



planning consultants

**Section 96AA Application to Modify  
NSW Land and Environment Court Development  
Consent DA 2007/0856 in Minnici v Warringah  
Council [2009] NSWLEC 1098  
(File No. 11108 of 2008)**



Modification of Development Consent  
DA 2007/0856 and MOD 2013/0112 for demolition of  
existing buildings and construction of a mixed retail,  
commercial and residential development with basement level  
car parking, landscaping, ancillary development and two (2)  
lot subdivision and staged construction and occupation at 5  
& 5A Lawrence Street and 18 Marmora Street, Freshwater.

Prepared for: Moorgate Finance Pty Ltd  
Project No: 8722A  
Date: June 2014



## Statement of Environmental Effects

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

Printed: 11 June 2014  
File Name: P:\PROJECTS\8722A 18 Marmora Street, Freshwater\Reports\8722A.docx  
Project Manager: Rob Player  
Client: Moorgate Finance Pty Ltd  
Project Number: 8722A

## Document history and status

Version	Issued To	Qty	Date	Reviewed
Rev_1, Draft	Project Manager	1-e	19-05-2014	R. Player
Rev_2, Draft	Client	1-e	21-05-2014	D. West
Rev_3, Draft	Client	1-e	04.06.2014	R. Player
Final	Client and Council	10h	11.06.2014	R. Player
		2e		

**Table of Contents**

<b>1</b>	<b>Introduction</b>	<b>4</b>
1.1	Commission	4
1.2	Material Relied Upon	6
1.3	Summary of Conclusions and Recommendations	7
<b>2</b>	<b>Background</b>	<b>8</b>
<b>3</b>	<b>Site Context</b>	<b>8</b>
3.1	Location	8
3.2	Site Description	9
3.3	Surrounds	11
3.4	Surrounding Road Network	12
<b>4</b>	<b>Proposed Modifications</b>	<b>13</b>
4.1	General	13
4.2	Description of Proposed Development	13
4.3	Condition 1 – Approved Plans and Supporting Documentation	13
4.4	Condition 23 – BASIX Certification	18
4.5	Condition 27 – Section 94A Contributions	18
4.6	Condition 94 – BASIX Compliance Certification	19
<b>5</b>	<b>Statutory Provisions</b>	<b>20</b>
5.1	General	20
5.2	Section 96AA of the EP&A Act	20
5.2.1	Substantially the Same Development	20
5.2.2	Consultation with the relevant Minister, Authorities or Approval Agencies	24
5.2.3	Notification	24
5.2.4	Consideration of Submissions	24
5.3	Clause 115 of the EP&A Regulation 2000	24
<b>6</b>	<b>Environmental Planning Assessment</b>	<b>26</b>
6.1	Section 79C (1)(a) Planning Controls	26
6.1.1	SEPP 55 – Remediation of Land	26
6.1.2	SEPP 65 – Design Quality of Residential Flat Development.	27
6.1.3	SEPP (Building Sustainability Index) 2004	34

## Statement of Environmental Effects

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

6.1.4	Warringah Environmental Local Plan 2000.	34
6.1.5	Warringah Local Environmental Plan 2011	38
6.1.6	Warringah Development Control Plan 2011	42
6.1.7	AS2601 – Demolition of Structures	51
6.1.8	Building Code of Australia	51
6.2	Section 79C(1)(b) – Natural Environmental Impacts	52
6.2.1	Stormwater Drainage and Flooding	52
6.2.2	Erosion and Sediment Control	52
6.2.3	Air Quality	52
6.2.4	Landscaping	52
6.3	Section 79C(1)(b) – Built Environment Impacts	53
6.3.1	Relationship to Streetscape and Character	53
6.3.2	Relationship to Neighbouring Properties	53
6.3.2.1	Visual and Acoustic Privacy	53
6.3.2.2	Access to Sunlight	54
6.3.2.3	Views	54
6.3.3	Traffic and Parking Assessment	56
6.3.4	Waste Management	56
6.3.5	Accessibility	56
6.4	Section 79C(1)(b) - Social and Economic Impacts	57
6.5	Section 79C(1)(c) - The Suitability of the Site for the Development	57
6.6	Section 79C(1)(d) - Submissions	58
<b>7</b>	<b>Conclusion</b>	<b>59</b>

## Figures

Figure 1	Locality Plan	9
Figure 2	Site Plan	10
Figure 3	Aerial Photograph.	10
Figure 4	Table 1 Development Calculations	17
Figure 5	Photomontage of Amended Mixed Use Proposal	23
Figure 6	Compliance Table for SEPP No. 65 - RFDC	34
Figure 7	WLEP 2000 Locality Map	37
Figure 8	Extract of WLEP 2011 Zoning Map	38
Figure 9	Extract of WLEP 2011 Height of Buildings Map	40
Figure 10	Compliance Table for WDCP 2011	51

## Appendices

- A. Council's Pre-Application Meeting Report for the amended Proposal held on 23/01/2014.
- B. NSW Land & Environment Court Judgement in Minnici v Warringah Council (2009) NSW LEC 1098 issued on 03/04/2009.
- C. Court Approved DA plans for Development Consent DA 2007/0856 for the mixed use proposal issued on 03/04/2009.
- D. Court and Council approved Plan of Subdivision DP 1181713 for the site.
- E. Council MOD 2013/0112 Modification of Development Consent DA 2007/0856 for the mixed use proposal issued on 6 September 2013.
- F. Site Survey Plan prepared by Kiprovich & Associates, Consulting Surveyors.
- G. SEPP65 Design Verification Statement and amended Architectural DA plans for the proposal prepared by Benson McCormack Architects.
- H. Amended Landscape Plan for the proposal prepared by Spirit Level Design Pty Ltd.
- I. Flood Potential Statement & Drainage Plans and Erosion & Sediment Control Plan prepared by Meinhardt Infrastructure & Environment Pty Ltd.
- J. Transport, Traffic and Parking Assessment Report for the proposal prepared by Colston Budd Hunt & Kafes Pty Ltd.
- K. Access Report for the proposal prepared by Accessible Building Solutions.
- L. BCA Compliance Assessment Report prepared by AE&D.
- M. Geotechnical Assessment Report prepared by JK Geotechnics.
- N. BASIX Report and Certificates for the proposal prepared by GAT & Associates.
- O. Waste Management Plan for the proposal prepared by Moorgate Finance Pty Ltd.
- P. Email advice from Ausgrid on the proposal dated 7 May 2014.
- Q. Report relating to lawful commencement of the proposal under Development Consent DA 2007/0856 prepared by AE&D, Accredited Private Certifiers.
- R. Development Cost Report for the proposal prepared by Sean Fawle, Licensed Builder
- S. Clause 115 of the EP&A Regulation for the Section 96AA Application for the proposal prepared by DFP Planning.
- T. CPTED Report for the amended proposal prepared by DFP Planning.
- U. View Analysis Photographs and Photomontages of the amended proposal prepared by DFP Planning and Binyan Studios
- V. Photomontages of the amended proposal prepared by Binyan Studios

## 1 Introduction

### 1.1 Commission

This Section 96AA Application has been prepared by DFP Planning Consultants under instructions from Moorgate Finance Pty Ltd in respect to the NSW Land & Environment Court (Court) approval for a mixed use retail, commercial and residential development and two (2) lot subdivision at 5 & 5A Lawrence Street and 18 Marmora Street, Freshwater.

This application is made pursuant to Section 96AA of the Environmental Planning & Assessment Act 1979 (EP&A Act) to modify Development Consent DA 2007/0856 (as modified by MOD 2013/011) granted in the Court Judgment made by Commissioner Bly in *Minnici v Warringah Council* [2009] NSWLEC 1098 (File No. 11108 of 2008) issued on 3 April 2009 (Consent) and included as **Appendix B** in this report.

The purpose of this Section 96AA Application is to modify the description of the proposed development and four (4) conditions of the Consent relating to amended DA plans for the residential component of the mixed use proposal as described below:

- **Description of the proposed development**

The description of the proposed development is proposed to be modified so as to be consistent with the amended DA plans for the residential component of the mixed use proposal. The suggested rewording of the description of the proposed development is as follows:

*“Modification of Development Consent DA 2007/0856 granted for the demolition of existing buildings and construction of a mixed use development comprising of basement car parking, three storey retail/commercial building, 16 dwellings in 2 residential flat buildings and a detached dwelling and subdivision into 2 lots and the staged construction and occupation of the development.”*

- **Conditions 1 – Approved plans and supporting documentation**

This condition requires modification to refer to the amended architectural, landscaping and drainage plans (amended DA plans) for the mixed use proposal included as **Appendices G, H and I** in this report.

The design modifications as shown on the amended DA plans relate to the residential component only of the mixed use proposal to be constructed on Lot 1, DP 1181713 in the Court and Council approved plan of subdivision (see **Appendix D**) which is described in detail in Section 4 of this report.

This Section 96AA Application and the accompanying amended DA plans do not propose any design modifications to the Court approved three storey retail/commercial building with basement level car parking and a vehicular driveway access onto Lawrence Street to be constructed on Lot 2, DP 1181713 Lawrence Street, Freshwater in the approved plan of subdivision (see **Appendices C and D**).

- **Condition 23 – BASIX Certificate**

This condition requires modification to reference the new BASIX Certificate No. 539768M issued in respect to the amended DA plans for the two (2) proposed three (3) residential flat buildings and the proposed two (2) storey detached dwelling. (See **Appendix N** in this report).

- **Condition 27 – Section 94A Contribution**

The Section 94A Contribution levy to be paid by the proponent for the residential component of the amended DA plans for the mixed use proposal the subject of this Section 96AA Application should be modified as the total development cost is now

\$8,241,804.00 (See **Appendix R**). Hence, based on the Council's Section 94A Development Contributions Plan Levy rate of 1% of the total development cost for the residential component of the mixed use proposal, the Section 94 Contribution Levy payable should now be \$82,418.00

In addition, there is a Council drafting or typing error in the Section 94A levy table to Condition 27 that should be corrected.

- **Condition 94 – BASIX Compliance Certification**

This condition will require amendment to refer to the new BASIX Certificate No. 539768M for the amended DA plans lodged with this Section 96AA Application (see **Appendix N** in this report).

A copy of the Court Judgment in *Minnici V Warringah* (2009) NSW LEC 1098 (including the conditions of the Consent) is provided at **Appendix B** in this report.

The Modification of Development Consent DA 2007/0856 (MOD 2013/11) relating to the amendment of various conditions of the Consent and the description of the mixed use proposal to enable staged construction and occupation of the development was granted by Council on 6 September 2013 and is provided at **Appendix E** in this report.

Pursuant to Section 96AA of the EP&A Act, Warringah Council (Council), as the relevant consent authority may approve the modification of a development consent granted by the Court provided:

- It is satisfied 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);
- The modification application has been notified appropriately in accordance with the requirements of the Environmental Planning and Assessment Regulation 2000 (the Regulation) and/or any applicable Development Control Plans;
- It has notified, or made reasonable attempt to notify, each person who made a submission in respect of the relevant application of the proposed modification;
- Any submissions made during the notification period have been considered.

The proposed design modifications to the residential component of the mixed use proposal as shown on the amended DA plans (see **Appendices G, H and I**) is considered to be substantially the same development as the Court approved DA plans (see **Appendix C**) having regard to the following factors:

- The development proposal is still for the demolition of all existing buildings and other structures at the site and the construction of a mixed retail, commercial and residential buildings with basement level parking (Buildings A, B, C & D) and with extensive site landscaping as well as a two (2) lot subdivision and the staged construction and occupation of the development at the site.
- The amended proposal involves no design modifications to the Court approved three storey retail/commercial building with basement level car parking fronting onto Lawrence Street, Freshwater (Building A).
- The amended proposal still involves the construction of two (2) by three (3) storey residential flat buildings (Building B & C) and a two (2) storey detached dwelling (Building D) with basement level car parking and with a vehicular ramp and driveway access to Marmora Street and extensive site landscaping with similar building footprints, building envelopes, building heights, building setbacks and site landscaped areas as the Court approved DA plans.

- The amended DA plans involve an increase in the overall residential density from 10 to 16 residential apartments in the two (2) proposed residential flat buildings (Buildings B & C) as well as a detached dwelling (Building D) which has a similar floor area to the Court approved residential development. The proposed design modifications to the residential component of the mixed use proposal will achieve a better planning outcome by providing for a better mix of more affordable, smaller sized residential apartments.
- The proposed design modifications to the proposed two (2) residential flat buildings and detached dwelling are more compliant with the former WLEP 2000, WLEP 2011, WDCP 2011, SEPP 65 and the Residential Flat Design Code (RFDC) as well as Council's current drainage and flood level requirements which apply to the site and Freshwater locality compared with the Court approved DA plans for the mixed use proposal.
- The external appearance of the proposed two (2) residential flat buildings (Buildings B & C) and the detached dwelling (Building D) as well as the selection of building materials, colours and finishes and the site landscaping are designed to be of a more contemporary, high quality, attractive built form which will visually compliment the mixed land use character of the locality which consists of low to medium density residential development and a local commercial centre with shop-top housing.

## **1.2 Material Relied Upon**

For the purposes of preparing this report, we have reviewed documents and undertaken the following investigations:

1. Site inspections undertaken in February and April 2014;
2. Site Survey prepared by Kiprovich & Associates Pt Ltd dated 7 May 2012
3. Site Analysis prepared by Benson McCormack Architects dated May 2014;
4. Architectural Plans including Building Materials and Finishes prepared by Benson McCormack Architects dated May 2014;
5. Shadow Diagrams prepared by Benson McCormack Architects dated May 2014;
6. SEPP 65 Design Verification Statement prepared by Benson McCormack Architects dated May 2014;
7. Landscape Plan prepared by Spirit Level Designs Pty Ltd dated 4 April 2014;
8. Geotechnical Investigation Report prepared by JK Geotechnics dated 31 March 2014;
9. Stormwater Drainage Plan and Flood Potential Statement prepared by Meinhardt Infrastructure and Environment Pty Ltd dated 10 April 2014 and 28 April 2014;
10. Traffic and Parking Assessment Report prepared by Colston Budd Hunt & Kafes dated March 2014;
11. Access Report prepared by Accessible Building Solutions dated 24 March 2014;
12. BASIX Assessment Report prepared by GAT & Associates dated 22 May 2014;
13. Waste Management Plan prepared by Moorgate Finance Pty Ltd dated April 2014;
14. Crime Prevention Through Environment Design (CPTED) Report prepared by DFP Planning dated 2 May 2014;
15. Photomontages of Amended Mix Use Proposal prepared by Binyan Studios;
16. Development Cost Schedule for Amended Mixed Use proposal prepared by Sean Fawle, Licensed Builder dated 4 June 2014;



17. Warringah Council Pre-Application Meeting Report held on 23 January 2014;
18. NSW Land and Environment Court Judgement in *Minnici v Warringah Council* [2009] NSWLEC 1098 issued on 3 April 2009;
19. Court approved DA Plans for Development Consent DA 2007/0856 for the original Mixed Use Proposal;
20. Council's Notice of Determination of Modification of Development Consent DA 2007/0856 and MOD 2013/0112 for the mixed use proposal issued on 6 September 2013;
21. Deposited Plan (DP) 1181713 for the approved two (2) lot Plan of Subdivision of the site;
22. Erosion and Sediment Control Plan prepared by Meinhardt Infrastructure and Environment Pty Ltd dated 30 April 2014; and
23. BCA Compliance Assessment Report prepared by AE & D dated 19 May 2014.

