

4 Delmar Parade and 812 Pittwater Road, Dee Why

Section 4.55 Planning Statement

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4 DELMAR PARADE AND 812 PITTWATER ROAD, DEE WHY

Modifications to approved development for a
mixed use development comprising three
commercial tenancies and 219 apartments over 2
basements levels, lot consolidation and
subdivision

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Prepared under instructions from
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1.0 INTRODUCTION

This submission has been prepared as supporting documentation for an application made pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* to modify the consent for Development Application DA2022/0145 for Demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The application seeks approval for a range of refinements to the development to achieve an incremental improvement to the apartment layouts and residential amenity, a rationalised basement internal configuration, and design progression to the architectural expression of the development including a softening of the corners with curved balconies. The amended proposal also introduces a roof top communal open space area to the Pittwater Road building.

The amended proposal:

- Reduces Gross Floor Area by 614.7 square metres
- Reduces the total number of apartments from 219 to 218
- Reduces car parking spaces from 334 to 332 spaces
- Increases common open space from 2,219 square metres to 2,246.5 square metres
- Increases deep soil from 1,019 square metres to 1,034.6 square metres
- Results in a net reduction in shadow from 10am to 3pm on 21 June

The proposed modifications are detailed on amended architectural plans prepared by Rothelowman Architects. The application is also accompanied by the following:

Document	Consultant
SEPP 65 Design Verification Statement and Design Report	Rothelowman Architecture
Landscape Plans	Ground Ink
Traffic and Parking Assessment	TTPP
BASIX Certificate	Senica Consultancy Group
Amended Subdivision Plan	Norton Partners Surveyors
Flora and Fauna Statement	Aquia Ecological Surveys
Accessibility Statement	Accessible Building Solutions

This Statement has been prepared pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*. The Statement provides an assessment of the amended proposal having regard to the relevant legislative context, social economic and environmental impacts, potential amenity impacts of the development on the surrounding locality and the measures proposed within the application to mitigate such impacts.

The Statement details the proposed amendments against applicable environmental planning instruments and development control plans including:

- State Environmental Planning Policy No. 65 Design Quality of Residential Flat Development
- State Environmental Planning Policy (Building and Sustainability Index: BASIX) 2004
- Warringah Local Environmental Plan 2011
- Warringah Development Control Plan 2011

Having regard to the applicable legislative framework, the proposed amendments to the approved development are such that the development retains the same fundamental characteristics and is therefore substantially the same development. The amended development remains consistent with the aims and objectives of the relevant environmental planning instruments and development control plan whilst improving compatibility with the emerging character of the locality.

2.0 SITE DESCRIPTION AND LOCATION

2.1 Locality Description

The site is located within the suburb of Dee Why and is within Northern Beaches Local Government Area.

The site is located at the southern entry into the Dee Why town centre and along with its neighbours forms an important gateway function for the town centre, referred to as the 'Delmar Precinct'. The precinct comprises four allotments zoned B4 Mixed Use bounded by Delmar Parade to the north, Pittwater Road to the west, Stony Range Botanic Garden to the south and low density residential context to the east.

The Delmar Precinct is undergoing transformation and conversion from a predominantly commercial and semi-industrial pocket into a vibrant mixed use precinct. Construction is well progressed for a 7 storey mixed use development at 2 Delmar Parade on the corner of Delmar Parade and Pittwater Road, also by Landmark Group which is the proponent for the subject application. The subject proposal represents the balance of the Delmar Precinct with the exception of the AVIS site at 816 Pittwater Road.

The site is not identified as a heritage item nor is it located in a heritage conservation area in Schedule 5 of the WLEP 20011. The location of the site is illustrated in Figure 1 below.

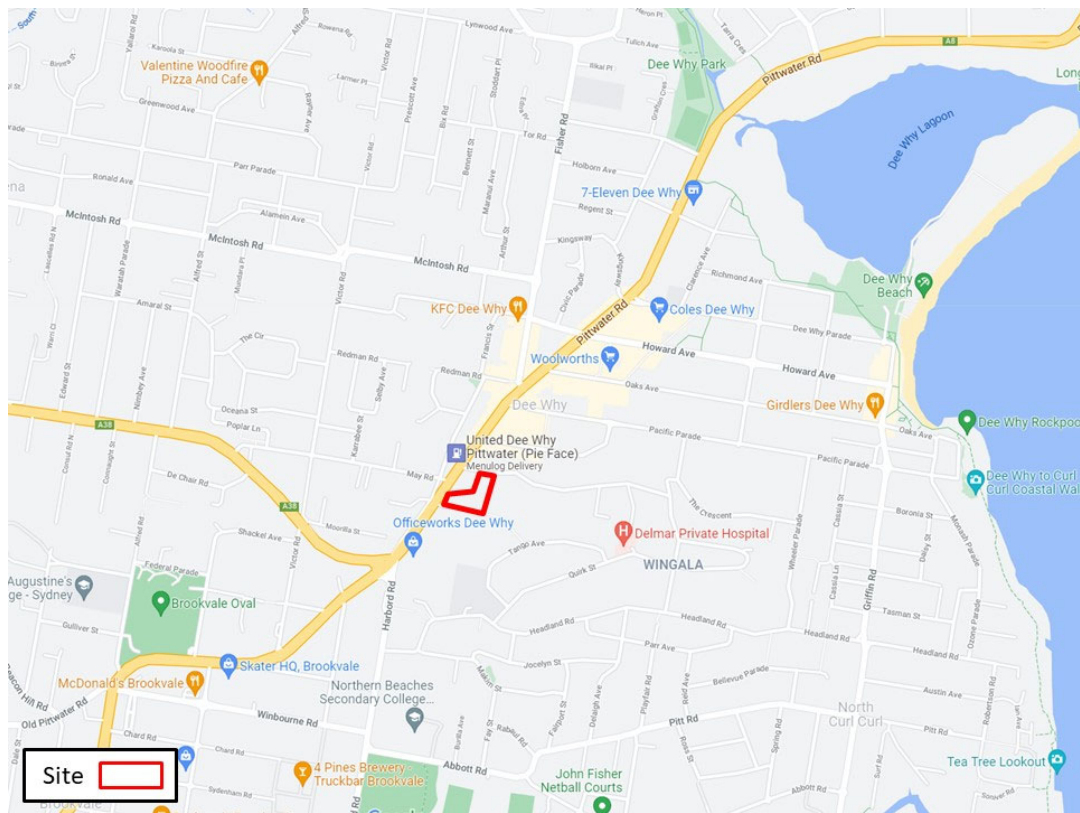


Figure 1:

Site Location: (Source: Google Maps 2021)

2.2 Site Description

The site comprises 2 allotments and is legally described as SP 32071 and SP32072 known as 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The site is irregular in shape with a frontage of approximately 52 metres to Delmar Parade and a frontage of approximately 20 metres to Pittwater Road and is a crudely L-shaped site which wraps around 2 Delmar Parade and 816 Pittwater Road to the west. The site has a depth of 100.75 metres from north to south and a length of approximately 130 metres from east to west and shares its southern boundary with an adjacent parcel of land which is road reserve. The site has an area of 7,790 square metres.

