedroom units have increased.

The proposed modified apartment mix requires the provision of 68 resident parking spaces and 12 visitor parking spaces to be provided. The proposed modification only includes the provision of 64 resident parking spaces and 10 visitor spaces. Furthermore, Council's Traffic Engineer has advised that parking space number 15 on basement level 1 and parking space number 1 on basement level 2 are required to be deleted to provide a turning area as they are at the end of blind aisles (**new condition 24A**). This will reduce the number of parking spaces provided to 62 resident parking spaces, which is a shortfall of 6 resident parking spaces and 2 visitor parking spaces.

The shortfall in the parking has been considered in the context of the objectives of the control, impacts on street parking and whether the number of proposed spaces can adequately cater for the number of dwellings proposed. Council's Traffic Engineer has raised

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no concerns with the shortfall in parking having regard for impact on street parking within the vicinity of the development.

The proposed parking numbers are considered to provide adequate on-site parking within a basement car park. The proposed parking arrangement minimizes the potential for pedestrian and vehicle conflict and vehicles can enter and leave the site in a forward direction. The proposed parking numbers will enable at least one space per unit to be provided and the shortfall in parking is minor (6 resident and 2 visitor spaces). It is considered that the parking proposed under this modification provides parking in an efficient manner that has little impact to neighbouring properties or the street.

*Site Waste Management*

The proposal has been assessed against the provisions of Wyong DCP 2005 and the Wyong Shire Council Waste Control Guidelines.

The proposed modification provides an adequate waste storage area within the basement, and the bins are taken to a new separate temporary bin store area enclosure on the north eastern side setback on the day of collection. The waste collection vehicle will reverse into the waste collection area on the site for collection of waste from the enclosure. There is enough space to accommodate the waste servicing truck.

The revised waste collection arrangements are considered more suitable and a safer option than kerb-side bulk bin collection. Detailed comments are provided within the waste discussion under Section 4.15 matters discussed below.

*Chapter 60 - The Entrance Peninsula*

The original development had regard for the provisions of Wyong DCP 2005, Chapter 60, which provided specific controls relating developments in The Entrance. Chapter 60 has since been replaced by Wyong DCP 2013, Chapter 5.3 which includes controls generally relating to the design and residential character of the area.

The proposed modification will remain consistent with the desired character of The Entrance Peninsula as follows:

- The proposed upgrades to the façade will enhance the architectural quality of the development;
- Enhancing the landscape setting by providing substantial planting and protecting scenic qualities of the area;
- Improving the quality of the streetscape by the modified façade and increased deep soil areas and landscaping the street setbacks;
- Minimising and disguising the bulk and scale of the approved development by increasing the articulation to the façade through incorporation of architectural

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- elements and balconies and the provision of substantial landscaping to soften the built form of the development; and
- Providing an effective residential address with clear pedestrian access to the outdoor communal open space provided on the site and the public open space areas within the vicinity of the site.

It is considered that the modified development continues to achieve the objectives of the character of The Entrance with the modified development having an improved streetscape presentation.

**Relevant Regulations**

There are no specific matters under the Regulation that require further discussion.

**Likely Impacts of the Development (built environment, natural environment, economic and social impacts)**

*Built environment*

A thorough assessment of the aspects of the proposed development on the built environment has been undertaken in terms of the planning controls.

*Accessibility*

The proposed modification to the layout of the basement parking provides accessible residential parking spaces that are practical and in accordance with AS/NZS 2890.6 (2009) – “Off-street parking for people with disabilities”. The modification provides accessible pathways from the street to the building entry, lift core and communal open space areas.

*Internal access and parking*

As previously discussed in the report, the parking is considered to be suitable for the modified development. Sufficient parking will be available, with at least one parking space provided to each unit. The modification to the basement provides parking in an efficient manner that has little impact to neighbouring properties or the streetscape and that retains deep soil planting around the perimeter of the site which is an appropriate outcome for the development and surrounding area. The access ramp will remain in the same location as originally approved and will provide suitable access to the basement carpark.

*Drainage*

The site falls gently to the rear. The Applicant has submitted a stormwater quality management plan that indicates that stormwater is directed to Council’s drainage system via an overland flow path around the development and a 23kL stormwater tank. The internal

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stormwater management plans have been designed in accordance with AS3500.3 – Stormwater drainage and is considered adequate for the scale of the development.

*Waste disposal*

The original approved development included kerbside waste collection of bulk bins. The proposed modification includes a garbage room within the basement and servicing on site at ground level. The proposal provides an adequate waste storage area within the basement, and the bins are taken to a separate enclosure on the north corner of the site on the day of collection. The waste collection vehicle will enter in a forward direction into the site and use the manoeuvring area within the site to reverse into the service bay, allowing for the vehicle to exit in a forward direction in a single manoeuvre (figure 16).

Turning paths have been provided to demonstrate manoeuvring for the waste collection truck on-site are compliant with AS2890.2. Residents will transport their general waste and recyclables to the Waste Storage Room on Basement Level 2 and deposit into the appropriate bulk bin or Mobile Garbage Bin (MGB). The building manager will be responsible for transporting the general waste bulk bins to the bin collection area on the ground level via the car ramp for twice-weekly collection, no earlier than the day before collection day. For the collection of bulk bins, a rear-loading waste collection vehicle will enter the site via Fairport Avenue and park in the ground floor loading bay. Fortnightly kerbside collection of green waste bins is also proposed.

Landscaping along the northern boundary of the waste servicing area is proposed including New Zealand Christmas Trees which grow up to 3 metres in height (figure 17). It is considered that the proposed modifications to the waste servicing arrangements will improve the previously approved arrangements, which currently required kerbside collection of all waste which would result in a significant number of bulk bins and MGB's along the street on waste collection days.