### **1.3 Summary of Conclusions and Recommendations**

DFP Planning has concluded that the proposed design modifications to the residential component of the mixed use proposal as shown on the amended DA plans (see **Appendices G, H and I**) as well as the proposed modification to various conditions of Development Consent DA 2007/0856 (MOD 2013/11) will not substantially alter the Court approved development and accordingly, the mixed use development proposal (as proposed to be modified) is considered to satisfy the requirements to enable these modifications to be approved by Council pursuant to Section 96AA of the EP&A Act.

The proposed design modifications to the mixed use proposal will better meet the needs of the local community for a better residential apartment mix and more affordable, smaller sized residential apartments and a dwelling house. The amended proposal will be more compliant with the relevant statutory planning controls and Council's flood level and drainage requirements for the site and locality.

Furthermore, the amended mixed use proposal will have acceptable natural and built environmental impacts in the locality including traffic, parking and residential amenity impacts.

It is the opinion of DFP Planning that the Section 96AA Application in respect to the amended DA plans and modification of certain Conditions of Development Consent DA 2007/0856 (as modified), should be approved by Council having regard to the merits of the amended mixed use proposal pursuant to Section 79(C) and Section 96AA of the EP&A Act.

## 2 Background

DA 2007/0856 for the proposed mixed use development at 5 and 5A Lawrence Street and 18 Marmora Street, Freshwater (the Site) was originally lodged with Council on 5 September 2007 at which time the prevailing environmental planning instrument was Warringah Local Environmental Plan 2000 (WLEP2000). The site was located partly within the H1 Freshwater Beach Locality (18 Marmora Street) and partly within the H2 Harbord Village Locality (5 and 5A Lawrence Street) under WLEP 2000. The proposed mixed used development was permissible with the consent of the Council under WLEP 2000.

DA 2007/0856 for the mixed use proposal was refused by Council on 10 June 2008. However, an appeal subsequently lodged by the applicant, F. Minnici with the NSW Land and Environment Court in *Minnici V Warringah Council* (2009) NSWLEC 1098 (File No. 11108 of 2008) was the subject of a Court hearing on 30 and 31 March 2009.

The Court judgement issued on 3 April 2009 in *Minnici V Warringah Council* (2009) NSWLEC 1098 (File No. 11108 of 2008) upheld the Court appeal. The Court Orders issued by Commissioner Bly granted Development Consent to DA 856/2007 for the mixed use retail/commercial and residential development at the site subject to certain conditions (see **Appendix B**).

On 6 September 2013 Council approved a Section 96AA Application (MOD 2013/0112) involving a modification of Development Consent DA 2007/0856 for the demolition of existing buildings and construction of a mixed use development comprising basement car parking, 3 storey retail/commercial building, ten (10) residential apartments in two (2) buildings and a detached dwelling and subdivision into 2 lots and the staged construction and occupation of the development including the modification of various conditions of the Consent (see **Appendix E**).

This new Section 96AA Application seeks the approval of Council to amended DA plans for the residential component of the mixed use proposal and modifications to related conditions of the Consent.

A Pre-Application Meeting was held with Council's Planners and other technical officers on 23 January 2014 to discuss the proposed design modifications to the mixed use proposal as well as modifications to related conditions of Development Consent DA 2007/0856 (as modified) prior to the lodgement of this Section 96AA Application with Council (see **Appendix A**). This Section 96AA Application and the accompanying amended DA plans and specialist consultant reports have addressed all of the matters identified in Council's Pre-Application Meeting report.

## 3 Site Context

### 3.1 Location

The site is located on the northern side of Lawrence Street and is centrally positioned within the Freshwater Village Local Centre. The site also extends through to Marmora Street which is a local low density residential street in the Freshwater locality. **Figure 1** below is a locality plan showing the location of the site.

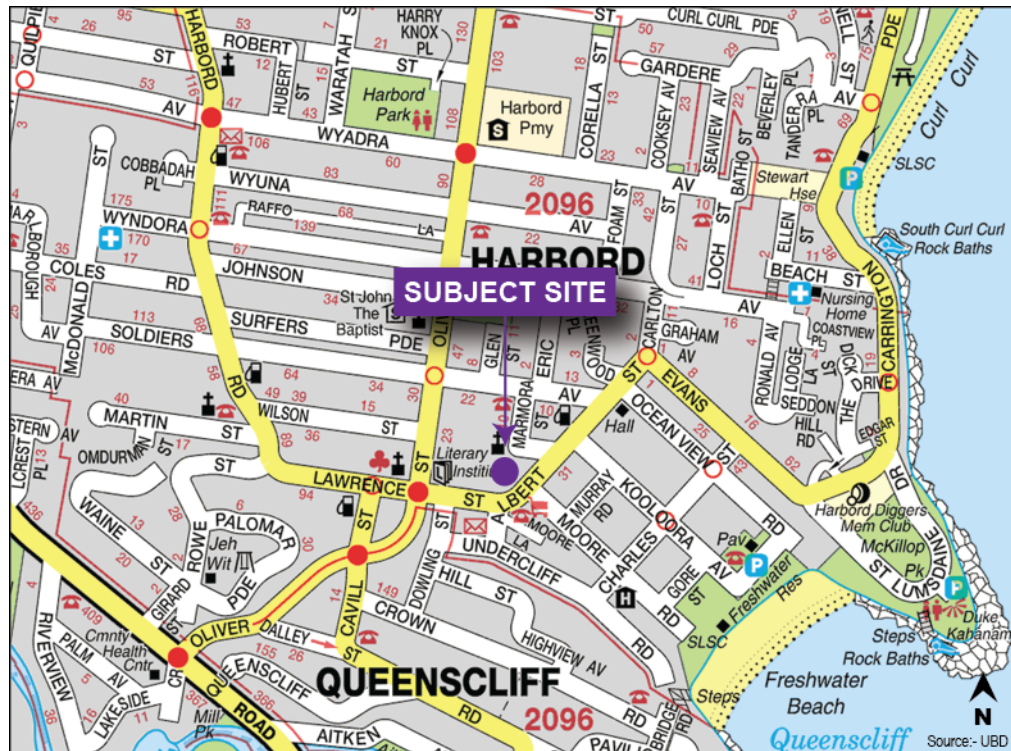


Figure 1 Locality Plan

### 3.2 Site Description

The original real property description of the site as referred to in Development Consent DA 2007/0856 (as modified) is Lot A and Lot B in Deposited Plan 37558, 5 and 5A Lawrence Street, Freshwater and Lot 9 in Deposited Plan 10321, 18 Marmora Street, Freshwater.

Following on from the Court approval in April 2009 resulting in the granting of Development Consent DA 2007/0856, the site has been approved by the Court and Council to be re-subdivided into two allotments being Lot 1 and Lot 2 in Deposited Plan 1181713 as shown on the approved plan of subdivision (see **Appendix D**). Lot 1 is the site of the residential component of the Court approved mixed use proposal which is the subject of the amended DA plans in this Section 96AA Application. Lot 2 is the site of the retail/commercial component of the Court approved mixed use proposal under Development Consent DA 2007/0856 (as modified) which will remain unchanged as a consequence of this Section 96AA Application.

At the time of preparation of this Section 96AA Application, the Court and Council approved plan of subdivision which forms part of Development Consent DA 2007/0856 and MOD 2013/0112 for the mixed use proposal has been lawfully and physically commenced with the construction and completion of sewer main works which were completed in December 2013 which has been confirmed by AE&D, Private Certifiers (see **Appendix Q**). The approved plan of subdivision for the mixed use proposal is awaiting the issue of the Subdivision Certificate by Council to enable Deposited Plan 1181713 to be registered with the NSW Land Titles Office. It is noted that Development Consent DA 2007/0856 and MOD 2013/0112 for the Court approved mixed use development including the two (2) lot subdivision of the site has been lawfully commenced prior to 3 April 2014 and, accordingly, is a valid development consent that has not lapsed.

**Figure 2** below is a site plan which shows Lots 1 and 2 in DP 1181713 of the approved plan of subdivision being the total site of the mixed use proposal.

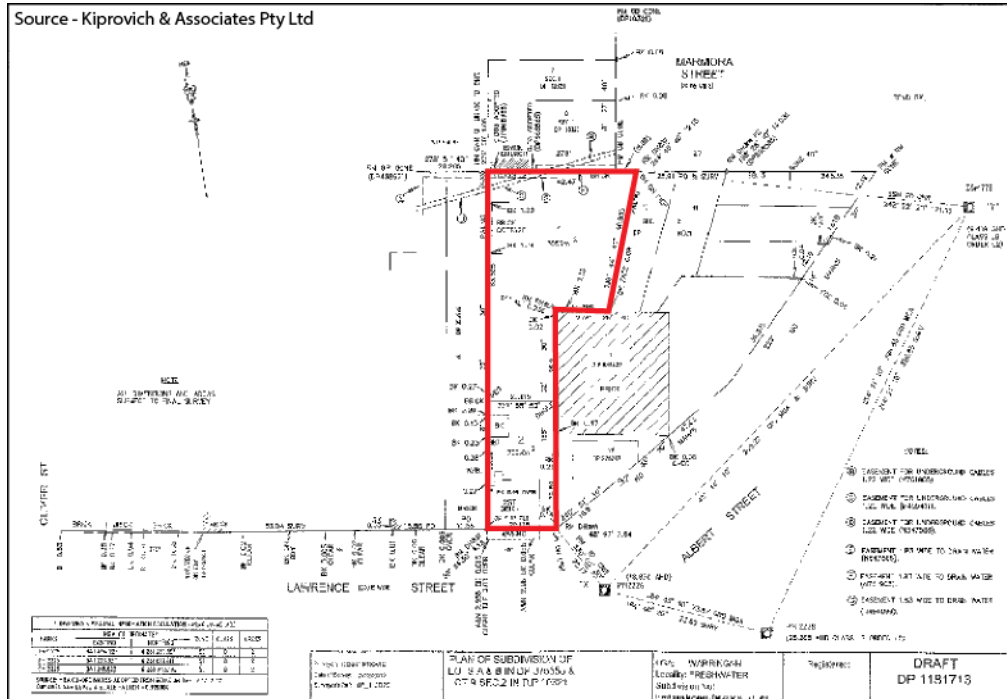


Figure 2 Site Plan

**Figure 3** below is an aerial photograph showing the total site in its local context consisting of the Freshwater Village Local Centre as well as the surrounding low and medium density residential neighbourhood in the Freshwater locality.



Figure 3 Aerial Photograph.

As noted earlier in this report, this Section 96AA Application is in respect to amended DA plans for the mixed use proposal and only relates to the proposed residential development to be constructed upon Lot 1 DP 1181713 fronting onto Marmora Street, Freshwater. The Section 96AA Application does not propose any design modifications to the Court

approved three storey retail/commercial building with basement level parking and with a vehicular ramp driveway access onto Lawrence Street, Freshwater.

Lot 1 DP1181713 which is the subject of the amended DA plans for the residential component of the mixed use proposal is an irregular shaped allotment with a site area of 2056m<sup>2</sup>. The site has a 5.89 metre frontage to Marmora Street.

There are several easements for underground cables and drainage including a Council easement for drainage towards the northern rear boundary of the site which extends onto the adjoining Church property at Lot 8 DP10321 Marmora Street. There is also an existing sewer main which dissects the site of the mixed use proposal.

The existing buildings and structures on Lot 1 DP 1181713 which are to be demolished consist of a two storey brick dwelling with driveway access to Lawrence Street and a single storey fibro and weatherboard dwelling with a driveway access to Marmora Street.

The existing vegetation at the site consists of lawn and garden areas and a few scattered exotic trees which are to be removed for the construction of the residential component of the mixed use proposal.

The topography of the site falls in a northerly direction from its Lawrence Street frontage (RL19.34) to its Marmora Street frontage (RL14.47) representing a slope from south to north of about 5 metres. The site also has a slight cross slope from west to east of approximately 1.0 metre.

All essential public utility services are available to the site for the mixed use proposal.

### **3.3 Surrounds**

The Freshwater Village Local Centre is characterised by a mix of small retail and commercial buildings including some with low rise shop top housing as well as a few modern larger two and three mixed retail, commercial and apartment-style buildings.

The scale and architectural style of the existing retail/commercial buildings and mixed use buildings within the Freshwater Village is diverse, ranging from traditional single and two (2) storey shops and commercial buildings to modern three (3) storey mixed use, commercial and residential flat buildings. Lawrence Street and Albert Street are the focal point and principal local roads within the Freshwater Village Local Centre.

Council has recently granted development consent to a three (3) storey mixed use retail and residential flat building on the existing Freshwater Fruit and Vegetable Markets site which adjoins to the south at Lot 1 DP 830423, corner Lawrence Street and Albert Street, Freshwater.

There is a Council public car park, public reserve and community facility buildings to the west of the site accessed from Lawrence Street and Oliver Street. The adjoining properties to the east and west of the site are existing traditional retail/commercial buildings with vacant rear yards.

A large Telstra building and an Electricity Substation is located to the west of the site fronting onto Oliver Street and adjoining Council's public car park.

Adjoining the site to the east at Lot 10 DP 10321 is an existing single storey dwelling with a frontage to Marmora Street.

The site immediately adjoins St Peter's Uniting Church to the north which is also located in Marmora Street.

Development further to the north and east along Marmora Street is mostly single and two (2) storey dwelling houses on typical sized residential lots. Marmora Street has an established tree lined streetscape character.

### **3.4 Surrounding Road Network**

The road network in the vicinity of the site includes Marmora Street, Lawrence Street, Albert Street and Soldiers Avenue.

Marmora Street provides access to the residential component of the Court approved mixed use proposal. It is a local street and connects to Albert Street at its south east end and to Soldiers Avenue at its north west end. It provides an undivided carriageway with one traffic lane and one parking lane in each direction, clear of intersections and has a speed limit of 50kph.

Albert Street forms part of the “main street” within the Freshwater Village Local Centre, with the other section of the “main street” continuing onto to Lawrence Street. Albert Street is located south and east of the site. In the vicinity of the site, it provides one traffic lane in each direction with kerb side parking. It has a speed limit of 50kph north east of Marmora Street and a speed limit of 40kph south east of Marmora Street.

Soldiers Avenue is located north of the site. In the vicinity of the site it provides one traffic lane and one parking lane in each direction. It forms an uncontrolled T-Intersection with Marmora Street and has a speed limit of 50kph.