The highest point of the site is at the south-eastern corner and there is a fall of approximately 4.5 metres from the rear of the site to the front of the site at Delmar Parade which is the equivalent of slightly more than one storey. The site is relatively level east to west with only a minor fall to Pittwater Road. The site currently contains three 2 storey commercial buildings, with one aligned Delmar Parade, another aligned to Pittwater Road, and a third building located at the southern end of the site. The areas around the building comprise extensive hardstand car parking with some very limited vegetation. The site is currently served by two driveways along the Delmar Parade frontage of the site.

An aerial view of the site and surrounds is included as Figure 2.



Figure 2:

Aerial view of the site (Source: Six Maps, Department of Lands 2021)

2.3 Surrounding Development

The context of the site is undergoing substantial transformation from low scale office and industrial based uses to high density mixed use and residential development as envisaged for the Dee Why Town Centre.

The neighbouring sites within the Delmar Precinct include 2 Delmar Parade on the corner of Pittwater Road and Delmar Parade, and the AVIS site at 816 Pittwater Road. Construction is well progressed for a 7 storey mixed use development at 2 Delmar Parade, also by Landmark Group which is the proponent for the subject application. That building has a 4 storey podium and 3 storey upper component.

The AVIS site contains a vehicle rental business comprising hard stand parking areas and single storey building. This site is likely to be redeveloped as an integrated component within the overall Delmar Precinct and enjoys a legal right to use the car park entrance to 2 Delmar Parade which will service the future development of that site.

Immediately adjacent to the south of the site is a road reserve which contains a car park at the western end, and becomes a pedestrian link to Tango Avenue for the remainder of the frontage to the subject site. To the south of the road reserve is the 3.3 hectare Stoney Range Botanic Garden which is a regenerated bushland reserve which contains walking tracks, a nursery BBQ area and other facilities.

The site to the north at 822 Pittwater Road across Delmar Parade contains a recently completed 9 storey mixed use building which has a 3 to 4 storey podium and a tower element above which is setback from Pittwater Road, but with no setback above the podium from Delmar Parade.

Opposite the site to the north-west across Pittwater Road is a petrol station at 625 Pittwater Road, and a recently completed 7 storey mixed use development at 5 Mooramba Road, Dee Why which has a 4 storey podium and 3 storey component above.

Immediately adjacent to the east is 6 Delmar Parade which contains an existing dwelling, and 8 Delmar Parade which is a battleaxe allotment to the rear which also contains a dwelling.

3.0 BACKGROUND

3.1 Development Application DA2022/0145

On 14 July 2023, the Sydney North Planning Panel granted consent to development application DA2022/0145 which provided for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.



Figure 3:

3D image of approved development as viewed from Delmar Parade

4.0 PROPOSED MODIFICATIONS

4.1 General Description

The application seeks approval for a range of refinements to the development to achieve an incremental improvement to the apartment layouts and residential amenity, a rationalised basement internal configuration, and design progression of the architectural expression of the development including a softening of the corners with curved balconies. The amended proposal also introduces a roof top communal open space area to the Pittwater Road building.

The amended proposal:

- Reduces Gross Floor Area by 631.5 square metres
- Reduces the total number of apartments from 219 to 218
- Reduces car parking spaces from 334 to 332 spaces
- Increases common open space from 2,219 square metres to 2,246.5 square metres
- Increases deep soil from 1,019 square metres to 1,034.6 square metres

4.2 Detailed Description

The application seeks approval for the following specific amendments:

Level	Changes
Basement 2	<ul style="list-style-type: none">• Ramping basement levels changed• Carparks and storage reconfigured to accommodate structure• Structure adjusted• Stairs added adjacent to Lift A• Basement 2 level raised
Basement 1	<ul style="list-style-type: none">• Ramping basement levels changed• Carparks and storage reconfigured to accommodate structure• Structure adjusted• Stairs added adjacent to Lift A• Grease arrestor moved to basement for access
Ground	<ul style="list-style-type: none">• Accessible bathrooms added to commercial tenancies• Unit layouts adjusted• Mix adjusted• Gym / Residents lounge opened• Storage rooms reconfigured• Services room added to ground• Grease arrestor room relocated to basement• Substation moved to the Pittwater Road building southern facade and doubled in size due to increased EV vehicle electrical demand loading in NCC. (refer to new arch ground floor)
Level 1	<ul style="list-style-type: none">• Northern corner balconies of Delmar building curved• Unit layouts adjusted

Level	Changes
	<ul style="list-style-type: none"> • Mix adjusted • Changes to windows • Structure adjusted • Length of western internal planters on Delmar building Reduced • B.305 & C.302 Bedroom area reduced • Pittwater commercial corner curved • Planter removed from over flood void • E.201 shroud removed
Level 2	<ul style="list-style-type: none"> • Northern corner balconies of Delmar building curved • Unit layouts adjusted • Mix adjusted • Changes to windows • Structure adjusted • D.303 Balcony extended south • B.305 & C.302 Bedroom area reduced • E.306 balcony extended • E.308 balcony extended • E.302 shroud removed • F.301 balcony curved • F.303 Western facade widened, and balcony lengthened • Skylight locations adjusted
Level 3	<ul style="list-style-type: none"> • Northern corner balconies of Delmar building curved • Unit layouts adjusted • Mix adjusted • Changes to windows • Structure adjusted • D.403 Balcony extended south • B.405 & C.402 Bedroom area reduced • E.406 balcony extended • E.408 balcony extended • E.402 shroud removed • F.401 balcony curved • F.403 Western facade widened, and balcony lengthened
Level 4	<ul style="list-style-type: none"> • Northern corner balconies of Delmar building curved • Planter removed from Delmar facade • Unit removed from core A