The on-site waste servicing arrangements will reduce the impact on the street during waste collection days and will result in similar acoustic impacts to what would have occurred on the street however, it will be for a shorter duration of time as the waste servicing truck will not continually move between bins. It is considered that the proposed modifications to the waste servicing are suitable for the development.



SWEEP PATH OF WASTE COLLECTION VEHICLE SHOWN DASHED (11M HRV).

PROPOSED RELOCATION OF SEWER LINE

TANKS UNDER (REFER STORMWATER PLANS FOR DETAILS)

PAVED HARDSTAND FOR WASTE TRUCK MANOEUVRING

TEMPORARY BIN HOLDING AREA (30 SQM)

SHARED ENTRANCE PATH /VEHICLE MANOEUVRING AREA

AUTOMATIC CLOSING FIRE DOOR

MULTI-STOREY RES. BUILDING (APPROX. 7 STOREYS)

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Site plan of the proposed waste transfer station. The plan shows a paved hardstand for waste truck manoeuvring, a temporary parking area, and a temporary storage area. The site is bounded by a road to the north and a road to the east. The plan includes a north arrow and a scale bar. A large black rectangular area is present in the center of the plan, likely representing a redacted section or a placeholder for a building footprint.

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**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Whilst there may be some acoustic impact to adjoining residents at the rear of the property at 30 Marine Parade on collection day, this will be a limited window of impact that occurs twice per week and for short duration. **Conditions 27A and 87A** will be imposed to require that attenuation measures are implemented to the temporary bin holding area to ensure that the placement and use of the waste bins will not unreasonably impact the adjoining neighbours.

Any attenuation measures will be required to be included on the Construction Certificate plans. It is considered that a reasonable acoustic outcome consistent with a medium density residential environment can be achieved having regard for the inclusion of conditions 27A and 87A.

*Locality and streetscape*

The proposal will not adversely impact on the character and amenity of the locality and streetscape. The scale, form, character and density of the modified development is considered acceptable within the locality given the R3 zoning of the site. The proposed modification involves changes to the façade which includes greater articulation to the built form.

The design and appearance of the modified development is of a high design that is of an architectural appearance which is satisfactory within the future character of the streetscape. The form and scale of the development is consistent with that envisaged for the site under the R3 zoning for medium density development. The proposal provides a design that clearly identifies the residential entry and minimises impacts of car parking by incorporating a basement. The built form is well articulated and composed, includes a suitable materials palette and has considered the relationship to surrounding properties and the opportunities presented by the location of the site.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**



**Figure 18: 3D perspective of modified development and materials palette**

*Privacy, overlooking and boundary treatments*

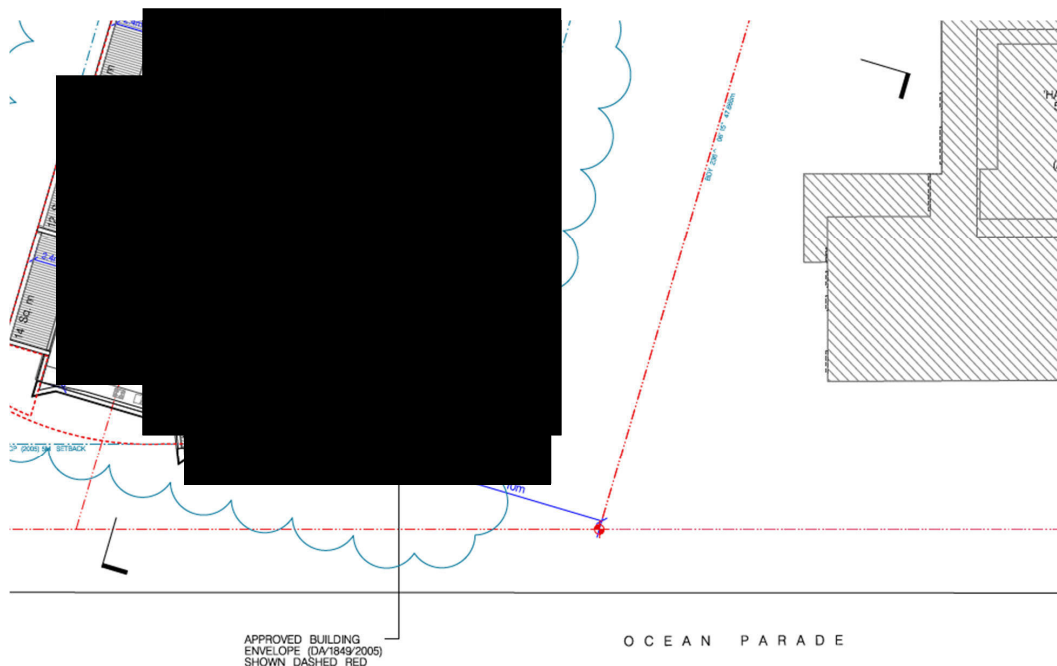
The nearby dwellings to the south east of the site are the most sensitive of potentially affected neighbouring properties that are most likely to be impacted by overlooking and privacy impacts from the future occupants of the development. Overlooking potential has been minimised in the design through the orientation of dwellings, internal layouts and balconies to avoid conflict.

Apartments along the north eastern façade have been orientated to the south east or north west to prevent privacy impacts with 30 Marine Parade. The balconies on the south eastern façade have been recessed within the façade to limit overlooking and include solid balustrades. Additionally, physical distance and separation of over 20 metres will address potential visual privacy issues through large setbacks along the south eastern boundary.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

The modification includes new balconies to the south eastern portion of the building (figure 19). The southernmost balconies along the south eastern boundary are generally located forward of the building line of 50-54 Ocean Parade and are not located off living areas in the subject development and as such will have lesser privacy impacts.