## 4 Proposed Modifications

### 4.1 General

This Section 96AA Application is in respect to the proposed modification of Development Consent DA 2007/0856 as modified by MOD 2013/0112 for the proposed mixed use development at the site and involves the following matters:

- (a) Design modifications to the residential component of the mixed use proposal as shown on the amended DA plans which consist of amended Architectural Plans prepared by Benson McCormack Architects (see **Appendix G**), amended Landscape Plans prepared by Spirit Level Design Pty Ltd Landscape Architects (see **Appendix H**) and amended Stormwater Drainage Plans prepared by Meinhardt Infrastructure and Environment Pty Ltd (see **Appendix I**).

The proposed design modifications to the residential component of the mixed use proposal as shown on the amended DA plans will require modification to the description of the proposed development as well as Condition 1 to correctly identify the approved DA plans as modified and supporting documentation.

- (b) Consequential amendments to Conditions 23, 27 and 94 of the Consent to be consistent with the amended DA plans for the mixed use proposal in relation to the new BASIX Certificate and the Section 94A Contribution levy to be paid by the applicant.

The following sections of this report outline each of these modifications in more detail.

### 4.2 Description of Proposed Development

The description of the proposed development in Development Consent DA2007/0856 as modified by MOD 2013/011 will need to be further modified so as to be consistent with the amended DA plans for the residential component of the mixed use proposal.

The suggested rewording of the description of the proposed development is as follows:

*“Modification of Development Consent DA 2007/0856 granted for the demolition of existing buildings and construction of a mixed use development comprising of basement car parking, three (3) storey retail/commercial building, sixteen (16) dwellings in two (2) residential flat buildings and a detached dwelling and subdivision into two (2) lots and staged construction and occupation of the development.”*

### 4.3 Condition 1 – Approved Plans and Supporting Documentation

The proposed modified Condition 1 is as follows:

**“A. Modify Condition No.1 – Modification of Consent – Approved Plans and supporting documentation to read as follows:**

*The development must be carried out in compliance (except as amended by any other condition of consent) with the following:*

- a) *Modification Approved Plans*

Architectural Plans – Endorsed with Council’s stamp		
Drawing No.	Dated	Prepared by
DP 1181713 – Plan of Subdivision of Lots A & B in DP 375558 and Lot 9 Sec. 2 in SP 10321	7 December 2012	Rob Kiprovich Surveyor
Issue A Plans: DA02, DA03, DA04, DA05, DA06, DA10, DA15, DA16, DA17.	5 September 2007	Blackmore Design Group

**Statement of Environmental Effects**

5 &amp; 5A Lawrence Street and 18 Marmora Street, Freshwater

<b>Architectural Plans – Endorsed with Council’s stamp</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared by</b>
Issue B Plans: DA01, DA14, DA18, DA19	19 March 2008	Blackmore Design Group
Issue C Plans: DA08, DA09, DA11, DA12, DA13	27 February 2009	Blackmore Design Group
Issue D Plans: DA07, DA20	27 February 2009	Blackmore Design Group

*Note: Further information on Construction Certificates can be obtained by contacting Council’s Call Centre on 9942 2111, Council’s website or at the Planning and Assessment Counter.*

b) *As further modified by Modification Approved Plans*

<b>Architectural Plans – Endorsed with Council’s stamp</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared by</b>
Issue B Plans : A-0001,A-0002, A-0003, A-0004, A-0010, A-0050, A-0100, A-0101, A-0102, A-0103, A-0104, A-0105, A-0106, A-0107, A-0108, A-0109, A-0110, A-0111, A-0112, A-0113, A-0114, A-0115, A-0116, A-0200, A-0201, A-0202, A-0203, A-0204, A-0205, A-0206, A-0207, A-0208, A-0209, A-0220, A-0211, A-0212, A-0213, A-0213, A-0214, A-0221, A-0222, A-1600, A-1601, A-1602, A-1603, A-1604, A-1605, A-1606, A-1607, A-1608, A-1609, A-1610, A-1611, A-1612, A-1613.	June 2014	Benson McCormack Architects
SH – 01	22 May 2014	Benson McCormack Architects and Digital Line Pty Ltd
<b>Landscape Plans – Endorsed with Council’s stamp</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared by</b>
Revision E Plan : LP 01	4 April 2014	Spirit Level Designs Pty Ltd
<b>Engineering Plans – Endorsed with Council’s stamp</b>		
<b>Drawing No.</b>	<b>Dated</b>	<b>Prepared by</b>
111927-00-MIE000 Revision 00	10 April 2014	Meinhardt
111927-00-MIE100 Revision 01	10 April 2014	Meinhardt
111927-00-MIE150 Revision 00	10 April 2014	Meinhardt
111927-00-MIE151 Revision 00	10 April 2014	Meinhardt
111927-00-MIE010 Revision 00	30 April 2014	Meinhardt

*Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans (DACGBapasd)."*

**Appendix C** to this report is A3 copies of the Court approved DA plans for the mixed use proposal prepared by Blackmore Design Group, Architects as referred to in Condition 1 of



Development Consent DA 2007/0856. **Appendix D** is the Court and Council approved plan of subdivision involving the re-subdivision of the total site into two (2) lots.

This Section 96AA Application proposes design modifications to all three (3) proposed residential buildings referred to as Buildings B, C and D on the amended DA plans (see **Appendix G**).

**Appendix G** to this report are A3 copies of the amended architectural plans for the residential component of the mixed use proposal prepared by Benson McCormack Architects. Photomontages of the amended mixed use proposal as viewed from the Marmora Street site frontage and an aerial view are included as **Appendix V**.

The key proposed design modifications to the proposed mixed use development are as follows:

- The residential basement car parking level has a total of 36 car spaces (consisting of 32 resident car spaces and 4 visitor car spaces) as well as provision of shared zones adjoining the disabled car parking spaces, caged storage areas and repositioning of the lift lobbies and stair access to proposed residential Buildings B, C and D.
- Building B is retained as a three (3) storey residential flat building with a similar building footprint and building envelope as the Court approved DA plans but reconfigured to consist of 8 smaller apartments rather than 5 large apartments and with a slightly lower overall building height and having a flat roof rather than pitched roof form.
- Building C is retained as a three (3) storey residential flat building with a similar building footprint and building envelope as the Court approved DA plans but reconfigured to consist of 8 smaller apartments rather than 5 large apartments and with a slightly lower overall building height and having a flat roof rather than pitched roof form.
- Building D is retained as a two (2) storey detached dwelling house with a smaller building footprint and building envelope to the Court approved DA plans and a building height not exceeding the 8.5 metre limit and also has a flat roof form.
- The architectural style and selection of building materials and finishes is of a more contemporary, modern, high quality built form and will be visually enhanced by the extensive site landscaping.
- Buildings B and C are the 2 x three (3) residential flat buildings which have been repositioned so as to be wholly located within the B2 Local Centre Zone under WLEP 2011 (being the former H2 Harbord Village Locality under WLEP 2000). Building D is the proposed two (2) storey detached dwelling which is located wholly within the R2 Low Density Residential Zone under WLEP 2011 (being the former H1 Freshwater Beach Locality under WLEP 2000).
- The ground floor levels of residential Buildings B, C and D as well as the vehicular driveway/ramp onto Marmora Street have all been raised to comply with the current flood level and drainage requirements of Council as specified following the Council Pre-Application Meeting for this Section 96AA Application.

**Appendix H** to this report are amended landscape plans prepared by Spirit Level Design, Landscape Architects which includes details of the proposed landscaping treatment of the communal open space areas including screen planting of the front, side and rear site boundary setback areas to adjoining properties as well as the private open space for the proposed residential flat buildings (Buildings B and C) and for the proposed detached dwelling (Building D).

**Appendix I** to this report is amended stormwater drainage plans and soil and erosion control plan for the mixed use proposal prepared by Meinhardt Infrastructure and Environment Pty Ltd. The amended stormwater drainage plans have been designed to fully comply with the Council's current flood level and stormwater drainage requirements (including onsite detention storage facilities) which did not apply at the time of the Court approved DA plans for the mixed use proposal in early 2009.

**Figure 4** below provides the development calculations for the amended architectural DA plans for the residential component of the mixed use proposal prepared by McCormack Architects.

benson  
mccormack  
architects

studio 5, 505 balmah road, llyfield nsw 2040

e - enquires@bensonmccormack.com

abr: 76 129 130 285

# MARMORA STREET

18 Marmora Street Freshwater

Issue: B  
Dated: 19.03.14  
Checked by: JN

PROJECT DATA	
Site Area	2,041m²
Zoning	R2 - Low Density Residential
Height	R2 (Freshwater Study Area) Zone L 8.5m
Setbacks	B2 R2 Zone L 11m Front 6.5m / Side 0.9m / Rear 6m
Number of Storeys	B2 R2 Merit Assessment 3 Storeys
Landscaped Open Space	B2 R2 40%
Site Coverage	R2 N/A
Heritage	N/A

## DEVELOPMENT DATA

BUILDING B													
	GROSS					UNIT	UNIT	TOTAL UNIT		FLOOR	SOLAR ACCESS	CROSS FLOW	
LEVEL	BUILT AREA m²	USE	UNIT NUMBER	NUMBER OF BEDS	UNIT TYPE	INT AREA m²	EXT AREA m² EXCL. GARDENS	AREA m²	OTHER AREA m²	GFA m²	REQ. 70%	REQ. 60%	COMMENTS
GROUND	354m²	RESI RESI RESI CORRIDOR	B01 B02 B03	2 + STUDY 1 + STUDY 2 + STUDY	CROSS THROUGH SINGLE ASPECT CROSS THROUGH	110m² 68m² 123m²	33m² 16m² 36m²	143m² 84m² 159m²	33m²	328m²	1 0 1	1 0 1	
LEVEL 1	370m²	RESI RESI RESI CORRIDOR	B04 B05 B06	3 2 3	CROSS THROUGH SINGLE ASPECT CROSS THROUGH	119m² 85m² 123m²	21m² 13m² 21m²	140m² 98m² 144m²	12m²	331m²	1 1 1	1 0 1	
LEVEL 2	338m²	RESI RESI CORRIDOR	B07 B08	3 3	CROSS THROUGH CROSS THROUGH	160m² 139m²	41m² 41m²	201m² 180m²	12m²	302m²	1 1	1 1	
SUB TOTALS	1062m²					927m²	222m²	1149m²	57m²	961m²	7	6	

BUILDING C													
	GROSS					UNIT	UNIT	TOTAL UNIT		FLOOR	SOLAR ACCESS	CROSS FLOW	
LEVEL	BUILT AREA m²	USE	UNIT NUMBER	NUMBER OF BEDS	UNIT TYPE	INT AREA m²	EXT AREA m² EXCL. GARDENS	AREA m²	OTHER AREA m²	GFA m²	REQ. 70%	REQ. 60%	COMMENTS
GROUND	349m²	RESI RESI RESI CORRIDOR	C01 C02 C03	2 + STUDY 2 + STUDY 2	CORNER CORNER SINGLE ASPECT	110m² 94m² 94m²	22m² 22m² 26m²	132m² 114m² 120m²	35m²	332m²	1 1 1	1 1 1	CROSSFLOW THROUGH COURTYARD
LEVEL 1	353m²	RESI RESI RESI CORRIDOR	C04 C05 C06	3 3 2	CORNER CORNER SINGLE ASPECT	110m² 111m² 94m²	21m² 30m² 19m²	131m² 141m² 113m²	12m²	329m²	0 1 1	1 1 1	CROSSFLOW THROUGH COURTYARD
LEVEL 2	304m²	RESI RESI CORRIDOR	C07 C08	3 3 + STUDY	CORNER CORNER	131m² 135m²	24m² 57m²	155m² 192m²	10m²	280m²	0 1	1 1	
SUB TOTALS	1006m²					879m²	221m²	1100m²	57m²	941m²	6	8	

BUILDING D													
	GROSS					UNIT	UNIT	TOTAL UNIT		FLOOR	SOLAR ACCESS	CROSS FLOW	
LEVEL	BUILT AREA m²	USE	UNIT NUMBER	NUMBER OF BEDS	UNIT TYPE	INT AREA m²	EXT AREA m² EXCL. GARDENS	AREA m²	OTHER AREA m²	GFA m²	REQ. 70%	REQ. 60%	COMMENTS
GROUND	95m²	RESI	D01	4	CROSS THROUGH	92m²	22m²	186m²	0m²	86m²	1	1	
LEVEL 1	77m²					72m²			0m²	68m²			
SUB TOTALS	172m²					164m²	22m²	186m²		154m²	1	1	

										TOTALS			
										PERCENTAGE	14	15	
											82%	88%	

#### 4.4 Condition 23 – BASIX Certification

This condition requires modification to reference the new BASIX Certificate No. 539768M issued in respect to the amended DA plans for the two (2) proposed residential flat buildings and the detached dwelling (See **Appendix N** in this report).

The proposed modified Condition 23 is as follows:

***“No. 23. BASIX Certificate***

*The development shall fully comply with the schedule BASIX Commitment specified within BASIX Certificate No..... Plans and specifications that reflect those commitments identified on the BASIX Certificate to be satisfied prior to the issue of the Construction Certificate for the staged construction for Lot 1 in DP 118173, shall be submitted Certifying Authority prior to the release of the Construction Certificate.*

*Reason: To ensure the development complies with the requirements of the SEPP (Building Sustainability Index: BASIX 2004).”*

#### 4.5 Condition 27 – Section 94A Contributions

The Section 94A Contributions required to be paid by the applicant will need to be modified to reflect the \$8,241,804.00 total development cost for the residential component of the amended mixed use proposal which is identified as Stage 1 in the construction of the proposed development.

It is also noted that Council has made a drafting or typing error in relation to the table for the Section 94A levy for the commercial component of the Court approved mixed use proposal in MOD 2013/0112 which requires correction to state as follows:

*“Stage 2 contribution based on total commercial development cost of \$8,773,000”*

*(instead of)*

*“Stage 1 contribution based on total residential development cost of \$10,250,000.”*

**Appendix R** to this report is a schedule detailing the estimated cost of work for the residential component of the amended mixed use proposal prepared by Sean Fawle, Licensed Builder which is estimated to be \$8,241,804.00.