Level	Changes
	<ul style="list-style-type: none"> • Unit layouts adjusted • Mix adjusted • Changes to windows • Structure adjusted • D.503 Balcony extended south • E.505 & C.502 Bedroom area reduced • E.506 balcony extended • E.508 balcony extended • E.502 shroud removed • F.501 balcony curved • F.503 Western facade widened, and balcony lengthened
Level 5	<ul style="list-style-type: none"> • Skylight locations adjusted • Mechanical plant zone added to roof • Communal open space shifted east • Accessible bathroom added to communal open space • Roof and lift overrun levels increased • Unit layouts adjusted • Mix adjusted • D.602 Balcony extended south • D.605 facade line adjusted • Ramp added into communal open space • E.601 balcony extended • E.603 balcony extended • E.605 balcony extended • E.609 balcony extended • F.601 balcony curved • F.603 Western facade widened, and balcony lengthened
Level 6	<ul style="list-style-type: none"> • Skylight locations adjusted • Mechanical plant zone added to roof • Roof and lift overrun levels increased • Roof line adjusted to match changes below • Communal open space added to Pittwater building • Accessible bathroom added to communal open space • Lift E and stairs brought up to level 6 to service communal open space • F.705 reduced to allow access to communal open space from Core F • F.705 & F.706 facade line adjusted and balconies increased • F.701 balcony curved

Level	Changes
	<ul style="list-style-type: none"> F.703 Western facade widened, and balcony lengthened
Level 7	<ul style="list-style-type: none"> F.805 & F.806 facade line adjusted and balconies increased F.701 balcony curved F.703 Western facade widened, and balcony lengthened
Level 8	<ul style="list-style-type: none"> Skylight locations adjusted Mechanical plant zone added to roof Roof and lift overrun levels adjusted Roof line adjusted to match changes below



Figure 4:

3D image of the proposed amended development as viewed from Delmar Parade



Photograph 4:

3D image of the proposed amended development as viewed from Pittwater Road

4.3 Amendment to Torrens title Plan of Subdivision

The approved development provides consent for Torrens title Subdivision of the development into 2 Torrens title allotments which reflects the commercial component of the development and the residential component.

The subject amendment includes minor changes to the approved plan of subdivision to reflect the proposed amendments to the approved development.

4.4 Numerical Overview

The elements of the approved development which are proposed to be amended are detailed in the below table with a comparison between the approved development and subject Section 4.55 proposal:

Element	Approved	Amended Proposal
Site Area	<ul style="list-style-type: none"> FSR zone 2.4:1 – 6,800 square metres FSR zone 3.2:1 – 990 square metres Total - 7,790 square metres 	<ul style="list-style-type: none"> FSR zone 2.4:1 – 6,800 square metres FSR zone 3.2:1 – 990 square metres Total - 7,790 square metres
Gross Floor Area	<ul style="list-style-type: none"> FSR zone 2.4:1 – 15,262.4 square metres FSR zone 3.2:1 – 4,222.1 square metres Total – 19,484.5 square metres 	<ul style="list-style-type: none"> FSR zone 2.4:1 – 14,829.7 square metres FSR zone 3.2:1 – 4,023.3 square metres Total – 18,853 square metres
Apartments	219	218
Apartment Mix	<ul style="list-style-type: none"> 86 x 1 bedroom apartments (39.3%) 91 x 2 bedroom apartments (41.5%) 42 x 3 bedroom apartments (19.2%) 	<ul style="list-style-type: none"> 90 x 1 bedroom apartments (41.3%) 88 x 2 bedroom apartments (40.3%) 40 x 3 bedroom apartments (18.4%)
Car parking	334 spaces comprising: <ul style="list-style-type: none"> 258 residential spaces 44 residential visitor spaces 32 commercial spaces 	332 spaces comprising: <ul style="list-style-type: none"> 256 residential spaces 44 residential visitor spaces 32 commercial spaces
Common Open Space / Landscaped Area	2,011 square metres (equivalent of 26% of site area)	2,246.5 square metres (equivalent of 29% of site area)
Deep Soil Area (6m min)	1,019 square metres (13%)	1,034.6 square metres (13%)
Solar Access for apartments	70.8% 2 hours; 14.2% no sun	70.6% 2 hours; 14.7% no sun
Cross Ventilation for apartments	63%	61.9%

4.5 Shadow Changes Resulting from Proposed Amendments

The proposed amendments have resulted in minor changes to the shadow which is cast as a result of the approved amendments. These changes in shadow are illustrated in detail in the shadow diagrams which support this application which demonstrate that whilst there has been a minor increase in shadow at 9am, for the remaining 6 hours of the day there is an overwhelming reduction in shadow when compared with the approved development of between 46.16sqm to 74.19sqm for the vast majority of the day.

A comparison of shadow impact is provided below:

- 9am: Additional 46.56sqm of shadow

- 10am: Reduction of 11.73sqm of shadow
- 11am: Reduction of 46.16sqm of shadow
- 12pm: Reduction of 47.42sqm of shadow
- 1pm: Reduction of 46.38sqm of shadow
- 2pm: Reduction of 65.39sqm of shadow
- 3pm: Reduction of 74.19sqm of shadow

4.6 Amendments to Conditions

The following conditions are proposed to be amended or deleted as a consequence of the proposed modifications to the approved development:

4.6.1 Condition No. 1

The proposed amendments seek consent for changes Condition No. 1 to reflect the updated:

- architectural plans and elevations
- landscape plan
- subdivision plans
- BASIX Certificate

4.6.2 Condition No. 7

The Section 7.11 contribution in Condition No. 7 needs to be amended to reflect the reduced number of apartments and revised apartment mix, as well as the minor reduction in commercial floor space.

5.0 STATUTORY PLANNING FRAMEWORK

5.1 Environmental Planning & Assessment Act 1979

5.1.1 Section 4.55

Section 4.55(2) of the Environmental Planning and Assessment Act 1979 empowers Council to modify a development consent, as follows:

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and

(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and

(c) it has notified the application in accordance with:

(i) the regulations, if the regulations so require, or

(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

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

In the consideration of the issue of whether or not the amended proposal is 'substantially the same development', the Land & Environment Court case of *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 establishes a number of tests which are of assistance.

Furthermore, we are also reminded in *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 that it is the consent that is to be modified. The approved development consent is for the following purpose:

"Demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision"

In the circumstance of the subject development consent, the amendments do not substantially change or remove the quantum and general arrangement of the previously approved commercial and residential uses, and do not affect the correct characterisation of the amended proposal as being *substantially* the same as that which has already been approved due to the generic overall description

of the development as a “mixed use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision”.

Also of relevance to the issue of whether or not the amended proposal is ‘substantially the same development’, is that the Land & Environment Court consistently describes the Section 4.55 modification provision (previously Section 96) as “beneficial and facultative” and it is intended to assist the modification process rather than to act as an impediment to it and “It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision” (*North Sydney Council v Michael Standley & Associates Pty Limited* [1998]).