The northern most balconies are located off living areas and will likely be used more often, however it is considered that the building separation of over 20 metres is sufficient to mitigate privacy impacts and will generally not overlook into living areas of the adjoining property. The balconies in the centre are not located off living areas and will be used less often and result in lesser privacy impacts. Furthermore, the development also incorporates deep soil planting around the perimeter of the site that allows for landscaping that incorporates trees of an appropriate scale for the development that assist in breaking view lines and mitigating privacy impacts of the lower floor apartments.



**Figure 19: Orientation and building separation of balconies on the south eastern façade**

*Overshadowing*

Shadow diagrams have been prepared for the modified development between 9:00am and 3:00pm, for 21 June (midwinter) in order to demonstrate a worst-case scenario for solar access and shadow impact on the shortest day of the year. Due to the orientation of the site, the shadowing created by the development extends over Ocean Parade and partially over the properties on the opposite side of Ocean Parade to the south west of the site and the south eastern neighbouring properties at 50-54 Ocean Parade. It is noted that the adjoining



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

properties of the site share the same R3 Medium Density Residential zoning as the subject site.

During midwinter in the morning, shadowing from the proposal extends across Ocean Parade and the side and front setbacks of 55 Ocean Parade and 57-59 opposite the subject site. At midday, the shadowing impacts occur to the north western boundary of 50-54 Ocean Parade, including the side wall of the dwellings and side setback. Some of the rear open space of 31 Marine Parade will be overshadowed at midday. During midwinter in the afternoon, shadowing from the proposal extends further across 50-54 Ocean Parade and 31 Marine Parade and causes solar access impacts across most of the 50-54 Ocean Parade between 1pm and 3pm.

Given the proposed modifications to the roof structure/design the overshadowing is slightly different to that which was approved, however the overall impact will generally remain the same as shown in the shadow diagrams in figure 20. It is considered that the proposed modification is reasonable having regard for the overshadowing resultant from the originally approved development.



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**



06 SHADOW DIAGRAM - 21 JUNE 3:00 PM  
NTS

**Figure 20: Shadow diagrams 21 June – modification shown in blue; originally approved development shown in green**

#### *Wind Funnelling*

The modified development generally retains the building separation distances as originally approved. The generous building separation distances will not result in wind funnelling between buildings. Furthermore, the minor increase in the building height will not exacerbate wind speeds in the area

#### *Views*

In considering the impact to views as a result of the proposed modification, the planning principles provided in Tenacity Consulting v Waringah [2004] have been considered below.

- *Assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

#### *Comment:*

Water views to the north will be impacted by the development from 50-54 Ocean Parade which have views to The Entrance foreshore and the bridge and are currently uninterrupted. Views from 50-54 Ocean Parade to the north east of The Entrance Beach and Norah Head lighthouse will not be impacted by the building, however landscaping will impact views for the lower storeys of 50-54 Ocean Parade. Some views from 55 Ocean Parade to The Entrance beach will be impacted by the development, however the views are currently partially obscured.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

The bulk, scale and setbacks of the building remain relatively the same under the proposed modification. In terms of the height, the lift overrun may result in minor additional view loss, however, the proposed modification does not significantly increase any view loss to that which was originally considered in the original granting of consent.

- *What part of the property the views are obtained? For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic*

Comment:

Views are currently obtained from the north western side of 50-54 Ocean Parade over the side boundary of the subject site towards The Entrance foreshore and bridge. They are visible from the upper floor balconies of the units and the rooftop communal open space from both sitting and standing positions.

Views towards Norah Head are also visible from sitting and standing positions above the landscaping along the rear boundary of 50-54 ocean Parade. Views from 55 Ocean Parade are available from all levels of the RFB from balconies and windows on the front elevation down Fairport Avenue and over the subject site on the opposite side of Ocean Parade, they are available from both sitting and standing positions.

The proposed modification will not significantly increase any view loss to that which was approved originally, as the footprint of the originally approved development remains the same except for some additional articulation on the northern façade and south western façade and the addition of a lift overrun on the roof terrace area.

- *The extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment:

The impact to views was assessed in the original assessment of the development. Views from 50-54 Ocean Parade towards The Entrance foreshore and bridge are significantly affected as a result of the approved development. All levels of 50-54 Ocean Parade would be affected by

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**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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the erection of the building. However, it is noted that the development has already been approved Council is unable to re-assess impacts that are approved. Subsequently consideration of the extent of the impact is focused on any additional impact to the views from the proposed modifications.

The proposed modification includes the increase in the building height, most significantly to the southern portion of the building. Views are obtained from 50-54 Ocean Parade predominantly over the northern portion of the site where the building height is lower. The northern portion of the building will have an RL between RL 29.5 and PL 30.5. The RL of the rooftop communal open space of 50-55 Ocean Parade has a floor level of RL 31.5 and as such they will still have reasonable views over the subject development towards The Entrance Foreshore and bridge. Furthermore, it is noted that the northern rooftop shade structure has been proposed to be deleted as part of the modification which will alleviate some view loss from the approved development and over the northern portion of the building and rooftop planting consists of low shrubs up to 0.5m in height.

Views obtained from the lower storeys of 50-55 Ocean Parade will not be available towards The Entrance foreshore and bridge, only views towards Norah Head lighthouse will be retained, however it is noted that these views were impacted by the approved development and are not further impacted by the proposed modification.

With regard to the views from 50-54 Ocean Parade towards Norah Head, it is noted that the landscape plan includes trees up to 10 metres in height and an Illawarra flame tree which grows up to 16 metres in height in the ground level communal open space area located in the eastern corner of the site. The landscaping has the potential to impact some views towards Norah Head from the lower levels of 50-54 Ocean Parade.