Therefore, based on the Council’s Section 94A Development Contributions Plan levy rate of 1% of the total development cost, the contribution payable by the applicant to Council for the amended mixed use proposal should now be \$82,418.00

The proposed modified condition 27 is as follows:

***“27. Section 94A Contribution***

*\$102,500 is to be paid to Warringah Council as a Section 94A levy prior to the issue of the Construction Certificate for the staged construction for Lot 1 in DP 1181713.*

*\$87,730 is to be paid to Warringah Council as a Section 94 A levy prior to the issue of the Construction Certificate for Lot 2 DP in 1181713.*

*This amount has been calculated using the Warringah Section 94A Development Contributions Plan. The amount will be adjusted at the time of payment according to the quarterly CPI (Sydney -0 All Groups Index). Please ensure that you provide details of this Consent when paying contributions so that they can be easily recalculated.*

The basis for the calculations is as follows:

**“Warringah Section 94A Development Contributions Plan**

**Stage 1 contribution based on total residential development cost of \$8,241,804.00**

Contribution – all parts Warringah	Levy Rate	Contribution Payable	Council Code
Total S94A Levy	0.95%	\$78,297.10	6923
S94A Planning and Administration	0.05%	\$4120.90	6924
Total	1.0%	\$82,418.00	

**Warringah Section 94A Development Contributions Plan**

**Stage 2 contribution based on total commercial development cost of \$8,773,000.**

Contribution – all parts Warringah	Levy Rate	Contribution Payable	Council Code
Total S94A Levy	0.95%	\$83,343.50	6923
S94A Planning and Administration	0.05	\$4,386.50	6924
Total	1.0%	<b>\$87,730.00</b>	

**28. Structural Adequacy of Adjoining Buildings** A certificate from an appropriately qualified and practicing Structural Engineer, certifying the structural adequacy of the adjoining properties numbers 16 and 20 Marmora Street, 22-26 Albert Street and 9 Lawrence Street and their ability to withstand the proposed excavation works, shall be submitted to the Certifying Authority prior to the issue of the Construction Certificate for the staged construction and occupation of the development on Lot 1 in DP 1181713. The certificate shall detail any measures required to be incorporated into the work to ensure that no damage will occur to adjoining premises during the course of the works, and that the completed works will be structurally adequate.

Reason: To ensure the protection and structural integrity of adjoining properties, and that common law property rights are recognised. (DACGCsaab)”

#### 4.6 Condition 94 – BASIX Compliance Certification

This condition will require modification to refer to the BASIX Certificate No. 539768M for the amended DA plans lodged with this Section 96AA Application (see **Appendix N**).

The proposed Condition 94 is as follows:

**“94 BASIX Compliance Certification**

Prior to the issue Interim Final Occupation Certificate for the staged construction and occupation of the development on Lot 1 in DP118173, all the selected BASIX commitments as detailed in the BASIX Certificate No 539768M lodged with the Development Application (as modified by the Section 96AA Application ...) must be completed.

Reason: To ensure that the development complies with the requirements of the SEPP (Building Sustainability Index: BASIX 2004).”

## 5 Statutory Provisions

### 5.1 General

Section 96 of the EP&A Act contains the provisions that must be considered by Council in determining an application to modify conditions of a Notice of Determination granting a Development Consent. In this regard, the relevant provision is Section 96AA of the EP&A Act.

In addition to the EP&A Act, Clause 115 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) contains the information that must be submitted with an application to modify a consent. The requirements under the EP&A Act and EP&A Regulation are dealt with in the following subsections.

### 5.2 Section 96AA of the EP&A Act

Sections 96AA of the EP&A Act applies to modifications where a development consent has been granted by the Court and the proposed modifications to the development require further environmental assessment as referred to in Section 4.3 of this report. Specifically, S96AA provides that:

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

#### 5.2.1 Substantially the Same Development

*"(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)."*

There have been several judgements made by the NSW Land and Environment Court (Court) in relation to whether or not a modification constitutes a development which is "substantially the same as that originally approved".

In *Vacik Pty Ltd V Penrith City Council* (unreported 24 February 1992), Stein J stated (in relation to s.102):

*"In my opinion substantially when used in the section means essentially or materially or having the same essence."*

In *Moto Projects (No 2) Pty Ltd V North Sydney Council* (1999) 106 LGERA 298, Bignold J made the following observations:

*"The requisite factual finding obviously requires a comparison between the development as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development...and ...the comparison involves an appreciation, qualitative as well as quantitative, of the developments being compared in the proper context."*

In *Michael Standley & Associates Pty Ltd V North Sydney Council* (unreported), Lloyd J made the following observations:

*"...the questions posed by subs (1)(a) and S102 is not whether a component part of a proposed development is substantially the same as the approved development. The question is whether the development as proposed to be modified is substantially the same development. That is a different question. It is not difficult to envisage a component part of a proposed building being substantially different from the same component part of an approved building but at the same time both buildings could be described as being substantially the same development. The question is whether the proposed development, viewed as a totality, is substantially the same as the approved development."*

In considering *Tipalea Watson Pty Ltd V Kur-ring-gai Council* (203) NSWLEC 253, Bignold J concluded:

*“...that the nature and description of the approved development necessarily involves some flexibility in matters of design which are referable to the relevant conditions, but this result does not preclude the undertaking of a meaningful comparison as required by S.96(2)(a).”*

and

*“The modifications do not result in a development that is significantly different in terms of architectural appearance and character from the originally approved development.”*

and

*“The modified development will create some changes in the external appearance of the approved development but such changes could not be said to create more than “modifications” to the originally approved development...they do not radically transform the originally approved development.”*

and

*“The effect of the proposed modifications is to enhance the particular features of the approved development...”*

It is clear from these Court judgements that the main consideration is whether the proposed mixed use development, when viewed in totality, is substantially the same as that originally approved by the Court even if the proposed modifications alter to some extent the external appearance and internal layout of the development.

Section 4.2 of this report provides a description of the proposed design modifications to the residential component of the mixed use proposal as shown on the amended architectural plans prepared by Benson McCormack Architects (see **Appendix G**) and the amended landscape plans prepared by Spirit Level Design, Landscape Architects (see **Appendix H**) and the amended drainage plans prepared by Meinhardt Infrastructure and Environment Pty Ltd (see **Appendix I**).

Notwithstanding, even though some parts of the mixed use proposal are proposed to be changed, as shown on the amended architectural, landscape and stormwater drainage plans (see **Appendices G, H and I**), as a total development, the modified proposal is considered to be substantially the same as that originally approved by the Court under Development Consent DA2007/0856 and, accordingly the amended mixed use proposal can be considered as a modification under Sections 96AA of the EP&A Act.

More specifically, the amended DA plans for the mixed use proposal are considered to be substantially the same development as the Court approved DA plans having regard the following factors:

- The development proposal is still for demolition works and construction of a mixed retail, commercial and residential buildings and use of the buildings as retail shops and commercial offices (Building A) residential apartments (Buildings C and D) and a detached dwelling (Building D) with basement level car parking and an with extensive landscaped garden setting at the site.
- The proposed 3 storey retail and commercial building with basement level car parking and a vehicular driveway access onto Lawrence Street (Building A) is unchanged from the Court approved DA plans (see **Appendix C**);
- The 2 x 3 storey proposed residential flat buildings (Buildings B and C) have a similar building footprint, building envelopes, building setbacks and a slightly reduced building height with a flat roof rather than a pitched roof form. The proposed residential flat buildings (Buildings B and C), as shown on the amended DA plans, are proposed to be modified to have an additional dwelling unit on each floor level resulting in an increase from a total of 10 to 16 residential apartments. In effect, the redesign of the 2 proposed residential flat buildings (Buildings B and C) to

achieve the increase in the dwelling yield from 10 to 16 residential apartments will result in a better planning outcome in providing for a more diverse mix of apartment types and smaller, more affordable, residential apartments in close proximity to the Freshwater Village Local Centre and public transport, as well as a range of community and public recreational services and areas in the locality.

- The proposed 2 storey detached dwelling (Building D) has a similar building footprint, building setbacks, building envelopes and slightly reduced building height with a flat roof rather than a pitched roof form, as compared with the Court approved DA plans.
- The residential component of the proposed mixed use proposal, as shown on the amended DA plans (see **Appendix G**) still provides for a vehicular driveway access onto Marmora Street with a ramp access to a basement car parking level consistent with the Court approved DA plans.
- The amended DA plans for the residential component of the mixed use proposal is more compliant with the planning controls under the former WLEP 2000, WLEP 2011, WDCP 2011, SEPP 65 and the “Rules of Thumb” under the RFDC. The amended mixed use proposal is also compliant with Council’s current flood and drainage requirements for the site and the Freshwater locality. The proposed residential flat buildings (Buildings B and C) are now wholly located within the B2 Local Centre zone (former H2 Harbord Village Locality under WLEP 2000) which was not the case with the Court approved DA plans for the mixed use proposal.
- The amended Landscape plan for the residential component of the mixed use proposal (see **Appendix H**) provides for extensive screen landscaping of the communal open space areas including screen landscaping along the site boundaries to complement the existing tree lined and landscaped garden setting of the Marmora streetscape and the wider Freshwater locality.

In the circumstances, it is considered that the amended DA plans (see **Appendices G, H and I**) for the residential component of the mixed use proposal as compared with the totality of the Court approved DA plans for the mixed use proposal is substantially the same development in the circumstances of this case.

Reproduced as **Figure 5** below are two (2) photomontages being an aerial view showing the context of the amended mixed use proposal in the Freshwater Village locality and the amended proposal as viewed from the Marmora Street site frontage. (see **Appendix V**)





Figure 5 Photomontages of Amended Mixed Use Proposal



Accordingly, it is considered that the amended mixed use proposal is substantially the same development as the approved DA plans referred to in Condition 1 of Development Consent DA 2007/0856 as originally granted approval by the Court.

## 5.2.2 Consultation with the relevant Minister, Authorities or Approval Agencies

*“(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.”*

This Section 96AA Application is an integrated development which will require referral by Council to the NSW Office of Water under Section 91A(2) of the EP&A Act to assess whether an approval is required for the excavation and tanking of ground water as part of the potential dewatering of the site in the construction of the mixed use proposal with the basement car parking levels.

However, the Geotechnical Assessment report for the amended proposal prepared by JK Geotechnics (see **Appendix M**) states as follows:

*“Based on the investigation results, we expect that intermittent groundwater seepage following periods of rainfall will flow over the bedrock surface and through joints and bedding planes within the bedrock.*

*The proposed excavation will intersect the groundwater seepage paths, though provision for drained retaining walls will permit groundwater through-flow and will reduce the possibility of groundwater levels building up behind the basement retaining walls.*

*In view of the above, the proposed development should not adversely affect the existing transient groundwater flows to the extent that there will be any significant impact on surrounding buildings and structures, provided the recommendations presented in this report are adopted.*

*Furthermore, dewatering during construction or tanking measures over the long term are considered unwarranted.”*

## 5.2.3 Notification

*“(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 modifications of a development consent.”*

It is understood that Council will notify the Section 96AA Application in respect of the amended DA plans for the mixed use proposal and the proposed modification to various conditions of Development Consent DA 2007/0856 in accordance with the requirements of Council's adopted WDCP for public notification of such applications.

## 5.2.4 Consideration of Submissions

In accordance with Council's normal practice, any submissions arising from the public notification of this Section 96AA Application in respect to the amended mixed use proposal will be assessed by Council in the determination of the Application.

## 5.3 Clause 115 of the EP&A Regulation 2000

Subclause 115(1) of the Regulation details the information required to be submitted with an application to modify a Development Consent under Section 96 of the Act. These details are outlined in **Appendix S** to this submission.

Subclause 115(1A) requires that, if the application for modification relates to a residential flat building development for which the development application was required to be

accompanied by a design verification statement from a qualified designer under Clause 50(1A), the modification application must be accompanied by a design verification from a qualified designer, being a statement in which the qualified designer verifies that:

- “(a) he or she designed, or directed the design, of the modification of the residential flat development, and*
- (b) the residential flat development, as modified, achieves the design quality principles set out in Part 2 of State Environmental Planning Policy No.65 – Design Quality of Residential Flat Development, and*
- (c) the modifications do not diminish or detract from the design quality, or compromise the design intent, of the development for which the development consent was granted.”*

A Design Verification Statement from Benson McCormack Architects addressing these matters is enclosed with this submission at **Appendix G** in this report.

Subclause 115(1C) requires if the application for modification relates to development for which the development application was required to be or was accompanied by a BASIX Certificate/s, the application for modification must also be accompanied by the appropriate BASIX Certificates.

The new BASIX Certificate No. 539768M prepared by GAT and Associates for the amended DA plans are enclosed in this report at **Appendix N**.

## 6 Environmental Planning Assessment

Section 96AA(1A) of the EP&A Act requires that such of the matters referred to in Section 79C(1) of the EP&A Act as are of relevance to the proposed modification must be taken into consideration in determining the application for modification.

Accordingly, the following subsections provide an environmental planning assessment of the proposed modifications in respect to the amended DA plans for the residential component of the mixed use proposal that are relevant matters for consideration under Section 79C(1) of the Act.

### 6.1 Section 79C (1)(a) Planning Controls

Under Section 79C (1)(a) of the EP&A Act, the consent authority must take into consideration the provisions of :

- Section 79C(1)(a) (i) Environmental Planning Instruments;
- Section 79C(1)(a) (ii) Draft Environmental Planning Instruments;
- Section 79C(1)(a) (iii) Development Control Plans;
- Section 79C(1)(a) (iiia) Planning Agreement;
- Section 79C(1)(a) (iv) The Regulations.

The relevant environmental planning instruments are:

- State Environment Planning Policy No. 55 – Remediation of Land (SEPP65);
- State Environment Planning Policy No. 65 – Design Quality of Residential Flat Development (SEPP 65);
- State Environmental Planning Policy (Building Sustainability Index) 2004 (SEPP – BASIX);
- Warringah Local Environmental Plan 2000 (WLEP 2000);
- Warringah Local Environmental Plan 2011 (WLEP 2011);
- Warringah Development Control Plan 2011 (WDCP).

In addition to the above, the Australian Standard 2601-Demolition of Structures is a matter prescribed in the Regulation to be considered in the preparation of the DA.

The remainder of this subsection provides an assessment of the amended DA plans for the residential component of the mixed used proposal in regard to the above mentioned environmental planning instruments, WDCP and other relevant policies and planning controls.