An examination of the amended proposal against the tests which can be established by the various relevant caselaw and also largely informed by the Land & Environment Court case of *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298, is provided below:

Test 1: Is the proposal a modification of the original proposal, in that it does not radically transform the original proposal?

The modifications to the approved development represent a refinement and improvement and are not a radical transformation because they do not alter the fundamental nature of the approved development. Whilst some components are proposed to be changed more than other components, collectively the amended development is conceptually the same as that which has previously been approved. The proposed amendment remains for the demolition of existing structures and the construction of a 6 to 8 storey mixed use building; the general site and building layout remains virtually identical; the collection of residential and non-residential uses remain the same, the number of residential apartments remains almost exactly the same, there is little change to the non-residential quantum, and the vehicle access and egress and internal circulation is essentially the same. The proposed internal reconfigurations and other rationalisations do not render the approved development radically transformed when considered within the context of the overall approval for the site.

Test 2: Is the proposed development essentially or materially the same development as the development for which consent was originally granted?

In considering whether the proposed modified development is materially or essentially the same, it is necessary to undertake both a quantitative and qualitative assessment of the differences. The comparative task needs to assess not only the physical features of the changes, but also the environmental impacts of the changes.

Quantitative Assessment

The table below provides a quantitative comparison of the features of the approved development for the site and the proposed amendments.

On an assessment of the quantitative components of the consent which are approved, the application as proposed to be amended is essentially and materially the same development and therefore substantially the same development.

Element	Approved	Amended Proposal
Site Area	<ul style="list-style-type: none"> FSR zone 2.4:1 – 6,800 square metres 	<ul style="list-style-type: none"> FSR zone 2.4:1 – 6,800 square metres

Element	Approved	Amended Proposal
	<ul style="list-style-type: none"> FSR zone 3.2:1 – 990 square metres Total - 7,790 square metres 	<ul style="list-style-type: none"> FSR zone 3.2:1 – 990 square metres Total - 7,790 square metres
Gross Floor Area	<ul style="list-style-type: none"> FSR zone 2.4:1 – 15,262.4 square metres FSR zone 3.2:1 – 4,222.1 square metres Total – 19484.5 square metres 	<ul style="list-style-type: none"> FSR zone 2.4:1 – 14,829.7 square metres FSR zone 3.2:1 – 4,023.3 square metres Total – 18,853 square metres
Apartments	219	218
Apartment Mix	<ul style="list-style-type: none"> 86 x 1 bedroom apartments (39.3%) 91 x 2 bedroom apartments (41.5%) 42 x 3 bedroom apartments (19.2%) 	<ul style="list-style-type: none"> 90 x 1 bedroom apartments (41.3%) 88 x 2 bedroom apartments (40.3%) 40 x 3 bedroom apartments (18.4%)
Car parking	334 spaces comprising: <ul style="list-style-type: none"> 258 residential spaces 44 residential visitor spaces 32 commercial spaces 	332 spaces comprising: <ul style="list-style-type: none"> 256 residential spaces 44 residential visitor spaces 32 commercial spaces
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Deep Soil Area (6m min)	1,019 square metres (13%)	1,034.6 square metres (13%)
Solar Access for apartments	70.8% 2 hours; 14.2% no sun	70.6% 2 hours; 14.7% no sun
Cross Ventilation for apartments	63%	61.9%

Qualitative Assessment

The site layout, arrangement of uses and building configuration across the site is essentially the same as that which has been approved. In particular:

- The amended proposal retains the same massing, footprint and scale of built form above 2 basement levels.
- The commercial component is located in the same position on the ground floor and continues to address and activate the street interfaces.
- Virtually the same number of residential apartments are retained and are still positioned in the same configuration across the site.

- The amended proposal maintains the same overall configuration of the site, similar quantum of residential units and mix of uses, building location, and a similar size and form. Whilst the architectural expression has been rationalised, this does not represent a radical departure from the approved development and represents a reasonable design progression which achieves an improvement when compared to the approved development.
- A tabulated comparison of the indicative uses in the approval and the amended application is provided below which demonstrates that the amended proposal retains the same indicative uses:

Approved Uses	Amended Uses
Residential	Residential
Commercial	Commercial

Qualitatively, the amended proposed is considered to be essentially and materially the same as the approved development for the site when considered holistically as it retains predominantly the same:

- Purpose for a mixed use development comprising commercial and residential uses;
- Site arrangement including location of uses;
- Range of indicative uses and activities; and
- Vehicle access arrangements, internal circulation and exit arrangements, and car parking location.

Test 3: Is the way in which the development is to be carried out essentially or materially the same?

There is no change to the way in which the development is to be carried out.

Test 4: Does the proposed modification affect an aspect of the development that was important, material or essential to the development when it was originally approved?

Development consent is approved for a mixed use development of the site. The proposal as amended retains all of the same indicative uses, features and facilities of the approved development.

The physical arrangement of open space, buildings and vehicular access and internal circulation necessary to facilitate the development all remain essentially the same and whilst addition open space is proposed above the Pittwater Road building, this is to achieve an improved outcome.

There is no aspect of the approved development which was important, material or essential to the development when it was approved which is proposed to be removed or substantially altered. Accordingly, the proposed amendments to the approved development do not affect an aspect of the development that was considered an essential or critically important component of the overall development as originally approved.

In conclusion, having regard to the guidance provided by the relevant case law and having undertaken a detailed comparison of the quantitative and qualitative elements of the development, the proposed Section 4.55(2) modification application to the approved Development Consent DA2022/0145 has been demonstrated to satisfy the “substantially the same development test” pursuant to Section 4.55(2)(a)

5.2 Environmental Planning & Assessment Regulation 2021

Clause 100 of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation) sets out the information which must be provided with an application for a modification of a development consent under section 4.55(2) of the Act.

Clause 100(3) of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation) relates to the requirements for a BASIX certificate for modifications to a development consent under section 4.55(2) of the Act and require an update BASIX Certificate. An amended BASIX Certificate accompanies this application.

Clause 102 of the EP&A Regulation states that if an application for the modification of a development consent under section 4.55(2) of the Act relates to a residential apartment development for which the development was required to be accompanied by a design verification from a qualified designer, the modification application must be accompanied by a design verification from a qualified designer. In accordance with clause 102(2) the statement must:

- (a) verify that the qualified designer designed, or directed the design of, the modification of the development, and
- (b) verify if the qualified designer designed, or directed the design of, the development for which the original development consent was granted (the original development), and
- (c) explain how the development addresses—
 - (i) the design quality principles, and
 - (ii) the objectives in the Apartment Design Guide, and
- (d) verify that the modification does not—
 - (i) diminish or detract from the design quality of the original development, or
 - (ii) compromise the design intent of the original development.