The original development was approved with landscaping in the ground level communal open space area with a mature height of up to 10 metres. Having regard for the original approval and to ensure the view impacts of the proposed modification towards Norah Head are not further reduced, a condition of consent is proposed to replace the Illawarra flame tree with another species which grows to a maximum height of 10 metres which is consistent with the landscaping of the original approval (**condition 29A**).

With regard to the views from 55 Ocean Parade the Residential Flat Building would not experience any further impact to views as a result of the modification given the existing four storey building is well below the building height of the development as originally approved. Having regard for the impact to views resulting from the originally approved development, and the modifications to the building height in relation to the heights of adjoining properties, it is considered that any additional impacts on views as a result of the modification will be minor and are considered to be reasonable.

- *The reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one*



**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

*that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment:

As previously discussed, the impacts to the views are primarily resultant from the development as originally approved, specifically the impacts to 55 Ocean Parade and the lower levels of 50-54 Ocean Parade and are not further impacted by the proposed modification. In considering the proposed modification it is considered that the development is substantially the same and the minor increase to the building height will not result in further unreasonable impact to the adjoining properties having regard for the fact that views were obstructed to 50-54 Ocean Parade on all levels from the originally approved development (except the rooftop communal open space area), and the increase in building height will not result in views being restricted from the rooftop communal open space. It should also be noted that the removal of the northern rooftop shade structure will alleviate some view loss to that which was originally approved, and the low shrubs will help maintain views for 50-54 Ocean Parade.

Having regard for the above consideration of the planning principle it is considered that the impacts to views are primarily resultant from the approved development and that any additional impact to views will be minor and limited to the northern view from the rooftop communal open space of 50-54 Ocean Parade where views will still be available to the north. Furthermore, it is noted that views towards Norah Head lighthouse to the north east will be maintained from all levels of 50-54 Ocean Parade currently enjoying the view given the subject site is located to the north west of the adjoining property.

*Safety, security and crime prevention*

The principles of Crime Prevention Through Environmental Design (CPTED) have been considered under the design of the proposed modification. The design has appropriate regard for the principles of CPTED and the following design measures have been considered:

- The residential units provide passive surveillance of the public domain, open space, the driveway access and the pedestrian entry to the building.
- The development maintains clearly defined separate pedestrian and vehicular entry points from Ocean Parade and Fairport Avenue that will be access controlled.
- The entries to the development will be appropriately lit at night to enhance safety, visibility and legibility.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

- An electronic access control system with fob keys is supplied to occupants; this allows controlled access through the development including the ground floor entry, stairs as well as lifts and other circulation routes.
- The internal areas within the development such as the entrances and lobbies will be well used by residents.

Having regard for the principles of CPTED and safer by design, the proposed development as modified adequately discourages anti-social behaviour and minimises the opportunities for criminal activities.

*Overall built environment impacts*

The proposed modification will not adversely impact on the character and amenity of the locality and streetscape. The scale, form, character and density of the development are acceptable within the locality.

A thorough assessment of the proposed modification's impact on the built environment has been undertaken having regard for *SEPP 65* and the *ADG* along with the relevant statutory controls and policies at the time of the granting of the original development consent and the built environment impacts are considered to be reasonable within the context of the site.

**Natural environment**

There will be no significant impact upon the natural environment as a result of the proposed modification.

*Flooding*

The proposal has a ground floor level at RL 12.0 to satisfy current **condition 21** which requires a minimum 300mm freeboard from the 1% AEP flood levels. The crest of the driveway is required to have a 100mm freeboard to the 1% AEP flood level to prevent floodwaters entering the basement (**condition 24**). This freeboard is also consistent with current design requirements outlined in *Wyong Development Control Plan 2013*, Chapter 3.3 Floodplain Management.

*Economic impacts*

The modified development is likely to result in positive economic impacts through the provision of a variety of cost-effective housing and employment generation for the duration of the construction of the building.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

*Social impacts*

The development will provide high amenity residential dwellings that have been designed to fit within their context, in close proximity to facilities, services and recreation opportunities. The development is considered to make a positive social impact upon the area.

**Suitability of the Site for the Development**

The site is situated at the edge of The Entrance town centre and this location is well serviced with a high level of amenity. The site is accessible to public transport and facilities and the proposed development provides benefits to the ongoing viability of The Entrance town centre by encouraging people to live within the centre.

The site is located within a medium density residential area. Although the modified development proposes a minor increase in the building height, it is of similar heights to the adjoining residential flat buildings which are 7 storeys (north east) and 6 storeys (south east). The building form is considered consistent with the character of the area and the modification to the architectural design and treatment of the building will present well on all facades.

The design of the modified development is in an appropriate form, layout and scale that is substantially the same as the originally approved development. There are no significant site constraints or hazards that would render the location of the development as unsuitable. The building form as modified will present well within the streetscape and will not adversely impact on the character and amenity of the locality.

**Submissions**

The application was notified in accordance with Wyong DCP 2013, Chapter 1.2 Notification of Development Proposals. Chapter 1.2 requires notification for residential flat buildings for 21 days. The application was originally notified for 21 days from 13 November 2020 to 4 December 2020. During the assessment of the application it was identified that notification of one adjoining property has been missed in the original notification period and as such a notification letter was sent to the property to provide a notification period from 25 May 2021 to 15 June 2021. A request to extend the notification period was granted and notification concluded on 13 July 2021.

During notification 25 submissions were received. A number of common themes were identified in the submissions relating to the height, bulk and scale, overshadowing, views, privacy, noise, landscaping, apartment mix and the original consent. The general issues raised in relation to the proposal are included in the following table.