#### 6.1.1 SEPP 55 – Remediation of Land

The Council's Assessment Report on the original DA 2007/0856 for the mixed use proposal at the site states as follows:

*“Clause 7(1)(a) of State Environmental Planning Policy No 55 – Remediation of Land (SEPP 55) and Clause 48 of WLEP 2000 state that a consent authority must not consent to the carrying out of any development unless:*

- *It has considered whether the land is contaminated, and*
- *If the land is contaminated, it is satisfied that the land is suitable in its contaminated state for the purpose for which the development is proposed to be carried out,*
- *If the land requires remediation to be made suitable for the development proposed to be carried out, it is satisfied that the land will be remediated before the development is carried out.*

*In response to these requirements the applicant submitted a Phase 1 – Preliminary Contamination Assessment prepared by GeoEnviro Consultancy Pty Ltd dated January 2008 (Ref: JG07011A-R2).*

*The Report notes that prior to the 1940s the site was used primarily for agricultural activities. Organochlorine Pesticides (OCP) and Organophosphorous Pesticides (OPP) are likely to have been used by the agricultural activities. However, the Report notes:*

*“As there were no apparent agricultural activities on the subject site since the 1950s, we consider the likelihood of residual pesticides contamination to be present within the site (to be) low.*

*The Report also states that no activities relating to heavy industrial production, manufacturing and storage of hazardous material that may cause contamination are known to have occurred on this site.*

*The Report concludes the following (as amended by the letter from GeoEnviro Consultancy Pty Ltd dated 25 March 2008):*

*Based on the results of this preliminary study, we consider the risk of significant soil contamination within the major portion of the site is considered low and is therefore suitable for the intended land use.*

*The Phase 1 – Preliminary Contamination Assessment was referred to Council’s Environmental Health Officer. No issues were raised by Council’s Environmental Health Officer.*

*Accordingly, based on the information submitted, Council can be satisfied that the land is suitable for the proposed development and therefore the requirements of SEPP 55 and Clause 48 of WLEP 2000 have been met.”*

The existing building and land uses at the site which consist of the existing retail/commercial building fronting onto Lawrence Street and two (2) existing detached dwelling houses at the rear of the site fronting onto Marmora Street have been in existence since the 1950’s. The conclusions in the Phase 1 – Preliminary Contamination Assessment report prepared by GeoEnviro Consultancy Pty Ltd dated January 2008 and 25 March 2008 are still applicable to the assessment of the suitability of the site for the amended mixed use proposal. Accordingly, the site is considered to have a low risk of significant soil contamination and the site is therefore suitable for the mixed use proposal and therefore complies with the requirements of SEPP 55.

#### **6.1.2 SEPP 65 – Design Quality of Residential Flat Development.**

**Appendix G** includes a Design Verification Statement as required under SEPP 65 for the amended DA plans prepared by Benson McCormack Architects which provides the following comments with respect to the 10 principles under SEPP 65;

##### **“PRINCIPLE 01: CONTEXT**

*“Good design responds and contributes to its context. Context can be defined as the key natural and built features of an area.*

*Responding to context involves identifying the desirable elements of a location’s current character or, in the case of precincts undergoing a transition, the desired future character as stated in planning and design policies. New buildings will thereby contribute to the quality and identity of the area.”*

##### **COMMENT**

Part of the site (7 Lawrence Street) is located within the Freshwater Village Study Area which comprises a mix of predominantly two storey retail and commercial establishments while the other part (18 Marmora Street) is located within a residential precinct comprising of single and two storey detached houses.

Within the study area, there have been upgrades to the public domain such as improved footpaths, planter beds, benches, etc. but buildings within the area are comparatively dated. There have been a number of development proposals within the immediate context that are similar in character to the works proposed on the subject site such as that on the adjacent 22-26 Albert Street as well as at the proposal at 12-32 Lawrence Street.

The proposal maintains and complements the desired Freshwater Village coastal character as envisaged in the Warringah Development Control Plan 2011 through careful architectural articulation and selection of high quality building materials and finishes (including extensive use of natural stone and timber) and is considered to be a compatible contemporary expression of the future character within the immediate area.

It has been designed within Council's controls and will not create any unreasonable impact to adjoining developments. Considerable effort has been made to achieve a sensitive interface with the neighbouring property at 20 Marmora Street and is considered a significant improvement to that property than previously approved.

**PRINCIPLE 02: SCALE**

*"Good design provides an appropriate scale in terms of bulk and height that suits the scale of the street and the surrounding buildings."*

*Establishing an appropriate scale requires a considered response to the scale of existing development. In precincts undergoing a transition, proposed bulk and height needs to achieve the scale identified for the desired future character of the area."*

**COMMENT**

The proposal is considered to represent and to achieve an appropriate scale relationship with the desired future character of the immediate area. It has been carefully designed to respond to approved developments within the village centre to prevent any over-development in the subject site.

The proposal is fully compliant with the maximum building height plane of 11m within the portion of the site zoned B2 Local Centre and steps down in height, mimicking the natural ground fall on the subject site as it transitions from local centre to the residential precinct along Marmora Street.

The proposal has been carefully considered to provide a balance between the amenity for future residents and occupants in existing adjoining properties.

**PRINCIPLE 03: BUILT FORM**

*"Good design achieves an appropriate built form for a site and the building's purpose, in terms of building alignments, proportions, building type and the manipulation of building elements."*

*Appropriate built form defines the public domain, contributes to the character of streetscapes and parks, including their views and vistas, and provides internal amenity and outlook."*

**COMMENT**

The proposed building articulation, its proportions and material selection have been carefully manipulated to deliver a contemporary architectural form that is coastal in nature and is considered a compelling interpretation of the desired future character within the Freshwater Village Centre.

**PRINCIPLE 04: DENSITY**

*"Good design has a density appropriate for a site and its context, in terms of floor space yields (or a number of units or residents)."*

*Appropriate densities are sustainable and consistent with the existing density in an area or, in precincts undergoing a transition, are consistent with the stated desired future density. Sustainable densities respond to the regional context, availability of infrastructure, public transport, community facilities and environmental quality."*

**COMMENT**

Part of the site is zoned B2 Local Centre (Freshwater Study Area) whilst the other is zoned R2 Low Density Residential. This split in zoning within the subject site is reflected through the different proposed building densities which are both sensitive to the low rise residential context along Marmora Street whilst also introducing denser residential accommodation in anticipation of an increase in population with the growth and development of Freshwater Village Centre.

The proposed densities on the site are considered to be appropriate and sustainable given its proximity to public transport, shops, services and amenities.

**PRINCIPLE 05: RESOURCE, ENERGY and WATER EFFICIENCY**

*“Good design makes efficient use of natural resources, energy and water throughout its full life cycle, including construction.*

*Sustainability is integral to the design process. Aspects include demolition of existing structures, recycling of materials, selection of appropriate and sustainable materials, adaptability and reuse of buildings, layouts and built form, passive solar design principles, efficient appliances and mechanical services, soil zones for vegetation and reuse of water.”*

**COMMENT**

The proposed scheme adopts and utilizes passive design principles to heat and cool internal environments. The majority of apartment units are oriented or have openings towards the north to benefit from solar gain, whilst internal courtyards are utilized to enable passive cross flow ventilation, all this with the aim of reducing energy consumption during occupancy.

A BASIX assessment has been carried out and the proposal achieves a good rating through the use of smart design features such as water saving fixtures and appliances, rainwater storage and reuse, photovoltaic systems and energy efficient light fixtures for common areas.

**PRINCIPLE 06: LANDSCAPE**

*“Good design recognises that together landscape and buildings operate as an integral and sustainable system, resulting in greater aesthetic quality and amenity for both occupants and the adjoining public domain.*

*Landscape design builds on the existing site’s natural and cultural features in responsible and creative ways. It enhances the development’s natural environmental performance by co-ordinating water and soil management, solar access, micro-climate, tree canopy and habitat values. It contributes to the positive image and contextual fit of development through respect for streetscape and neighbourhood character, or desired future character.*

*Landscape design should optimise useability, privacy and social opportunity, equitable access and respect for neighbours’ amenity, and provide for practical establishment and long term management.”*

**COMMENT**

Landscaping is used to form part of the entry sequence into the proposed complex, not only as a tool which complements the proposed buildings to create a calm interface to Marmora Street but also as a medium which facilitates and mediates the transition between different zonings across the site in terms of building scale, height and bulk.

Along with an abundance of screen planting for the benefit of ground floor apartments, common open spaces are introduced as smaller pocket spaces within the overall landscape setting which are intended to allow for much more intimate and meaningful interactions between future residents. This steers away from the large ‘field-like’ common spaces often adopted with similar types of developments which feel desolated when not in use and cause noise issues to residents when they are.

**PRINCIPLE 07: AMENITY**

*“Good design provides amenity through the physical, spatial and environmental quality of a development.*

*Optimising amenity requires appropriate room dimensions and shapes, access to sunlight, natural ventilation, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas, outlook and ease of access for all age groups and degrees of mobility.”*

**COMMENT**

Careful consideration has been given to the design of individual apartments and the development as a whole, optimizing the amenity provided for future occupants. One such method is through the manipulation of wall planes, orientation of living spaces and adequate balcony depths which provides an efficient level of visual and acoustic privacy between apartments in different blocks and to neighbouring properties as well. All apartments have direct access onto external private open spaces which serve as extensions to internal living spaces.

82% of the proposed apartments meet solar access criteria as specified in the Residential Flat Design Code while 88% of the proposed apartments meet the natural ventilation criterion, well beyond the minimum requirements in both instances.

To provide fair opportunity to all future occupants regardless of mobility, access is provided to all areas within the development and common areas of all levels within each building, complying with ASNZ1428.1-2001. Two adaptable units (C03 and C06, Building C), have been allocated. Each unit can easily be converted to accommodate additional requirements. Three accessible car parking spaces have been provided within the basement.

Individual caged spaces are allocated to units within the basement as additional storage space to those already provided within the apartments.

**PRINCIPLE 08: SAFETY and SECURITY**

*“Good design optimises safety and security, both internal to the development and for the public domain.*

*This is achieved by maximising overlooking of public and communal spaces while maintaining internal privacy, avoiding dark and non-visible areas, maximising activity on streets, providing clear, safe access points, providing quality public spaces that cater for desired recreational uses, providing lighting appropriate to the location and desired activities, and clear definition between public and private spaces.”*

**COMMENT**

All balconies within the development have been carefully oriented and configured to provide passive surveillance to the common open space of the development. Additionally these spaces shall be adequately lit when dark to not only increase visibility but also to discourage any opportunity for criminal behaviour.

Secure access will be provided to the complex entry via Marmora Street as well as to building entries as additional levels of security. Swipe card access will also be required for lift access to and from the basement level.

**PRINCIPLE 09: SOCIAL DIMENSIONS and HOUSING AFFORDABILITY**

*“Good design responds to the social context and needs of the local community in terms of lifestyles, affordability, and access to social facilities.*

*New developments should optimise the provision of housing to suit the social mix and needs in the neighbourhood or, in the case of precincts undergoing transition, provide for the desired future community.*

*New developments should address housing affordability by optimising the provision of economic housing choices and providing a mix of housing types to cater for different budgets and housing needs.”*

**COMMENT**

The proposed scheme aims to contribute to the available housing stock within Freshwater Village Centre, already an established area, as well as to provide variety through a mix of one, two and three bedroom apartments to address changes in local lifestyle choices and demographics. The detached dwelling (Building D) will reinforce this mix by catering to families which are increasingly being pushed out of local centres as a result of increasing property prices.

This proposal will increase the social mix of residential dwelling types within the village centre, reinforcing its importance within the larger context of a commercial, retail and liveable hub.

**PRINCIPLE 10: AESTHETICS**

*“Quality aesthetics require the appropriate composition of building elements, textures, materials and colours and reflect the use, internal design and structure of the development. Aesthetics should respond to the environment and context, particularly to desirable elements of the existing streetscape or, in precincts undergoing transition, contribute to the desired future character of the area.”*

**COMMENT**

The proposal articulates its form, arrangement and façade materials to create a quality composition of buildings which responds to the nature of the local area as well as contributing positively to the appearance of the immediate context.

Stone and timber make up the natural materials which helps soften the perceived bulk of the complex by relating them back to the coast, while metal accents and details allow a contemporary reading of the buildings.”



**Figure 6** below provides an assessment of the amended DA plans for proposed residential flat buildings (Building B and C) under the “Rules of Thumb” of the Residential Flat Design Code (RFDC):

FIGURE 6 – COMPLIANCE TABLE FOR SEPP NO. 65 - RFDC			
ELEMENT	COMPLIANCE WITH RULE OF THUMB	COMPLIANCE WITH INTENT	COMMENT
Building Height – FSR	N/A	Yes	No FSR control applies.
Building Height – Storeys	N/A	Yes	3 storey height control applies under WDCP.
Building Height – Ceilings	Yes	Yes	Min. 2.7m ceiling heights are achieved.
Building Depth	No	Yes	The maximum building depth of Buildings B & C both slightly exceed 18.0m but are similar to the building depth of the Court approved DA plans with Council's Assessment Report commenting that “Therefore whilst the maximum depths may slightly exceed 18m, each dwelling will receive adequate natural light and natural ventilation.” This is similar the case with the amended proposal.
Building Separation	No	Yes	The distance of separation between the northern edge of the balconies of Building B and the southern elevation of Building C raises between 7.545m and 9.3m. A distance separation of between 11.29m and 12.92m has been provided between the living room windows on the northern elevation of Building B and the southern elevation of Building C. The proposed distance of separation between Buildings B and C is greater in the amended proposal than in the Court approved DA plans. The southern elevation of Building C has only recessed highlight and angled windows as well as privacy screens. The distance of separation between Building C and the detached dwelling (Building D) is 5.48m to the balcony and 8.21m to the eastern elevation. Notwithstanding, there is no adverse privacy impacts as the western elevation of Building D is a solid wall with no windows in this section.
Street Setbacks	N/A	Yes	The proposed residential flat buildings (Building B & C) do not have a street frontage.
Side and Rear Setbacks	Yes	Yes	No side and rear setbacks apply. Notwithstanding, Building B & C have articulated wall elevations to the western site boundary with landscaped courtyards.
Floor Space Ratio	N/A	N/A	No FSR control applies.