The required design verification statement accompanies the Section 4.55 application.

5.3 Environmental Planning Instruments

In accordance with Section 4.55(3) of the Environmental Planning and Assessment Act 1979 in determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application.

The provisions of relevant environmental planning instruments and development control plans are relevant matters for consideration under Section 4.55(2) and are addressed below.

5.3.1 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development

SEPP 65 applies to development for the purpose of a new residential flat building, shop top housing or mixed use development, the substantial redevelopment/refurbishment of one of these buildings or the conversion of an existing building into one of these types of buildings provided the building is at least 3 or more storeys and the building contains at least 4 or more dwellings. The development meets the definition of a residential flat building and as such the provisions of SEPP 65 are applicable to the proposed development.

SEPP 65 aims to improve the design quality of residential flat developments, provide sustainable housing in social and environmental terms that is a long-term asset to the community and delivers better built form outcomes. In order to satisfy these aims and improve the design quality of residential apartment buildings in the State, the plan sets design principles in relation to context and neighbourhood character, built form and scale, density, sustainability, landscape, amenity, safety, housing diversity and social interaction, and aesthetics.

SEPP 65 requires any development application for residential flat development to be assessed against the 9 principles contained in Schedule 1 of the SEPP and the matters contained in the Apartment Design Guide (ADG).

The proposed modifications maintain the same high level of amenity as that which has been approved, and achieves some incremental improvements to the amenity of the development, particularly as a result of increased common open space on the rooftop of the Pittwater Road building and therefore improves the consistency of the development with the principles within Schedule 1 of the SEPP and the matters contained in the ADG as discussed below:

- The internal and external areas of all revised apartments exceed the minimum required by the ADG.
- The proposed amendments retain compliance with the minimum 70% requirement of apartments which receive 2 hours solar access between 9am and 3pm.
- The proposed amendments retain compliance within the minimum 60% of apartments which receive cross-flow ventilation.
- The proposed amendments increase the quantum of common open space from 25% to 29%.
- The proposed amendments do not result in any change in relation to the other relevant amenity standards in the ADG such as floor to ceiling heights or building separation.

The proposed amendments also achieve an evolution and improvement to the aesthetics of the development.

The amended proposal remains satisfactory and indeed achieves a range of improvements with respect of the 9 design principles in the SEPP and the matters contained in the ADG.

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

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the development and aims to encourage sustainable residential development. An amended BASIX Certificate accompanies this application which confirms that the amended development will meet the NSW Government's requirements for sustainability.

5.3.3 State Environmental Planning Policy (Transport and Infrastructure) 2021

The amended proposal remains satisfactory with respect of the relevant clauses of State Environmental Planning Policy (Transport and Infrastructure) 2021 as it maintains the approved vehicular access from Delmar Parade, slightly reduced density of development and resulting traffic generation, and acoustic attenuation commitments.

5.3.4 Warringah Local Environmental Plan 2011

Zoning and Permissibility

The site is located within the MU1 Mixed Use zone pursuant to the Warringah Local Environmental Plan 2011 (WLEP).

The proposed amendments retain all approved elements of the approved development. The amended proposal will remain permissible and consistent with the objectives of the zones which apply to the site.

Subdivision

Clause 2.6 of the WLEP requires development consent for subdivision. The subject amendment application includes amended plan of subdivision which reflects the slight changes to the approved development which are proposed as part of this application.

Height

In accordance with clause 4.3 'Height of Buildings' the height of a building on any land is not to exceed the maximum height shown for the land on the 'Height of Buildings Map'. There are two maximum heights for the site, being 16 metres for the majority of the site and 24 metres for a small portion adjacent to Pittwater Road as shown in Figure 5.

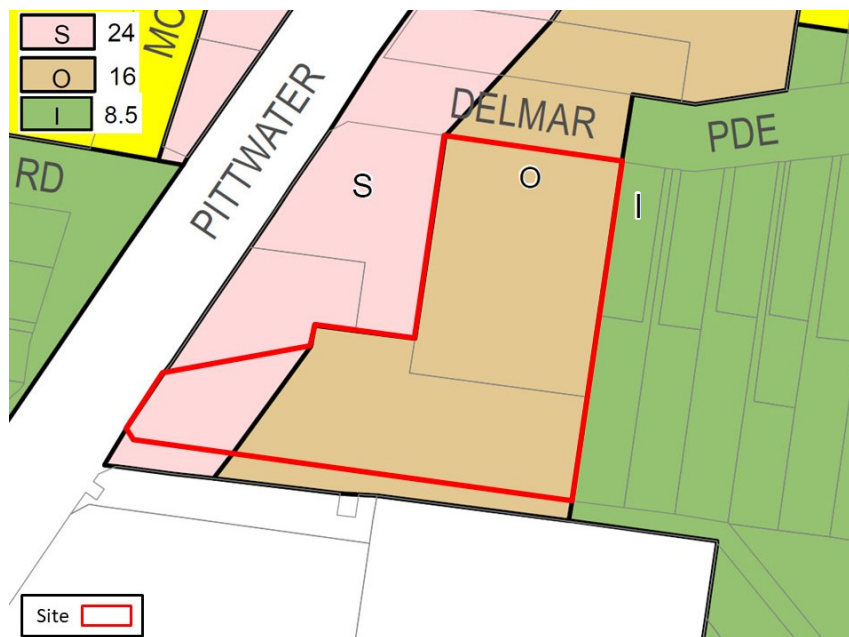


Figure 5

Extract from
the WLEP
Height of
Buildings Map

Whilst the approved development complied with this height control, the amended proposal now provides communal open space on the rooftop of the Pittwater Road building which results in some elements marginally exceeding the height control, with the largest area of variation being the lift overrun which provides access to the new rooftop communal open space with a minor breach of the 16 metre height control by 2 metres or 12.5%. However, the lift overrun is centrally located and the other rooftop elements have been pushed away from the edges of the roof such that none of these elements will be visible from the streetscape and also do not result in any additional shadow when compared with the approved development.