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

<b>Submission</b>	<b>Comment</b>
Notification not received until 24 May 2021 and less than four weeks to make submissions	The application was notified in accordance with Wyong DCP 2013, Chapter 1.2 Notification of Development Proposals. Chapter 1.2 requires notification for residential flat buildings for 21 days. The application was originally notified for 21 days from 13 November 2020 to 4 December 2020. During the assessment of the application it was identified that notification of one adjoining property had been missed in the original notification period and as such a notification letter was sent to the strata manager of the adjoining property to provide a notification period from 25 May 2021 to 15 June 2021. During the first week of notification period some of the notification plans were unavailable on Council's DA tracker and as such the notification period was extended a further seven days to 22 June 2021. A further request for an extension of time for an additional 3 weeks was granted until 13 July 2021 as a GIPA had been submitted to obtain the approved plans of the original development consent.
Excessive bulk and scale	The bulk and scale of the proposed modified development is generally the same as the bulk and scale of the approved development. The modified development remains consistent with the approved building footprint and the number of storeys. The proposed modification involves additional articulation to the facades and additional landscaping which is considered to mitigate the perceived bulk and scale of the development.
Non-compliance with the current Wyong LEP 2013 planning controls, in particular the height and FSR.	The application is for a section 4.55(2) modification to the original development consent granted which was approved with regard to the provisions of Wyong LEP 1991. As such a merit assessment has been undertaken and considered with regard to Section 4.55 matters such as the development being substantially the same. As discussed in the body of the report the proposed modification to the height is substantially the same to that which was originally approved (6 storeys with rooftop open space) and there is no proposed increase to the FSR.
Consistency/consideration of Coastal Zone Management Act of 2016	The assessment of the proposed modification has included consideration of SEPP (Coastal Management) 2018 which includes consideration of

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

<b>Submission</b>	<b>Comment</b>
	any potential impacts on the Coastal Use Area or Coastal Environment Area.
Insufficient parking and increase in traffic. The development has an increase in the number of units and a decrease in on-site parking spaces, placing greater pressure on kerbside parking in surrounding streets. Due to the popularity of the area for tourists kerbside parking is already unavailable in Fairport Avenue on weekends year-round and throughout the summer months.	The original development provided in excess of the required parking. The proposed modification will reduce the parking while the number of units is proposed to increase. As previously discussed in the report the parking proposed under the modification is considered to be suitable for the proposed development noting that the development will provide at least one parking space per unit and it will not result in additional traffic impacts on the local road network.
Noise from increased density, rooftop communal open space and motorcycle parking.	The increased density is not expected to result in any undue acoustic impacts as impacts will generally be restricted to the internal area of the development. Given the approved development contained 5 rooftop private pools it is considered that the deletion of the pools and the provision of communal open space with BBQ facilities and seating will not cause adverse acoustic impacts compared to the use of the pools. The modification includes the provision of two motorcycle parking spaces which are not considered to generate excessive noise.
Privacy	As discussed in the report the building separation distances, landscaping and design of the building, including recessed balconies and balcony orientation, is considered to have suitable regard for privacy and will not result in any adverse privacy impacts having regard for the medium density residential context. The rooftop terrace has been setback from the edge of the building 6.2m to mitigate any potential privacy issues, the setback has also been landscaped to provide further mitigation measures.
Shadow diagrams indicate that due to the height of the building neighboring units that currently receive reasonable sunlight will be in shade for the majority of daylight hours.	The shadow diagrams indicate the minor increase in building height and greater articulation on the northern and south western façade will result in some additional overshadowing to adjoining properties. As previously discussed in the report, the originally approved building generally overshadows the south eastern side of the adjoining property at

**3.2 DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

Submission	Comment
	50-54 Ocean Parade. The overshadowing impacts are generally the same as that which was originally approved with some minor increases and decreases in overshadowing due to the modified roof structures.
The location of the development so close to the eastern boundary is likely to create a wind tunnel.	The modified development will generally have the same building footprint. The only reduction in setbacks is on the ground floor where private open space courtyards are proposed which will not create wind funneling. The balconies proposed on the south eastern façade are recessed and will not encroach further into the originally approved setback. As discussed in the report it is considered that the building generous building separation will not result in wind funneling. <b>Condition 95</b> is recommended to be imposed requiring furniture to be secured by strata management during storm events.
Original DA 15 years old and assessed under old laws and regulations	The original development consent was granted in 2006 and was approved under the provisions of Wyong LEP 1991 and Wyong DCP 2005. Since the original approval Wyong LEP 1991 and Wyong DCP 2005 have been repealed and replaced by Wyong LEP 2013 and Wyong DCP 2013. A merits assessment of this modification has been undertaken accordingly.
Loss of views from the height of the building, landscaping on the roof, Illawarra flame tree at ground level in the western corner of the site, new balconies, including western views to the fairground, bridge, Tuggerah Lake and Watagans and beach views across to Norah Head lighthouse.	Consideration of the impact of the proposed modification on views has been assessed previously in the report. Views to Norah Head lighthouse towards the North East will not be impacted by the building from 50-54 Ocean Parade as the building subject to the current modification application is located to the north west of the property. However, it is acknowledged that the mature height of the Illawarra flame tree of 16m will likely impede some views between towards the Norah Head. <b>Condition 29A</b> is recommended to substitute the tree for a species which grows to a maximum mature height of 10m which is in accordance with the height of trees approved in the communal open space area of the original development. Views will not be impacted by the additional balconies on the south eastern façade. Views from the rooftop communal open space of 50-54 Ocean Parade towards the north will be available