FIGURE 6 – COMPLIANCE TABLE FOR SEPP NO. 65 - RFDC

ELEMENT	COMPLIANCE WITH RULE OF THUMB	COMPLIANCE WITH INTENT	COMMENT
Deep Soil Zones	Yes	Yes (generally)	In this commercial urban setting, deep soil zones are not required within the R2 zone and 37% is provided in accordance with the 2m width 1m depth controls. However contributory landscaping that does not strictly comply with these minimum dimensions is also provided and thus the proposed modified development is considered to achieve the intention of the 40% minimum landscaping control. It is further noted that Council's Assessment report on the original DA 2007/0856 indicated that the Court approved proposal had 25.2% of deep soil landscaped area.  Stormwater drainage treatment measures have been integrated into the design of the building.
Fences and walls	N/A	Yes	Appropriate fences and walls have been incorporated into the development.
Landscape design	N/A	Yes	Water efficient, appropriate landscaping to achieve a high level of residential amenity has been incorporated into the design of the building.
Open space	Yes	Yes	Communal open space areas provided with landscaped communal courtyards.
Orientation	N/A	Yes	The building has been orientated to maximise solar access and visual and acoustic privacy.
Planting on Structures	Yes	Yes	Soil depth and planter design is appropriate for the landscape areas.
Stormwater Management	N/A	Yes	OSD, stormwater retention and reuse have been incorporated into the design of the building.
Safety	N/A	Yes	The site is secured with access control, good quality lighting and a wide extent of casual surveillance to ensure a high standard of site security.
Visual Privacy	Yes	Yes	Generally complies with intent of building separation requirements and with privacy, screens and landscaping.
Building Entry	N/A	Yes	Building entries provided from both streets and parking areas.
Parking	N/A	Yes	Adequate and appropriate car parking is provided in accordance with Council's WDCP 2011.
Pedestrian Access	Yes	Yes	Access is provided from the street and car park, including access for disabled in accordance with AS1428.
Vehicle Access	Yes	Yes	Vehicle access is provided away from pedestrian entries and onto Marmora Street via a driveway ramp to the basement car park level.
Apartment Layout	Yes	Yes	The backs of kitchens are less than 8m

FIGURE 6 – COMPLIANCE TABLE FOR SEPP NO. 65 - RFDC

ELEMENT	COMPLIANCE WITH RULE OF THUMB	COMPLIANCE WITH INTENT	COMMENT
			from a window.
Apartment Mix	N/A	Yes	The apartment mix in Buildings B & C consists of 16 residential apartments with 1 x 1 bedroom + study; 2 x 2 bedroom; 4 x 2 bedroom + study; 7 x 3 bedroom; 1 x 3 bedroom + study as well as Building D which is a 4 bedroom detached dwelling.
Balconies	Yes	Yes	All balconies have a minimum depth of more than 2m.
Ceiling Heights	Yes	Yes	Commercial area ceiling height is 3.3m. Residential apartments have a ceiling height of 2.7m minimum in Buildings B, C and D,
Flexibility	Yes	Yes	Apartments have flexible layouts.
Internal Circulation	Yes	Yes	All paths and corridors have been designed to provide a high level of amenity, with widths in excess of 1.6m, recesses in the corridors for artwork and appropriate finishes, lighting and ventilation.
Mixed Use	N/A	Yes	A mix of usage types is incorporated in the development that complements and reinforces the character, and function of the Freshwater local area.
Storage	Yes	Yes	Adequate storage is provided within the apartments and also through the provision of separate storage areas at ground level.
Acoustic Privacy	N/A	Yes	Appropriate acoustic privacy measures have been designed into the development.
Daylight Access	Yes	Yes	A total of 82% of apartments receive a minimum of 3 hours of direct sunlight to living spaces/private open space between 9.00am and 3.00pm in mid-winter. There are no single aspect apartments.
Natural Ventilation	Yes	Yes	A total of 88% of apartments are naturally cross-ventilated
Awnings and Signage	N/A	Yes	An appropriate awning along the Lawrence Street frontage is incorporated into the design of the building.
Facades	N/A	Yes	The strongly articulated facades of the residential Buildings B,C and D enhance the architectural quality and the public domain.
Roof Design	N/A	Yes	The flat roof forms of Buildings B, C and D are designed to integrate into the building form and minimise the bulk and scale of the development.
Energy Efficiency	N/A	Yes	The building is designed to reduce the necessity for mechanical heating and cooling, minimise greenhouse gas emissions and support and promote renewable energy initiatives. BASIX Certificate No. 539768M for the amended DA plans is attached as <b>Appendix N</b> .

FIGURE 6 – COMPLIANCE TABLE FOR SEPP NO. 65 - RFDC

ELEMENT	COMPLIANCE WITH RULE OF THUMB	COMPLIANCE WITH INTENT	COMMENT
Maintenance	N/A	Yes	The building design and schedule of materials will ensure long life and ease of maintenance for the mixed use development.
Waste Management	Yes	Yes	A Waste Management Plan is submitted as part of the Section 96AA Application (see <b>Appendix O</b> ).
Water Conservation	Yes	Yes	Water management initiatives have been incorporated to ensure that no water is collected from lead or bitumen coated surfaces and asbestos roofs.  Stormwater runoff will be collected and screened, and disposed of or re-used in an appropriate manner.

Figure 6 Compliance Table for SEPP No. 65 - RFDC

### 6.1.3 SEPP (Building Sustainability Index) 2004

Under the EP&A Regulation 2000, all dwellings within the mixed use proposal are defined as BASIX affected buildings and accordingly, the provisions of the SEPP (Building Sustainability Index) 2004 apply.

**Appendix N** is an updated BASIX Certificate issued by GAT & Associates for the amended DA plans for the two (2) residential flat buildings and the detached dwelling (Buildings B, C and D) of the mixed use proposal.

Conditions 23 and 94 of Development Consent DA 2007/0856 require modification to reference the updated BASIX Certificate No. 539768M for the amended mixed use proposal.

### 6.1.4 Warringah Environmental Local Plan 2000.

The Court approved mixed use proposal under Development Consent DA 2007/0856 issued on 3 April 2009 in *Minnici V Warringah Council* (2009) NSW LEC 1098 (File No. 11108 of 2008) was assessed by the Council and the Court under the provisions of the former Warringah LEP 2000.

WLEP 2000 was repealed with the approval of WLEP 2011 on 9 December 2011 with the exception of land deferred from that LEP.

It is considered that the provisions of WLEP 2000 are of greater relevance to the assessment of the amended DA plans for the residential component of the mixed use proposal as well as the proposed modifications to related conditions of the Consent as originally approved by the Court on 3 April 2009.

**Appendix B** is a copy of the Court judgement of Commissioner Bly in *Minnici V Warringah Council* (2009) NSW LEC 1098 (File No. 11808 of 2008) which upheld the Court appeal and granted Development Consent DA 2007/0856 for the mixed use proposal at the site. The Court judgement relevantly states as follows:

*“14 As a consequence of the parties having entered into Consent Orders there are no matters in dispute between the parties that require resolution by the Court. Despite this I wish to comment on what appeared to be the three main matters of concern.*

*15 In relation to traffic and car parking I understand that the Council's traffic engineers have no objection to the proposal. More particularly the number of car parking spaces provided for both the residential and commercial components (70 spaces) exceeds Council's minimum standard (59 spaces).*

16 I understand that the residential component will generate some 5 to 10 vehicle trips (two-way per hour) in addition to the existing 25 vehicle trips in Marmora Street. Being a local road Marmora Street has an environmental goal of a maximum of 200 vehicle trips and the proposal does not cause an increase of the total number of vehicle trips to anything like this number. In these circumstances I do not accept that refusal of the application for reasons of car parking and traffic is warranted.

17 As for the presentation of the development in the streetscape I note that the two residential flat buildings are appropriately located in the H2 Locality, with Building C positioned some 20m and more from the site's frontage (at the driveway). This setback area is contained within the H1 Locality and is predominantly landscaped except for the access driveway to the basement that is positioned towards the eastern boundary of the site. The proposed detached dwelling house is also positioned about 20m from the site's frontage in the H1 Locality.

18 The Desired Future Character Statement for the H1 Locality provides that:

*The Freshwater Beach Locality will remain characterised by detached style housing in landscaped settings interspersed by existing apartment style housing.... Future development will maintain the visual pattern and predominant scale of existing detached style housing in the locality... the streets will be characterised by landscaped front gardens and consistent front building setbacks.*

19 Mr Shiels and Mr Player agreed that the proposal is appropriately responsive to this statement. Whilst the front setback of the proposed detached dwelling house is set back behind the typical front building setbacks in Marmora Street this is compensated by the provision of extensive landscaping in the setback area. Similarly whilst the access driveway is uncharacteristically long and in part wide, at the street crossover it is little different to what otherwise would be provided for a detached dwelling house. Again taking into account the landscaped setting that is to be provided I agree that this is a reasonable outcome.

20 More generally I accept that the manner in which this development responds to the interface between two localities and to the Marmora Street streetscape is sufficiently responsive to the H1 Locality Statement that refusal of the application in this regard would not be warranted.

21 In the H1 Locality a minimum rear building setback of 6m is required. This setback area is to be landscaped. Clause 63A of the LEP contains objectives for the rear building setback requirement that, relevantly are:

*To create a sense of openness in rear yards, and*

*To preserve the amenity of adjacent land, and*

*To maintain the visual continuity and pattern of buildings, rear gardens and landscape elements, and*

*To provide opportunities to maintain privacy between dwellings, and*

*To provide opportunities for the planting of substantial native trees.*

22 Mr and Mrs Jander's main concerns involve adverse impacts on the amenity of their rear yard and impacts resulting from the driveway on the rooms in their house that overlook it. Their rear yard comprises their principal private open space (about 11X9m) that is affected at the rear by an existing very tall brick wall associated with adjoining commercial development. (This wall also affects the proposed detached dwelling house). They are particularly concerned that the open outlook to the west that is presently available over the subject land would be replaced with built form resulting in the further enclosure or boxing in of their backyard.

23 In response to these concerns the applicant has provided plans that amend the design and setback (rear and side) of the dwelling house. More particularly the house is, at ground floor level to be set back 1.9m and at first floor level to be set back 2.9m from the rear boundary. These are the worst-case instances, because that part of the house at ground floor level within 3.8m of the common side boundary is set back 6m from the rear boundary. At first floor level the setback is about 6m. Also, taking into account that the house has a stepped configuration the other side setbacks vary between 2.9m and 1m and generally average in excess of 2m by comparison with a more common 900mm setback. In this context the applicant drew my attention to the proposed landscaping arrangements along the common boundary that include hedging plants, 2-3m high that will grow above the 1.8m high fence as well as a number of medium sized canopy trees, 6-8m high.

*24 Mr Shiels and Mr Player both acknowledged that the sense of openness would be affected but not to the extent that the amenity of the rear yard at No. 20 would be unreasonably affected. The design of the house results in there being no loss of privacy and the setbacks now proposed provide opportunities for appropriate landscaping. Beyond amenity impacts, whilst the pattern of buildings might be interrupted there are no consequences of concern. More generally they are also agreed that taking into account the house's compliance with the applicable height control, its considerable articulation and setbacks and landscaping its physical relationship to No.20 is appropriate.*

*25 By positioning the proposed house towards the rear of the site this results in several west-facing windows in No. 20 overlooking the proposed driveway and private open space and towards proposed Building C some 20m distance. Mr and Mrs Jander were concerned about noise impacts from the driveway and its appearance.*

*26 The Desired Future Character statement for the H2 Locality requires that:*

*Development that adjoins residential land is not to reduce the amenity enjoyed by adjoining occupants. In this regard the built form of development in the villages to provide a transition to adjacent residential development, including reasonable setbacks from side and rear boundary is particularly above the ground floor level.*

*27 As for the relationship to Building C across the open space, recognising that in the H2 Locality larger scale buildings are to be anticipated I agree with Mr Shiels that the landscaped private open space will provide the necessary and sufficient transition.*

*28 As for noise impact, the applicant has agreed to a condition that requires the provision of an appropriate side (dividing) fence that Mr Shiels and Mr Player agree should reasonably mitigate such impacts from the driveway. As for the appearance of the driveway and cars using it, this should be mitigated by the landscaping (described above) that is to be provided along the boundary.*

*29. The question of whether approval of the proposed development would create an adverse precedent was also raised. However, given the unique circumstances of this case I do not accept that this arises, particularly as I am satisfied that the proposal warrants approval.*

**Figure 7** below is an extract of the former WLEP 2000 Locality Map which shows that the site was partly situated within the H2 Harbord Village locality and partly within the H1 Freshwater Beach locality.



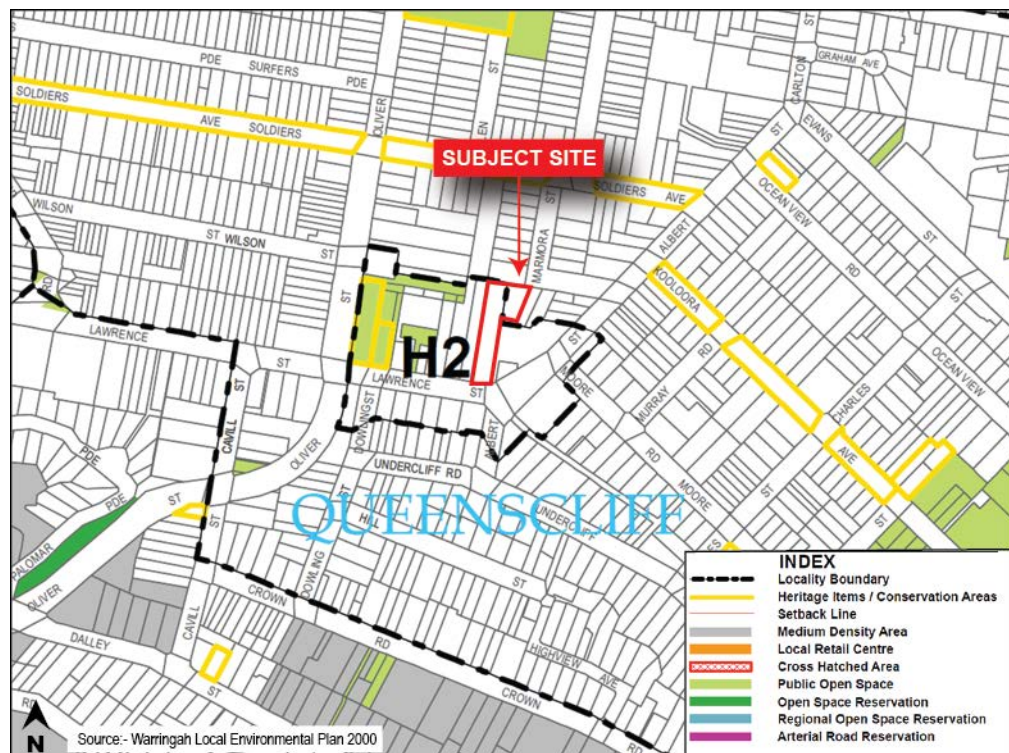


Figure 7 WLEP 2000 Locality Map

Both the Council Assessment Report and the Court judgement of Commissioner Bly in granting Development Consent 2007/0856 issued on 3 April 2009 comment that the mixed use retail/commercial and residential development was permissible under the provisions of the former WLEP 2000. The Court judgement of Commissioner Bly in respect to the mixed use proposal states:

*"4. The site is subject to the provisions of the Warringah Local Environmental Plan 2000. That part of the site that is to be developed with the commercial and residential flat buildings is included in the H2 Locality. That part of the site that is to be developed with the detached dwelling house, the access ramp to the residential basement and the central open space is included in the H1 Locality. The proposal is permissible with development consent."*

It is considered that the amended DA plans for the residential component of the mixed use proposal is even more compliant with the Desired Future Character Statement and the relevant planning controls under the former WLEP2000 in respect to the following matters:

- The Court approved DA plans (see **Appendix C**) for the proposed residential flat building (Building C) extended partly onto the H1 Freshwater Beach Locality under the former WLEP 2000 in relation to the ground floor portico entry, ground floor terrace areas as well as the first and second floor level balconies along the eastern elevation of the proposed residential flat building. The amended DA plans (see **Appendix G**) for the proposed residential flat building (Building C) has been redesigned so as to be located entirely within the H2 Harbord Village locality under the former WLEP 2000. Indeed, the proposed retail/commercial building fronting onto Lawrence Street (Building A) as well as the proposed two x three (3) residential flat buildings (Building B and C) are all located wholly within the H2 Harbord Village locality under the former WLEP 2000 which is now zoned B2 Local Centre under WLEP 2011.
- The rear building setback from the southern site boundary of the proposed detached dwelling (Building D) has been increased from a minimum of 900mm as shown on the Court approved DA plans to a minimum of 2.0 metres and up to 6.0 metres as

shown on the amended DA plans the subject of this Section 96AA Application which is more compliant with the 6.0 metre minimum rear building setback control under the former WLEP 2000 and now under WDCP 2011.