In addition, there has been a minor change to the floor to floor slab thickness to the Pittwater Road building on the top floor, resulting in a minor breach to the height control on the northern side of the building. This increase in floor thickness has been driven by recent changes by the building commissioner and NCC changes that require thicker concrete slabs and parapet heights due to the stricter requirement for falls to cast in drainage

Finally, further construction detailing and design has resulted in taller lift overruns for the other parts of the development which allows for higher speed lifts for residential amenity. This has resulted in a breach to the height control for the lift overruns for the Delmar Parade building, to a lesser extent.



Figure 6:

3D Height Plane

It is noted that as the application is a modification pursuant to Section 4.55 of the *Environmental Planning & Assessment Act 1979*, and there is a well established and extensive list of case law which confirms that a clause 4.6 variation request is not necessary for a modification application.

Key cases include:

- Lido Real Estate Pty Ltd v Woollahra Council (1997) 98 LGERA 1 at 4 per Talbot J and North Sydney Council v Michael Standley & Associates Pty Ltd [1998] NSWLR 468 at 480-481 per Mason P were two of the seminal cases which established that a clause 4.6 request is not required for a modification application. In Michael Standley, the Court of Appeal clearly stated:

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.

- This approach was affirmed in *Gann & Anor v Sutherland Shire Council* [2008] NSWLEC 157 at [8]-[18] per Loyd J. In *Gann & Anor*, the development as modified would breach the development standards for height, GFA and landscaped area. In this case Justice Loyd again confirmed that the modification power is a “stand alone” provision and therefore not subject to clause 4.6. His Honour confirmed that a clause 4.6 request was not required in relation to the breach of the height, GFA or landscaped area control as part of the modification application in this case. His Honour came to this conclusion based on the different wording for development applications compared to modification applications, which we have referred to above. In *Gann & Anor* it was confirmed that a clause 4.6 request is not needed for a modification application.
- *SDHA Pty Ltd v Waverley Council* [2015] NSWLEC 65 at [31] – [35] is a more recent case in which the Land and Environment Court confirmed that a clause 4.6 request does not form part of a modification application. In this case, in issue was whether a clause 4.6 for height and FSR was needed as part of a modification application. Justice Pepper found that the modification power is a complete power in itself and that a clause 4.6 request does not apply and is not relevant for a modification application, finding:

“the application before the Commissioner was a modification application pursuant to s 96 of the EPAA, and that, as a matter of law, s 96 constituted a complete source of power to modify a consent, and therefore, cl 4.6 did not apply and was not relevant for the purposes of s 96(3) of that Act”

Whilst Clause 4.6(8A) of the WLEP ordinarily acts to prevent variation to the building height development standard, as Clause 4.6 does not apply to the proposed S4.55 modification, the restriction from exceeding the height control as a result of Clause 4.6(8A) is not relevant to the proposal. Such an approach is not only expressly adopted by the above cases, but is also consistent with general principles of statutory interpretation (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).

Accordingly, the consent authority can lawfully consider and consent to a proposed variation to the height control expressed by Clause 4.3 of the WLEP in the context of the subject S.455 modification application.

Strict compliance with the height control is considered to be unnecessary and unreasonable in the circumstances of the proposed modification and there are sufficient environmental planning grounds to support the proposed variations to the height controls as follows:

- The proposed variation to the height control is a direct consequence of the desire to improve the amenity of the development by providing additional rooftop common open space above the Pittwater Road building.

- In order to achieve access to the roof top communal open space, the lift overrun and various other structures need to be increased in height. These structures are either centrally located (i.e. the lift core) or setback from the edges of the building, such that none of the elements which breach the height control are readily perceptible from the public domain.
- The setback of these elements from the edge of the building are such that they also do not result in any additional shadow beyond the shadow which results from the approved development.
- The general form and skyline modulation of the approved development will not be visibly altered by the proposed change.
- There are no other impacts to adjacent sites resulting from the proposed variation to the height control which would warrant strict compliance.
- The non-compliances with the height control ultimately improves the overall functionality and amenity of the development such that they will achieve a better outcome than a complying development.
- Strict compliance of the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public, and instead would reduce residential amenity when compared with that which is proposed in this modification application.
- Having regard to the planning principle established in the matter of Project Venture Development v Pittwater Council [2005] NSWLEC 191 most observers would not find the amended development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

Floor Space Ratio

Clause 4.4(2) of the WLEP provides that the maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map. There are two FSR zones which apply to the site being a 3.2:1 FSR along the Pittwater Road frontage of the site, and a 2.4:1 FSR for the remainder of the site, as illustrated in Figure 7 below.

The approved development involved a redistribution of Gross Floor Area across the site and whilst the approved development did not exceed the total density that can be achieved across the entire site, the approved development exceeded the maximum gross floor area in the 3.2:1 area by 1,054.1 square metres or 3.87%. This is illustrated in the table below:

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
2.4:1	6,800 sqm	16,320 sqm	15,262.4 sqm	2.24:1	N/A
3.2:1	990 sqm	3,168 sqm	4,222.1 sqm	4.27:1	1,054.1 sqm or 33.2%
TOTAL	7,790sqm	19,488sqm	19,484.6 sqm	N/A	N/A

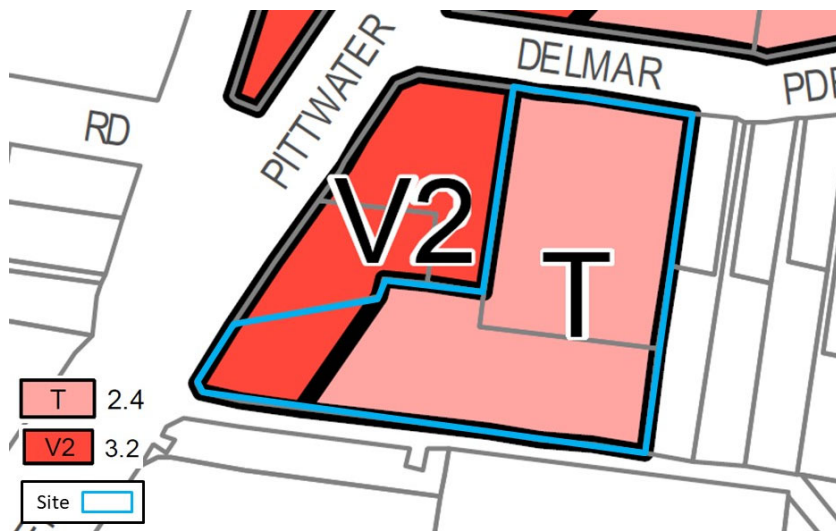


Figure 7:

Extract from
the WLEP
FSR Map

The proposed amendments have resulted in reduction in Gross Floor Area in both FSR zones and has actually reduced the extent of variation to the 3.2:1 FSR zone, as illustrated in the below table.