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<b>Submission</b>	<b>Comment</b>
	of the subject development where the building height is lower and low shrubs up to 0.5m in height are proposed.
The Harriot building was constructed after the original development was approved and as such the impacts of the approved building have not been considered.	The approved building cannot be re-assessed under this application. The assessment of the current modification application can only assess the scope of works proposed in the modification and any impacts to adjoining properties that may result from the modification application. However, while it is acknowledged the Harriot was not constructed at the time the original consent was granted in 2006, it should be noted that the consent was granted for The Harriot in 2002 and as such would have been considered in the granting of the original development consent of the subject development.
The proposed modification is not substantially the same as to what was originally approved, specifically with regard to the increase in height, additional units, change in building footprint and as the development has been incrementally changed (modification A).	The proposed modification is considered to be substantially the same as the development that was originally approved as previously discussed in the report. There have been no modifications approved since the original granting of the consent modification application. A previous modification application, referenced under DA/1849/2005/A was withdrawn (not determined) and as such the development has not been incrementally changed through previous modifications.
A Geotechnical report was completed in 2016. What was it for?	A geotechnical report was completed in 2016 and was submitted to Council with the current modification application. The conditions of the land and soil structure are not expected to have changed since the geotechnical was prepared. The information contained within the geotechnical report will be used to inform the construction requirements prior to the issue of a Construction Certificate.
Soil testing for acid sulfate soils should be required	As previously discussed in the report the site is identified as potentially containing class 5 Acid Sulfate Soils. The watertable may need to be lowered during the construction of the development as modified, however given the elevation of the site (between 11 metres and 15 metres AHD) it will not result in the watertable being lowered below 1 metre AHD on adjacent Class 1, 2, 3 or 4 land and as such an acid sulfate soils management plan is not required.

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<b>Submission</b>	<b>Comment</b>
Waste collection on-site – noise and safety, 4-5 pickups a week	The proposed waste management has been considered in the report and is considered to provide an improved outcome to kerbside collection as originally approved. Waste collection will only be twice weekly which is considered to limit any acoustic impacts. The waste servicing vehicle will enter the site in a forward direction over the shared pedestrian/waste truck area and will reverse into the dedicated waste servicing area on-site servicing which will limit pedestrian/vehicle conflict. Conditions have been recommended to ensure that the waste collection will not cause any unreasonable acoustic impact to adjoining properties and appropriate acoustic mitigation measures will be implemented prior to the issue on an Occupation Certificate.
Outside approved building footprint – balconies additional bulk, non-complaint/reduced setbacks.	The proposed modification is generally within the approved building footprint. There are some minor projections outside of the building footprint for articulation to the building façade and private open space courtyards to the ground floor units on the eastern side of the building. The upper level balconies will remain within the approved footprint. The reduced setbacks have been previously considered in the report and it is considered that the modifications outside of the approved footprint will provide additional articulation and will not result in amenity impacts from the reduced setback.
The waste management plan notes excavation fill to be used on site. Is there a change in land levels to what is currently there that would cause fence and planting heights to be raised?	The waste management plan states 'all excavated material generated on this site may be re-used in the landscaping or used on other sites as fill material, provided no contamination is present'. It is only stated that the excavated material may be used on this site for landscaping and may be used on <i>other</i> sites for fill.
Validity of operational consent/consent has lapsed. The SEE states that 3 month passed between the lapsing of the original consent and the letter from Council being issued saying that physical commencement has occurred. The	On 23 September 2009 Council issued a letter advising physical commencement has been achieved in relation to DA/1849/2005. As part of the physical commencement of the development 3 dwellings located on lots 16 and 17 in DP 18810 and lot A in DP 364571 were demolished and the lots were



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<b>Submission</b>	<b>Comment</b>
SEE does not claim the letter confirmed it occurred prior to the lapse date, as would have been required.	consolidated to partially satisfy condition 54 of the consent.
Communal open space is proposed at ground level in the eastern corner of the site which will be overshadowed from either Tasman Tower or its own building for most of the day, year-round. It would not be attractive and draw undesirable behaviour right on the boundary.	The original approved plans included the provision of the primary communal open space located within the eastern corner of the site, where a communal pool was proposed. The proposed modification maintains communal open space within the eastern corner of the site as it was originally located and as such the location of the communal open space within the eastern corner of the site is considered to be outside the scope of this modification application. It is considered that the proposed modification which includes the removal of the communal pool within the eastern corner of the site will lessen amenity impacts to adjoining properties specifically with regard to noise and there is no evidence to suggest that the overshadowing of the ground level communal open space would result in undesirable behaviour.
The Entrance Town Centre Master Plan (2011, Key Principles) stresses connectivity and embracing the values of the town centre. This development fails to fulfill these values.	The Entrance Town Centre Master plan key principles identify connectivity <i>within</i> and <i>to</i> The Entrance through walking and public transport. A condition of consent requires the construction of a pedestrian pathway along the frontage of the site which will connect into the existing pedestrian network providing improved pedestrian connectivity to the foreshore and town centre. The development will not have an impact on the provision of public transport in the area for people travelling to The Entrance. Other key principles also encourage renewal consistent with the urban framework and future direction for The Entrance and respect of the natural assets and beauty of the locality. It is considered that the modified development will support the renewal of the site and will further modernise the originally approved development without compromising the natural assets and beauty of the locality. It is considered that the modified development will not impede any of the design principles in The Entrance Town Centre Masterplan.