The amended DA plans for the proposed three (3) residential flat buildings (Buildings B and C) fully comply with the 11m building height control under the former WLEP 2000. Similarly, the amended DA plans for the proposed two (2) storey dwelling fully complies with the 8.5 metre building height control under the former WLEP 2000.

In conclusion, it is the opinion of DFP Planning that the proposed modifications to the Development Consent DA 2007/0856 for the residential component of the mixed use proposal, will not result in the development being inconsistent with the Desired Future Character Statements and relevant planning controls of the H1 and H2 localities under the former WLEP 2000 and the Court approved mixed use proposal which permitted minor variations to some of these controls.

#### 6.1.5 Warringah Local Environmental Plan 2011

WLEP 2011 took legal effect on 9 December 2011 and, as a result, repealed all Local Environmental Plans and deemed Environmental Planning Instruments applying to the Warringah LGA (except for Deferred Areas).

This Section 96AA Application in relation to the amended DA plans for the residential component of the mixed use proposal is required to be considered under WLEP 2011 as the transitional savings provision pursuant to Clause 1.8A of WLEP 2011 only applies to a development application which has not been finally determined by the consent authority and not in respect to a Section 96AA Application under the EP&A Act.

The WLEP 2011 Zoning Map shows the site is located partly within the B2 Local Centre zone and partly within the R2 Low Density Residential zone. An extract of the WLEP 2011 Zoning Map showing the total site is included as **Figure 8** below.

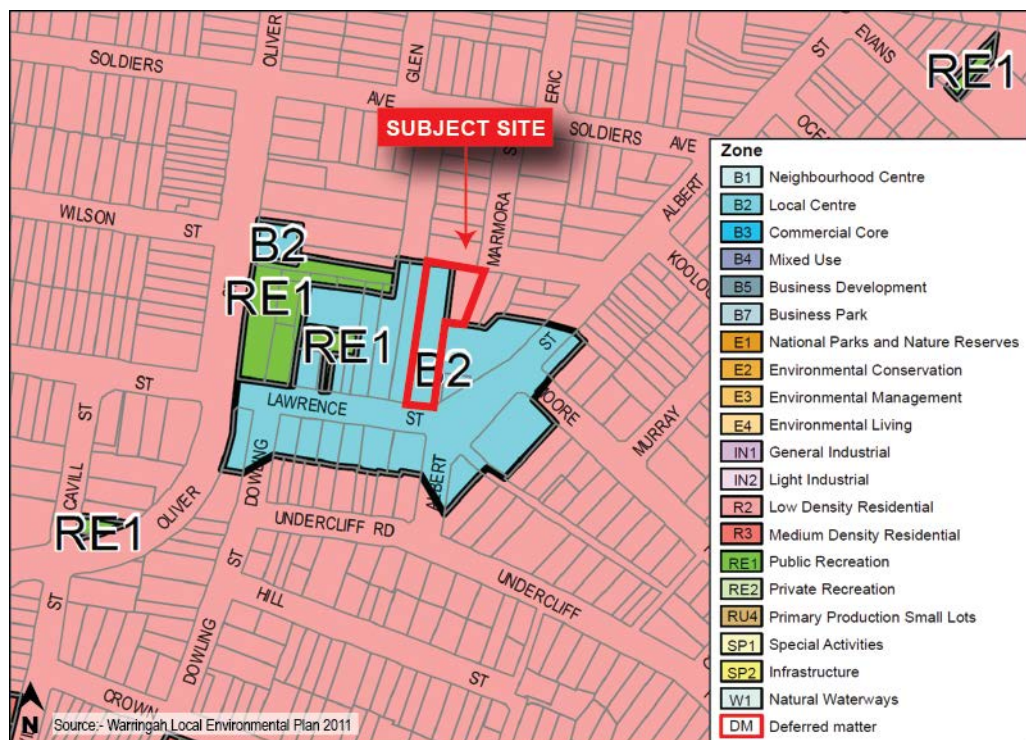


Figure 8 Extract of WLEP 2011 Zoning Map

The proposed retail/commercial building fronting onto Lawrence Street (Building A) as shown on the Court approved DA plans is a permissible development in the B2 Local



Centre zone under WLEP 2011. However, the two (2) proposed residential flat buildings (Buildings B and C) have changed from being permissible under the former WLEP 2000 to being a prohibited development in the B2 Local Centre zone under WLEP 2011.

Notwithstanding, this Section 96AA Application seeks to modify Development Consent DA2007/0856 for the Court approved mixed use proposal which has been lawfully commenced with the construction of sewer works for the two (2) lot subdivision of the site (see **Appendix Q**). Accordingly, the two (2) proposed residential flat buildings (Buildings B and C) remain as a permissible development under the terms and conditions of the original Development Consent DA 2007/0856 granted in the Consent Orders issued by the Court judgement of Commissioner Bly on 3 April 2009.

The proposed detached dwelling house is a permissible development in the R2 Low Density Residential zone under WLEP 2011.

The proposed driveway/ramp vehicular access to the basement car parking level is defined as a "road" which is a permissible development in both the B2 Local Centre zone and the R2 Low Density Residential zone under WLEP 2011. In any event, the proposed driveway/ramp to the basement car parking level of the proposed residential development (Buildings B, C and D) is permissible under the terms and conditions of the original Development Consent DA 2007/0856 issued by the Court for the mixed use proposal at the site and which has been lawfully commenced.

The objectives of the B2 zone under WLEP 2011 are:

- *"To provide a range of retail, business, entertainment and community facilities that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide an environment for pedestrians that is safe, comfortable and interesting.*
- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and the natural environment.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses."*

It is considered that this Section 96AA Application relating to amended DA plans for the residential component of the mixed use proposal will satisfy or otherwise not be inconsistent with the above stated objectives of the B2 zone. More specifically, the mixed use proposal will provide for a well-designed retail/commercial building fronting onto Lawrence Street in a central position within the Freshwater Village Local Centre. The two (2) proposed three (3) storey residential flat buildings and the two (2) storey detached dwelling house located within the northern portion of the site fronting onto Marmora Street will provide a satisfactory transition to residential land uses which will protect the existing and emerging residential streetscape and amenity of neighbouring residential properties generally to the north of the site along Marmora Street and the wider residential neighbourhood in this Freshwater locality.

The amended mixed use proposal will provide the opportunity for local employment opportunities in the proposed retail/commercial building and it will encourage public transport patronage, opportunities for walking and cycling as well as a safe, comfortable and interesting environment for pedestrians. The apartments in the two (2) proposed residential flat buildings are also designed to provide future residents with the opportunity to undertake home offices.

The proposed modified design of the residential component of the mixed use proposal as shown on the amended DA plans (see **Appendix G**) generally complies with the built form

controls under WLEP 2011, WDCP 2011 and the former WLEP 2000 and is of an appropriate scale and building height with an attractive architectural built form and landscaping treatment that will relate favourably to neighbouring land uses within both the Freshwater Village Local Centre and the surrounding residential neighbourhood of the Freshwater locality.

The objectives of the R2 zone under WLEP 2011 are as follows:

- *"To provide for the housing needs of the community within a low density residential environment."*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents."*
- *To ensure that low density residential environments are characterised by settings that are in harmony with the natural environment of Warringah."*

It is considered that the amended DA plans for the proposed dwelling house (Building D), driveway/ramp vehicular access to Marmora Street as well as the extensive landscaped treatment of the communal open space area within which the proposed residential development (Buildings B, C and D) will be visible in the public domain of Marmora Street and as viewed from neighbouring properties will visually compliment and harmonise with the mixed retail, commercial and residential character as well as with the tree lined residential streetscape and landscaped garden setting of the Freshwater locality.

Clause 4.3 of WLEP 2011 provides that 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. **Figure 9** below is an extract of the Height of Buildings Map which shows that the B2 zoned section of the site has an 11.0m building height limit and the R2 zoned section of the site has an 8.5m building height limit.

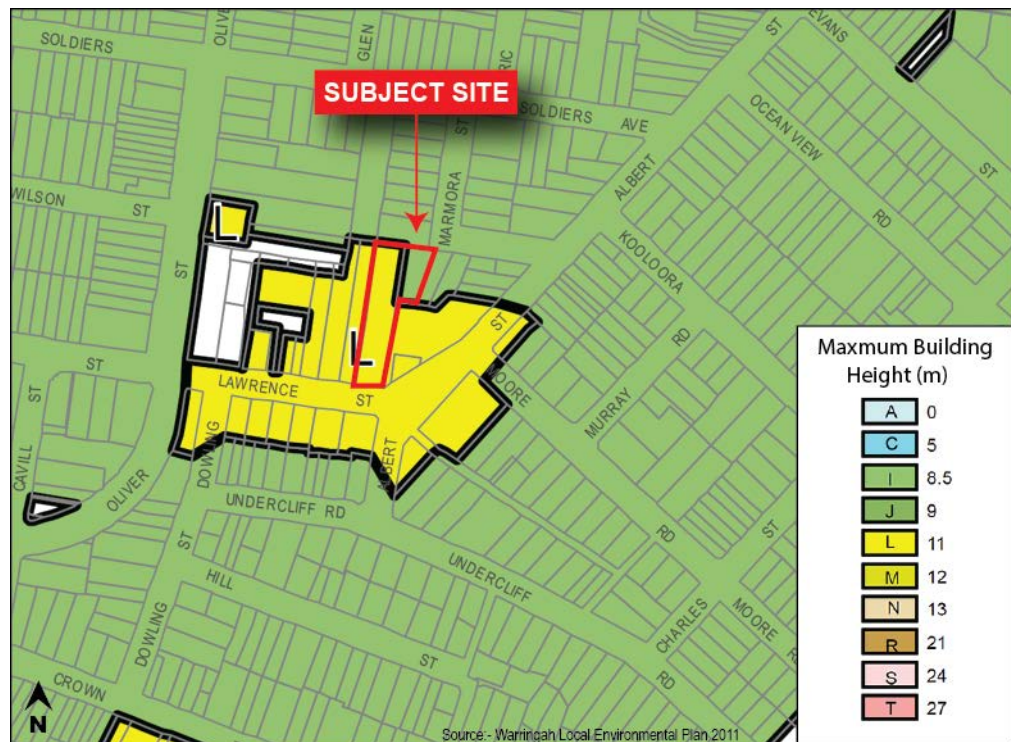


Figure 9 Extract of WLEP 2011 Height of Buildings Map

The amended DA plans for the residential component of the mixed use proposal fully complies with the 11m building height limit for the two (2) proposed residential flat buildings and also with the 8.5m building height limit for the proposed dwelling house.

Clause 6.3 of WLEP 2011 provides that Council shall not grant development consent to a development proposal on land to which this clause applies unless the Council is satisfied that the development:

- “(a) Is compatible with the flood hazard of the land, and*
- (b) is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and*
- (c) incorporates appropriate measures to manage risk to life from flood, and*
- (d) is not likely to significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or water courses, and*
- (e) is not likely to result in unsustainable social and economic costs to the community as a result of flooding.”*

**Appendix I** includes a Flood Potential Statement on the amended DA plans for the residential component of the mixed use proposal prepared by Meinhardt Infrastructure and Environment Pty Ltd which provides the following concluding remarks:

*“A review of the Overland flow arriving from the upstream Oliver Street car park and surrounds has been undertaken by Meinhardt and a new 3 metre wide easement with a vegetated swale is proposed along the Northern boundary of the development at 18 Marmora Street, Harbord to convey the 100 year flow. The swale has been designed to safely contain the entire 100 year flow without spillage into the surrounding properties. The existing Council stormwater pipe is to remain unchanged.*

*A new stormwater system is proposed to the development with OSD tanks to control discharge. This system is not affected by the upstream overland flow or the proposed swale.”*

Clause 6.4 of WLEP 2011 provides that Council shall not grant development consent to a proposal on land unless the Council is satisfied that:

- “(a) the application for development has been assessed for the risk associated with landslides in relation to both property and life, and*
- (b) the development will not cause significant detrimental impacts because of stormwater discharge from the development site, and*
- (c) the development on or affect the existing sub-surface flow conditions.”*

**Appendix M** is a Geotechnical Assessment Report on the site for the mixed use proposal prepared by JK Geotechnics dated 21 March 2014 which states as follows:

#### **“4.1 Geotechnical Issues**

*Based on our review of the seven previous boreholes drilled on, or close to, the subject site and with reference to the current sub-surface information, we consider the following to be the primary geotechnical issues for the proposed development:*

- The excavation cuts will extend through the soil and weathered bedrock profiles and will require support by shoring walls. The shoring walls must be installed prior to the commencement of excavation;*
- Excavation for the proposed basement will need to be carried out carefully due the presence of buried services which pass through, or very close to the site, as well as the presence of neighbouring structures on or close to the site boundaries. Care must be taken during excavations so as not to damage, undermine or remove lateral support from the property boundaries and neighbouring structures.*
- Vibrations will need to be controlled whenever hydraulic impact rock hammers are used during excavation;*
- Groundwater seepage is expected at, or just above, the soil/bedrock interface, especially after rainfall, and will therefore need to be controlled. We do not expect the seepage inflows to be continuous since rainfall does not occur all the time. Pumping of groundwater seepage collected within the basement sumps is only expected to occur on a periodic basis;*

- *The presence of high strength sandstone bedrock, which will present “hard” rock excavation and piling conditions;*
- *The footing system for the ground floor level which extends beyond the southern side of the basement will require careful consideration.....”*

#### **“4.7 Hydrogeological Issues**

*Based on the investigation results, we expect intermittent groundwater seepage following periods of rainfall will flow over the bedrock surface and through joints and bedding plains with the bedrock.*

*The proposed excavation will intersect the groundwater seepage paths, though provision for drained retaining walls will permit groundwater through-flow and will reduce the possibility of groundwater levels building up behind the basement retaining walls.*

*In view of the above the proposed development should not adversely affect the existing transient groundwater flows to the extent that there would be any significant impact of surrounding buildings or structures, provided that the recommendations provided in this report are adopted.*

*Furthermore, dewatering during construction or tanking measures over the long term are considered unwarranted.”*

The findings and recommendations in the Geotechnical Assessment Report prepared by JK Geotechnics can be addressed at the Construction Certificate stage of the mixed use proposal.

It is noted that the original DA was referred to the NSW Office of Water as an Integrated Development under Section 91A (2) of the EP&A Act to assess whether an approval is required for the excavation and the tanking of groundwater as part of the potential dewatering of the site in the construction of the mixed use proposal with basement car parking levels. Accordingly, this Section 96AA Application in respect to the amended DA plans for the residential component of the mixed use proposal should be referred by Council as an Integrated Development to the NSW Office of Water for its comments on the proposed development.