FSR zone	Site Area	Compliant GFA	Proposed GFA/FSR	FSR	FSR Variation
2.4:1	6,800 sqm	16,320 sqm	14,795.6 sqm	2.17:1	N/A
3.2:1	990 sqm	3,168 sqm	4,073.7 sqm	4.11:1	905.7 sqm or 28.5%
TOTAL	7,790sqm	19,488sqm	18,869.3 sqm	N/A	N/A

Heritage conservation

The subject site is not listed as an individual heritage item, nor is it located within a heritage conservation area. However, it is located adjacent to the heritage listed 'Stony Range Flora Reserve Conservation Area' (C6) included in Schedule 5: Environmental Heritage of the Warringah Local Environmental Plan (LEP) 2011.

However, the proposed amendments do not result in any meaningful change in relation to the relationship of the approved development with the adjacent heritage item. The additional roof top elements have been setback from the edge of the building, and these elements and all other amended components of the development do not result in any change in relation to the shadow cast by the approved development. The proposed amendments will continue to respect the heritage significance of the adjacent Stony Range Flora Reserve Conservation Area.

Residential Flat Buildings in the Zone B4 Mixed Use

Clause 6.7 of the WLEP states that development consent must not be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level. The approved development relied upon a Clause 4.6 request to support ground floor apartments. The amended proposal generally retains the arrangement of ground floor commercial tenancies and residential apartments as previously approved.

Dee Why Town Centre – Podium Heights

Clause 7.6A(2) of the WLEP specifies maximum podium heights for the Pittwater Road building and the Delmar Parade building. The approved development relied upon a Clause 4.6 request to vary the podium heights. The proposed amendments do not result in any change to the approved podium heights.

Dee Why Town Centre – Allowance for external ancillary plant and roof access

Clause 7.10 of the WLEP provides that development consent must not be granted to development on land in the Dee Why Town Centre involving the construction of a new building or external alterations to an existing building unless the consent authority is satisfied that—

- (a) the height of any external ancillary plant or access point is minimised and does not exceed 3.0 metres, and
- (b) any external ancillary plant or access point is suitably integrated with landscaping or architectural elements of the building, and
- (c) any external ancillary plant or access point is centrally located within the roof area to minimise or completely avoid being visible from the public domain in close proximity to the building, and
- (d) the total area of such plant and access points does not exceed 10% of the roof area, and
- (e) any balustrade or similar safety restraint (except a building parapet) is set in from the roof edge at least 3 metres, and
- (f) no external ancillary plant is located on the roof of the tall tower located on Site A or the two slimline towers on Site B

The amended proposal remains consistent with the requirements of this clause in that the only rooftop plant proposed is above the buildings, is less than 3 metres in height, less than 10% of the roof area of the development, and setback from the edge of the building such that it is suitably integrated with the architecture of the building.

Dee Why Town Centre – Promoting Retail Activity

Clause 7.12 of the WLEP relates to promoting retail activity in the Dee Why Town Centre to contribute to an active street life and provide for employment floor space. The approved development relied upon a Clause 4.6 request to vary the requirement in Clause 7.12 for non-residential uses on the ground and first floor. The amended proposal generally retains the arrangement of ground floor commercial tenancies and residential apartments as previously approved and retains an active and engaged street edge as a result of the ground level commercial tenancies which address both Pittwater Road and Delmar Parade.

Remaining Provisions

The proposed amendments to the approved development do not give rise to any further consideration against the remaining provisions of the WLEP beyond those which were considered in the assessment of the original development application.

5.4 Warringah Development Control Plan 2011

The following discussion outlines the amended proposal's compliance with the relevant provisions of the Warringah Development Control Plan 2011.

Part C Site Factors

Control	Response	Compliance
C2. Traffic, Access and Safety	The amended proposal is accompanied by a Traffic and parking report prepared by TTPA which confirms that the revised basement layout and design remains satisfactory in relation to the relevant Australian Standards.	Yes
C3. Parking Facilities	The amended proposal is accompanied by a Traffic and parking report by TTPP. The proposal provides off-street parking for a total of 332 cars over 2 basement levels, which complies with the minimum required parking provision. The approved vehicular access and egress arrangement is maintained at the site's Delmar Parade frontage.	Yes

Part D Design

Control	Response	Compliance
D2. Private Open Space	Clause 6A of SEPP 65 provides that a DCP cannot be inconsistent with the Apartment Design Guide in relation to the provision of private open space. The Apartment Design Guide requires a minimum of 8 square metres for a 1 bedroom apartment, 10 square metres for a 2 bedroom apartment and 12 square metres for a 3 bedroom apartment. The amended proposal maintains private open space which is compliant with the Apartment Design Guide for all apartments and predominantly well in excess of the minimum requirements.	Yes
D6 Access to sunlight	Clause 6A of SEPP 65 provides that a DCP cannot be inconsistent with the Apartment Design Guide in relation to the required solar access. The Apartment Design Guide only requires a minimum of 2 hours solar access rather than the 3 hours suggested by the DCP. In this regard, the amended proposal maintains 70% of apartments enjoying at	Yes

Control	Response	Compliance
	<p>least 2 hours solar access on 21 June between 9am and 3pm.</p> <p>The amended shadow diagrams indicate that there is no meaningful difference to the shadowing effects between the approved and modified development.</p>	
D7. Views	The amended proposal retains essentially the same envelope as the approved development, and does not result in any meaningful change in relation to views beyond the impacts associated with the approved development.	Yes
D9. Bulk	The majority of the height, the setbacks and footprints of the amended proposal are essentially unchanged and so there is no change to the approved bulk and scale.	Yes
D10. Building Colours and Materials	The amended architectural package includes a schedule of materials and finishes. The amended materials provided a design evolution and higher quality outcome when compared with the approved development.	Yes
D22. Conservation of energy and water	The proposal is accompanied by an amended BASIX report.	Yes

Part E The Natural Environment

Control	Response	Compliance
E1. Private Property Tree Management	The proposed amendments do not result in any changes in relation to tree removal.	Yes
E2 Prescribed Vegetation E5 Native Vegetation	The proposed amendments do not result in any changes in relation to the southern adjacent Stony Range Botanic Garden.	Yes
E10. Landslip Risk	A geotechnical report was provided in support of the approved development which demonstrated that the site conditions can support the proposed development.	Yes

Part G Special Area Controls

The subject site is within the area of Part G Special Area Controls and to which the specific provisions of Part G1 applies. The DCP provisions for the Dee Why Town Centre are addressed below:

Control	Response	Compliance
4. Streetscape and Public Domain		

Control	Response	Compliance
<p><i>Kerb setbacks</i></p> <ul style="list-style-type: none"> Delmar Parade: 4m Pittwater Road: no specified setback 	The amended proposal does result in any change to the approved and compliant setback of 4 metres from the kerb of Delmar Parade.	Yes
<p><i>Awnings</i></p> <p>Awnings must form an integral part of the architecture of the building and be designed along the full extent of the street frontage of the building and at a height to ensure suitable weather protection, having regard to site orientation.</p>	The amended proposal does result in any change to the approved awnings along both street frontages.	Yes
<p><i>Retail Activation</i></p> <p>Active uses must be provided adjacent to the public domain, including streets, open space, pedestrian accessways and laneways.</p>	The amended proposal retains active frontages to both adjacent streets.	Yes
5. Design and Architectural Diversity		
<p><i>Architectural Design</i></p> <p>New developments must be designed to avoid the use of blank walls fronting streets and the public domain. In circumstances where blank walls are unavoidable, they are to be designed in a manner that is consistent with the overall building form that contributes to the public domain and create visual interest.</p> <p>Corner sites must adequately address both street frontages; and combine architectural features, materials and landscape design to define corners</p>	<p>The amended proposal does not have any blank walls adjacent to streets and the public domain and retains a high level of street activation and engagement.</p> <p>The amended design improves the contribution of Building B to its corner location.</p>	Yes
<p><i>Housing</i></p> <p>1. Housing in new developments must provide for a mix of 1, 2 and 3 bedroom dwellings. For developments with 10 or more dwellings, at least 20 percent of 3 bedroom dwellings must be provided.</p> <p>2. A mix of one and three bedroom apartments are to be located where accessibility is more easily achieved for disabled, elderly people or families with children.</p>	<p>The amended proposal slightly adjusts the apartment mix and provides:</p> <ul style="list-style-type: none"> 90 x 1 bedroom apartments (41.3%) 88 x 2 bedroom apartments (40.3%) 40 x 3 bedroom apartments (18.4%) <p>Whilst the amended percentage of 3 bedroom apartments is below 20%,</p>	Yes on merit

Control	Response	Compliance
<p>3. Developments achieve a benchmark of 20% of the total apartments incorporating the Livable Housing Guideline silver level universal design features.</p> <p>4. Where a development comprises at least 5 dwellings, 10% (rounded up to the next whole number) of dwellings shall be capable of being adapted (Class C) under AS 4299.</p>	<p>it is virtually unchanged from the approved percentage of 3 bedroom apartments of 19.2%.</p> <p>The amended percentage of 3 bedroom apartments is consistent with the 'New South Wales Household and Dwelling Projections, 2008-2036: 2008 Release' prepared by the Department of Planning which indicates that the average household size in Sydney is expected to continue its decline from 2.61 in 2006 to 2.49 by 2036. In addition, the population projections indicate that the lone person household is the type of household expected to experience the greatest percentage increase between 2006 and 2036 (69%).</p> <p>The amended provision of apartments remains consistent with the expected increase in smaller households. Furthermore, there is already a high proportion of 3 bedroom + dwellings in the suburbs surrounding Dee Why and it is important that this project rebalances this with a high proportion of 1 and 2 bedroom apartments.</p> <p>The amended proposal maintains 20% livable apartments and 10% adaptable apartments.</p>	
<p><i>Tower Setbacks</i></p> <ul style="list-style-type: none"> Delmar Parade: 8m Pittwater Road: no specified setback 	<p>The amended proposal retains a 4 storey podium for the Delmar Parade building to achieve a cohesive outcome with the approved and under construction development at 2 Delmar Parade. There is no change proposed to the approved top floor setback of Building A which is a compliant 8 metres.</p>	Yes
Traffic and Parking		
<p>2. New developments are to be accompanied by a service delivery and loading dock plan.</p>	<p>The amended proposed development retains a loading dock as approved.</p>	Yes

Control	Response	Compliance
<p>3. Car parking and vehicle access points shall incorporate the following design elements:</p> <p>a. Recessed car park entries from the main building facade alignment;</p> <p>b. Avoidance of large voids in the facade by providing security doors or decorative grills to car park entry;</p> <p>c. Returning the facade finishes into the car park entry recess for the extent visible from the street;</p> <p>d. Concealing all services, pipes and ducts.</p>	The amended proposed retains the single vehicular entry and exit point on the eastern side of the Delmar Parade as approved.	Yes
<p>4. Parking should be:</p> <p>a. Provided underground;</p> <p>b. Designed and located to optimise deep soil planting.</p>	<p>All amended car parking remains underground in two basement levels.</p> <p>The amended proposal has slightly increased the amount of deep soil.</p>	Yes
Sustainability		
New development with a cost of works equal to or greater than \$5 Million must achieve a minimum 4 Star, Green Star – Design and As Built rating in the Green Building Council of Australia rating system.	The amended proposal is supported by a BASIX Certificate.	Yes

6.0 CONCLUSION

This submission has been prepared as supporting documentation for an application made pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* to modify the consent for Development Application DA2022/0145 for Demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision at 4 Delmar Parade and 812 Pittwater Road, Dee Why.

The application seeks approval for a range of refinements to the development to achieve an incremental improvement to the apartment layouts and residential amenity, a rationalised basement internal configuration, and design progression to the architectural expression of the development including a softening of the corners with curved balconies. The amended proposal also introduces a roof top communal open space area to the Pittwater Road building.

The amended proposal:

- Reduces Gross Floor Area by 614.7 square metres
- Reduces the total number of apartments from 219 to 218
- Reduces car parking spaces from 334 to 332 spaces
- Increases common open space from 2,219 square metres to 2,246.5 square metres
- Increases deep soil from 1,019 square metres to 1,034.6 square metres
- Results in a net reduction in shadow from 10am to 3pm on 21 June

The amended proposal retains the fundamental components of the approved layout and spatial characteristics of the development, retains or improves compliance with the amenity provisions of the Apartment Design Guide, and does not result in any change in impact to the surrounding properties.

As detailed in this submission the proposed modifications may be made by the consent authority in accordance with Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* as the proposed amendments do not radically transform the proposal or alter the overarching fundamental characteristics of the original approval, and so the amended proposal is appropriately categorised as being “substantially the same” as the approved development.

The proposed amendments remain consistent with the aims and objectives of the relevant environmental planning instruments and development control plan and will not result in any adverse impacts on the amenity of the locality. Accordingly, the proposed amendments are considered acceptable and warrant approval as they achieve an incremental improvement to the approved development.