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<b>Submission</b>	<b>Comment</b>
Property value reduced on adjoining properties	Land values are not a matter for consideration under s. 4.15 of the <i>Environmental Planning and Assessment Act 1979</i> (EP&A Act) and there is no evidence to suggest that the proposed development will have an impact on adjoining property values.
Details of the builder not provided.	The builder is not required to be provided to Council as part of the Development Application.
The building is no longer terraced/stepped down and will now be 6 storeys in height.	The original development was six storeys in height plus an additional three basement levels and rooftop terraces. Under the current modification application, no additional floors are proposed, the building will remain six storeys in height plus two basement levels and a rooftop terrace and will be stepped down the site.
Concerns will not meet construction standards	Condition 32 requires the development to be designed and constructed in accordance with Building Code of Australia. A Construction Certificate and Occupation Certificate is also required to confirm the development is built to the relevant construction standards.
No information has been provided on Amendment A	A Section 96(1A) application was lodged under DA/1849/2005/A on 11 March 2009 to modify the timing of payment of development contributions. The application was withdrawn on 29 May 2009.
The original development was only for 36 units, however, the SEE refers to 45.	The original development consent was granted for a 'Residential Flat Building comprising 45 units and Demolition of Existing Structures'. The proposed modification will result in a total of 56 units capable of independent living.
Extension of existing façade about 3m towards Tasman tower. Balconies as approved on the eastern side (i.e. lower levels) will be extended about 2m horizontally, while the upper levels will extend about 4-5m horizontally from the approved façade.	There is no extension of balconies towards Tasman tower proposed under the modification only articulation up to approximately 1m is proposed. The setback will generally remain the same apart from the additional articulation.
Deep soil planting compliance, basement underneath unsuitable for large trees above.	The development provides in excess of the required deep soil planting in accordance with the ADG. The trees located above the basement are considered suitable, while it is acknowledged the reduced soil depth will result in the trees growing to a smaller mature height.

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Submission	Comment
Draft CCLEP and CCDCP not considered	The Draft CCLEP has been considered in the assessment of the proposed modification, as part of the merit assessment, and it is considered that the development will remain consistent with the CCLEP. There is no requirement to consider the Draft CCDCP.
Vibration testing before commencement. Due to the proposal to excavation at or near the boundary and near buildings on adjoining properties concern is raised for the potential impacts to the structural integrity/structural damage of adjoining buildings particularly with regard to the basement carpark. A dilapidation report should be prepared by the body corporate of the adjoining buildings (or by negotiation with them) at the developer's cost. The cost would include a post-construction report comparing the two. In addition, if any concerns arise during construction, the body corporate must be protected by being enabled to contact Council for a stop work order and/or for an engineering opinion.	<p>A condition of consent (<b>condition 7</b>) was imposed during the original assessment of the proposal requiring the applicant to submit a dilapidation report for the adjoining properties to Council prior to the issue of a Construction Certificate. Condition 7 reads as follows:</p> <p><i>7 The applicant must supply Council with a dilapidation report for the adjoining properties, which documents and photographs the condition of buildings and improvements. The report must be submitted to Council prior to issue of the Construction Certificate and will be made available by Council in any private dispute between the neighbours regarding damage arising from site and construction works.</i></p> <p><b>Condition 56</b> was also subsequently included in the consent requiring any damage not shown in the dilapidation report to be rectified prior to the issue of an Occupation Certificate. Condition 56 reads as follows:</p> <p><i>56 Any damage not shown in the Dilapidation Report submitted to Council before site works had commenced, will be assumed to have been caused as a result of the site works undertaken and must be rectified at the applicant's expense, prior to release of the Occupation Certificate.</i></p> <p>In addition to the dilapidation report conditions, <b>condition 30</b> was imposed prior to the commencement of works to ensure the preservation and protection of buildings on adjoining allotments during excavation. Condition 30 reads as follows:</p>

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Submission	Comment
	<p>30 Any excavation below the level of footings of buildings on adjoining allotments requires the preservation and protection of the buildings from damage, and if necessary, underpinning and support of the building in a manner certified by a Practising Structural Engineer. The owner of the adjoining property must be given written notice of the intention to excavate and provided with details of the proposed work at least seven (7) days prior to excavation.</p>
There is an incomplete stormwater drainage system along the western end of the southern boundary. How will stormwater (and/or watering from landscape maintenance) reach the street system?	As previously discussed in the report the stormwater is proposed to be directed around the development via overland flow paths and into Council's drainage system. The stormwater management plan has been reviewed by Council's development engineer and the proposed stormwater management is considered suitable.
The SEE assumes infrastructure (with or without upgrades) will cope with the additional units in the locality, however the statement is untested. Have satisfactory clearance letter been received from all infrastructure providers?	The application was referred to Council's Water and Sewer Section, Traffic Engineer and Contributions Officer. Water and sewer identified there is sufficient capacity for the development and works will be required to replace the existing water main and sewer line due to the impact from the proposed works which would be subject to a section 306 letter of requirements. Council's traffic engineer has identified that the proposed modification will have no impact on street parking in locality and Council's Contributions officer has calculated the applicable contributions based on the apartment mix proposed which will be used in accordance with Council's Contributions Plans to upgrade community infrastructure and facilities. <b>Condition 44</b> which was imposed on the original consent requires other public authorities including Australia Post, AGL, Energy Australia and telecommunications carriers to be consulted prior to the commencement of works for any separate requirements they may have.
Mature size of the trees within the ground level setbacks – add unnecessary visual bulk and public safety from branches overhanging	The trees are considered to improve the streetscape and soften the built form of the development. The substantial landscaping has been proposed within the deep soil zones to provide improved amenity to

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<b>Submission</b>	<b>Comment</b>
footpath, views, drainage (leaf litter), choice and positing of trees particularly in courtyard.	the development and street. The landscaping will not result in excessive overshadowing and will not impact on sightlines. Ongoing <b>Condition 94</b> of the consent requires the landscaping to maintained to maturity with any trees that die to be replaced.
Dual key units misleading, unclear location of units	There are dual key units located on all levels of the residential flat building, for the purposes of assessment, Council has considered dual key units as two separate units. The number of dual key units on each level has been detailed on page 17 of the SEE.
Unable to see internal floor plans	In accordance with Clause 56 of the EP&A Regulations Council is only required to notify plans of the building that indicates its height and external configuration, as erected, in relation to the site on which it is to be erected. Internal floorplans are not provided on Council's website due to privacy and copyright. Plans are available for viewing at Council admin buildings only.
What conditions of consent will protect residents of adjoining properties from dust, any asbestos, fumes or other air-borne pollution during construction?	Condition 35 of the consent required the disposal of any asbestos materials to be in accordance with the requirements of Workcover NSW and AS 2601 - 2001 - The Demolition of Structures. Any other pollution from the construction of the development is covered by the Protection of the Environment Operations Act 1997.
Removal of demolition of building waste would be more efficient from near Fairport Avenue frontage. Neighbours do not want waste at their own boundaries. Further, unloading and storage of incoming building materials should be near the road frontages.	Prior to the issue of Construction Certificate <b>condition 12</b> requires the provision of a plan of management to be certified for any works for the development that impact on any public roads and public land for the construction phase of the development. It is noted that any waste generated from the construction, deliveries and storage of materials are temporary during the time of construction.
The retaining walls in the eastern part of the site appear to reach at least 2m, with an associated drainage system within 1m of each wall (east, south). How will these significantly sized structures be maintained from within the site? The basement roof will be close below and beside them.	Retaining walls along the boundaries will generally remain the same as what is existing, some additional retaining is required in the eastern corner of the site around the communal open space up to approximately 0.3m. Drainage along the north eastern and south western boundary is proposed as overland flow around the building and into Council's stormwater system, there will be no underground stormwater drainage along the boundaries which will

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<b>Submission</b>	<b>Comment</b>
	be impeded by retaining walls or the basement carpark.

**Submissions from Public Authorities**

There were no referrals or submissions from any public authorities associated with the modified development.

**Internal Consultation**

The application has been referred to and reviewed by the following experts in council and is generally supported subject to conditions of consent.

Urban Design	Supported without conditions.
Engineering	Supported subject to modified conditions.
Engineering – Traffic and Transport	Supported subject to modified conditions including <b>24A</b> .
Water and Sewer	Supported subject to original conditions including <b>4, 6 and 88</b> .
Waste Services	Modified conditions including <b>82</b> .
Contributions	Supported subject to modified condition <b>5</b> .

**The Public Interest**

The application was advertised for 21 days, in accordance with Wyong DCP 2013, Chapter 1.2 Notification of Development Proposals. During this period 25 submissions were received.

The majority of the objections related to a number of impacts resulting from the originally approved building. The proposed modification will improve the street presentation of the façade and landscaping to the streetscape. The development is substantially the same to that which was originally approved, and the modifications are not considered to result in adverse impacts to adjoining properties or exacerbate impacts resultant from the approved development.

Having regard for the planning controls applicable to the site and the merits of the proposed modification it is considered that the proposed modifications are reasonable and will provide an improved outcome for the development and surrounding locality and will not result in additional amenity impacts and it is therefore considered to be in the public interest.

**Ecologically Sustainable Principles:**

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

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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.

**Climate Change**

The potential impacts of climate change on the proposed development have been considered by Council as part of its assessment of the development application. This assessment has included consideration of such matters as potential rise in sea level; potential for more intense and/or frequent extreme weather conditions including storm events, bushfires, drought, flood and coastal erosion; as well as how the proposed development may cope, combat, withstand these potential impacts.

**Other Matters for Consideration**

*Development Contribution Plan*

The application falls under The Entrance District Section 7.11 Contributions Plan and the Shire Wide Section 7.11 Plan, however the Shire wide contributions do not apply as the Shire Wide Section 7.11 Plan was not in effect at the date of the original consent. The following contributions are applicable under The Entrance District Section 7.11 Contributions Plan:

- Open Space Land & Works
- Community Facilities Land & Works
- Roads

As the modification includes changes to the apartment mix the contributions have been updated base on the following apartment mix:

- 10 x 1 bedroom/studio units
- 38 x 2 bedroom units
- 8 x 3 bedroom units

Credits for 8 x 2 bedroom units and 3 x 3 bedroom units have been applied in accordance with the original consent for the serviced lots.

The total Section 7.11 contributions are \$526,945.14. The contributions are indexed by CPI quarterly and are required to be paid prior to the release of the Construction Certificate (**condition 5**).

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*Water and Sewer Contributions*

Water and sewer contributions are applicable to the development and a Section 307 Certificate issued under the *Water Management Act 2000* is required. Prior to the issue of a Section 307 Certificate, payment to Council of developer contributions is required. **Condition 6** was imposed on the original development consent requiring the payment of water and sewer contributions.

**Conclusion**

After consideration of the development against Sections 4.55(2) and 4.15 of the *Environmental Planning and Assessment Act 1979* and the relevant statutory and policy provisions, the proposed modification to development consent 1849/2005 is considered reasonable and warranted in this instance.

The proposed modification will result in substantially the same development for which consent was originally granted and before the consent as originally granted was modified. Accordingly, the proposed Section 4.55(2) is recommended for approval.

**RECOMMENDATION:**

That development consent 1849/2005 be modified in accordance with Attachment 1.

**Attachments**

<b>1</b>	Recommended Modified Conditions of Consent		D14813014
<b>2</b>	Development Plans	Provided Under Separate Cover	D14813336
<b>3</b>	Landscape Plans		D14813449
<b>4</b>	Original Approved Plans	Provided Under Separate Cover	D14815857
<b>5</b>	ADG Compliance Table		D14813466
<b>6</b>	Multiple Dwelling Residential Development Wyong DCP Comparison Table Comparison (DCP 2005 and DCP 2013)		D14813473
<b>7</b>	Public Development Plans	Provided Under Separate Cover	D14826321
<b>8</b>	Public Original Approved Plans	Provided Under Separate Cover	D14826518