#### **6.1.6 Warringah Development Control Plan 2011**

WDCP 2011 provides more detailed provisions than the WLEP 2011 for development in the Warringah LGA. WDCP 2011 did not apply at the time of the assessment of the original DA 2007/0856 for the mixed use proposal when it was first considered by Council and subsequently in the Court appeal in 2009 at which time Development Consent DA 2007/0856 was granted by the NSW Land & Environment Court to the development proposal.

Notwithstanding, most of the provisions in WDCP 2011 are similar to the General Principles, Desired Future Character Statements and Built Form Controls for the H1 and H2 Localities under the former WLEP 2000 which were considered in the Council's Assessment Report and the Court judgement on the original DA 2007/0856 for the mixed use proposal.

More specifically, the Council's Assessment Report on the original DA 2007/0856 for the mixed use proposal at the site provides the following conclusion:

*“The site has been inspected and the application assessed having regard to the provisions of Section 79C of the Environmental Planning Assessment Act 1979, State Environmental Planning Policy No. 55 - Remediation of Land, State Environmental Planning Policy No.65 – Design Quality of Residential Flat Development (including the Residential Flat Design Code), Warringah Local Environmental Plan 2000 and the relevant codes and policies of Council.*

*This assessment has found that the proposed development is generally consistent with the relevant planning controls, subject to the imposition of a number of special conditions that require amendments to the proposal.*

*Variations to the building height, front building setback and rear building setback built form controls have been supported pursuant to Clause 20 of WLEP 2000.*

*The variation to the building height built form control for Building A has been supported as the non-compliance generally only relates to the lift overrun and the balustrades to the service roof area. The non-compliance is located to the north of Building A and is setback a considerable distance from Lawrence Street. The non-compliance will not result in any significant impact on the streetscape of Lawrence Street or the amenity of adjoining properties.*

*The variation to the front building setback control to allow the garbage storage area and portico within the front setback of 18 Marmora Street has been supported subject to a condition requiring the garbage storage area to be setback a minimum of 2 metres from the front property boundary and the external appearance of the structure to be integrated with the surrounding landscape setting (including the use of natural materials).*

*A non-compliance with the rear building setback control is proposed for Building D as the applicant has attempted to locate Building D in such a way as to minimise the impact of the 6.4m wall of the commercial building at 22-26 Albert Street, which adjoins the southern boundary of 18 Marmora Street, and to maximise the front setback and the provision of landscaped setting at the front of the site. To ensure the non-compliance does not result in an unacceptable impact on 20 Marmora Street and to prevent the sense of enclosure which results from the non-compliance with the rear setback control combined with the minimal setbacks, a condition has been recommended to increase the setback of Building D to the eastern boundary, within the 6m of the southern boundary. Subject to the inclusion of this condition, the non-compliance will not adversely impact on the amenity of the adjoining properties.*

*It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed. Accordingly, the proposal is recommended for approval once the General Terms of Approval have been received from the Department of Water and Energy .....*

**Figure 10** below provides an assessment of the amended DA plans for the residential component of the mixed use proposal under the relevant provisions of WDCP 2011:

FIGURE 10 - COMPLIANCE TABLE FOR WDCP 2011			
Part B: Built Form Controls			
Control	Requirement	Amended Proposal	Compliance
<b>B1. Wall Height</b>	R2: 7.2m	5.5m to 8.2m	Does not comply - Minor variation supported on merit as per Court approved DA plans
	B2: N/A	N/A	N/A
<b>B2. Number of Storeys</b>	B2: 3 Storeys (Refer to the Freshwater Village Development Control Plan for area specific controls which requires buildings on land shown coloured on the DCP Map 'Number of Storeys' Must comply with the maximum height of 3 storeys).	3 Storeys	Complies
<b>B3. Side Boundary Envelope</b>	R2: 5m x 45°	Minor encroachment of proposed dwelling (Building D) along East Elevation.	Does not comply - Minor variation supported on merit as per Court approved DA plans.

**FIGURE 10 - COMPLIANCE TABLE FOR WDCP 2011**

Part B: Built Form Controls

<b>B4. Site Coverage</b>	N/A	N/A	N/A
<b>B5. Side Boundary Setbacks</b>	<p>R2: 0.9m</p> <p>B2: Refer to the Freshwater Development Control Plan for area specific controls which requires a minimum side setback of 2.0m where a side boundary adjoins land zoned for residential purposes. Additionally, this setback area is to be landscaped and densely planted.</p>	<p>&gt;0.9m</p> <p>Nil</p>	<p>Complies</p>
<b>B7. Front Boundary Setbacks</b>	<p>R2: 6.5m</p> <p>B2: Merit Assessment</p>	<p>&gt;6.5m</p> <p>N/A</p>	<p>Complies</p> <p>N/A</p>

## Compliance Table for Warringah Development Control Plan

### Part B: Built Form Controls

Control	Requirement	Amended Proposal	Compliance
<b>B9. Rear Boundary Setbacks</b>	R2: 6.0m  B2: Refer to the Freshwater Development Control Plan for area specific controls which requires a minimum side setback of 2.0m where a side boundary adjoins land zoned for residential purposes. Additionally, this setback area is to be landscaped and densely planted.	2.0m to 6.0m (approx.)	Does not comply - supported on merit as per Court approved DA plans
<b>B11. Foreshore Building setback</b>	N/A	N/A	N/A
<b>B12. National Parks Setback</b>	N/A	N/A	N/A
<b>B13. Coastal Cliffs Setback</b>	N/A	N/A	N/A
<b>B14. Main Roads Setback</b>	N/A	N/A	N/A
<b>B.15. Minimum Floors to Ceiling Height.</b>	N/A	N/A	N/A

### Part C: Siting Factors

Control	Comment
<b>C1. Subdivision</b>	N/A
<b>C2. Traffic, Access and Safety</b>	Satisfactory
<b>C3. Parking Facilities</b>	Satisfactory The basement car park level provides 36 spaces, including 4 visitor spaces. Provision is made for bicycle parking and storage spaces in the basement car park level.  Appendix 1 of the WDCP requires 27 car parking spaces to be provided by the modified proposal, including 4 visitor spaces.  As such, the proposal satisfies the requirements of the parking control.
<b>C4. Stormwater</b>	Detailed engineering plans are submitted with the Development Application for the modified proposal (see <b>Appendix I</b> ).
<b>C6. Building over or adjacent to Constructed Council Drainage Easements.</b>	N/A
<b>C7. Excavation and Landfill</b>	
<b>C8. Demolition and Construction</b>	
<b>C9. Waste Management</b>	



Part D: Design	
Control	Comment
<b>D1. Landscaped Open Space and Bushland Setting</b>	A satisfactory landscape setting will be maintained by the modified proposal. Amended landscape plans for the modified proposal have been provided (see <b>Appendix H</b> ).
<b>D2. Private Open Space</b>	Adequate areas of private open space is provided.
<b>D4. Electromagnetic Radiation</b>	The site is located within the vicinity of a major AUSGRID power substation (the Harbord Zone Substation to the west). AUSGRID have confirmed that "AUSGRID has no specific requirement relating to electric and magnetic fields which would apply to the proposed development" (see <b>Appendix P</b> ).
<b>D5. Orientation and Energy Efficiency</b>	Refer to the Freshwater Village Development Control Plan for the area specific requirements for building sustainability. BASIX Certificates for the modified proposal have been issued (see <b>Appendix N</b> ).
<b>D6. Access to Sunlight</b>	<p>The development is not to unreasonably reduce sunlight to surrounding properties.</p> <p>In the case of housing:</p> <ul style="list-style-type: none"> <li>• sunlight, to at least 50% of the principal private open spaces, is not to be reduced to less than 2 hours between 9am and 3pm on June 21, and</li> <li>• where overshadowing by existing structures and fences is greater than this, sunlight is not to be further reduced by development by more than 20%.</li> <li>•</li> </ul> <p>The proposed development complies with this Control as shown on the shadow diagrams which show the extent of shadows cast over neighbouring properties and the public domain. The diagrams show the extent of shadow cast at 9.00am, Noon and 3.00pm on 21 June (see amended DA plans at <b>Appendix G</b>).</p>
<b>D7. Views</b>	<p>The development is to allow for the reasonable sharing of views.</p> <p>The modified proposal complies with this Control.</p>
<b>D8. Privacy</b>	<p>The development is not to cause unreasonable direct overlooking of habitable rooms and principal private open spaces of other dwellings.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>• the windows of one dwelling are to be located so they do not provide direct and close views (ie from less than 9 metres away) into the windows of other dwellings, and</li> <li>• planter boxes, louvre screens, pergolas, balcony design and the like are to be used to screen a minimum of 50% of the principal private open space of a lower apartment from overlooking from an upper apartment.</li> </ul> <p>Note: The effective location of windows and balconies to avoid overlooking is preferred to the use of screening devices, high sills or obscured glass. Where these are used, they should be integrated with the building design and have minimal negative effect on the amenity of residents and neighbours.</p> <p>The modified proposal complies with this control.</p>



Part D: Design	
Control	Comment
<b>D9. Building Bulk</b>	<p>Refer to the Freshwater Village Development Control Plan for area specific requirements for building massing.</p> <p>The development is to have a visual bulk and an architectural scale consistent with structures on adjoining or nearby land and are not to visually dominate the street or surrounding spaces.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>side and rear setbacks are to be progressively increased as wall height increases.</li> <li>large areas of continuous wall planes are to be avoided by varying building setbacks and using appropriate techniques to provide visual relief, and</li> <li>appropriate landscape plantings are to be provided to reduce the visual bulk of new buildings and works.</li> </ul> <p>The proposed development, as viewed from Marmora Street, is considered to achieve a commensurate bulk and scale to surrounding development.</p>
<b>D10. Building Colours and Materials</b>	Refer to the Freshwater Village Development Control Plan for area specific requirements.
<b>D11. Roofs</b>	Refer to the Freshwater Village Development Control Plan for area specific requirements.
<b>D12. Glare and Reflection</b>	<p>The development is not to result in overspill or glare from artificial illumination, or sun reflection, which would unreasonably diminish the amenity of the locality.</p> <p>The proposed development is capable of complying with this Control subject to the provision of a Colours and Finishes Schedule showing all components and their proposed finish.</p>
<b>D13. Front Fences and Front Walls</b>	N/A
<b>D14. Site Facilities</b>	<p>Site facilities including garbage and recycling bin enclosures, mailboxes and clothes drying facilities are to be adequate and convenient for the needs of users and are to have minimal visual impact from public places.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>waste and recycling bin enclosures are to be adequate in size, durable, integrated with the building design and site landscaping, suitably screened from public places or streets and located for convenient access for collection, and</li> <li>housing which is required to have landscaped open space is to be provided with adequate open air clothes drying facilities which are suitably screened from public places or streets, and</li> <li>individual dwellings are to be provided with tan area for general storage.</li> </ul>

Part D: Design	
Control	Comment
	<p>The development complies with this Control subject to the provision of a Waste Management Plan which shows that the development complies with Council's interim "Waste Management Policy – Construction and Development PL 850 WASTE."</p> <p>A Waste Management Plan for the modified proposal has been provided (see <b>Appendix O</b>).</p> <p>Additionally, particular attention should be given to residential storage requirements under State Environmental Planning Policy No. 65 (Design Quality of Residential Flat Development).</p> <p>The modified proposal complies with this control.</p>
<b>D15. Swimming Pools and Spa Pools</b>	N/A
<b>D16. Tennis Courts</b>	N/A
<b>D18. Accessibility</b>	<p>The applicant is to demonstrate compliance with the requirements of AS 1428.1 – 2009* Design for access and mobility – General requirements for access – New building work and AS 1428.2 – 1992*. Design for access and mobility - Enhanced and additional requirements – Buildings and facilities.</p> <p>It is further noted that AS1428-2 has been superseded by AS1428.1 – 2009 and the B.C.A. (See Access report at <b>Appendix K</b>).</p> <p>Note: The Australian Human Rights Commission provides useful information and a guide relating to building accessibility entitled "The Good the Bad and the Ugly: Design and construction for access". This information is available on the Australian Human Rights Commission website.  <a href="http://www.humanrights.gov.au/disability_rights/buildings/good.htm">http://www.humanrights.gov.au/disability_rights/buildings/good.htm</a></p> <p>An Access Report for the modified proposal has been provided (see <b>Appendix K</b>).</p>
<b>D19. Site Construction in the R3 and IN1 Zone</b>	N/A
<b>D20. Safety and Security</b>	<p>The development is to maintain and where possible enhance the safety and security of the area.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>• buildings are to overlook streets as well as public and communal places to allow casual surveillance.</li> <li>• service areas and access ways are to be either secured or allow casual surveillance,</li> <li>• there is to be adequate lighting of entrances and pedestrian areas,</li> <li>• after hours land use activities are to be located along primary pedestrian routes,</li> <li>• public toilets, telephones and other public facilities are to be located so as to have direct access and the be clearly visible from well trafficked public spaces, and</li> <li>• entrances to buildings are to be from public streets wherever possible.</li> </ul> <p>The Section 96AA Application includes a formal assessment using the 'Crime Prevention Through Environmental Design' (CPTED) principles (surveillance, access control, territorial reinforcement</p>

Part D: Design	
Control	Comment
	and space management).
	A CPTED Report for the modified proposal has been prepared (see <b>Appendix T</b> ).
<b>D21. Provision and Location of Utility Services</b>	<p>Utility services must be provided to the site of the development, including provision for the supply of water, gas, telecommunications and electricity and the satisfactory management of sewage and drainage</p> <p>Utility services including service structures, plant and equipment are to be located below ground or be designed to be an integral part of the development and suitably screened from public places or streets. Where possible, underground utility services are to be provided in a common trench.</p>
<b>D22. Conservation of Energy and Water</b>	<p>Refer to the Freshwater Village Development Control Plan for area specific requirements for building sustainability.</p> <p>The development is to make the most efficient use of energy and water.</p> <p>In particular:</p> <ul style="list-style-type: none"> <li>the orientation, layout and landscaping of buildings and works and their sites are to make the best use of natural ventilation, daylight and solar energy.</li> <li>site layout and structures are to allow reasonable solar access for the purposes of water heating and electricity generation and maintain reasonable solar access to adjoining properties.</li> <li>buildings are to minimise winter heat loss and summer heat gain,</li> <li>landscape design is to assist in the conservation of energy and water.</li> <li>Reuse of stormwater for on-site irrigation and domestic use is to be encouraged, subject to consideration of public health risks,</li> <li>Any proposed subdivision of land must be generally in accordance with the guidelines set out in the document published by the former Sustainable Energy Development Authority under the title Solar Access for Lots: Guidelines for Residential Subdivision, copies of which are available at the offices of the Council.</li> </ul> <p>The development complies with this Control subject to the provision of the new BASIX Certificate which shows that the relevant parts of the development achieves compliance with the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.</p> <p>A BASIX Certificate for the modified proposal has been issued (see <b>Appendix N</b>).</p>
<b>D23. Signs</b>	N/A

Part E: The Natural Environment	
Control	Comment
<b>E1. Private Property Tree Management</b>	N/A
<b>E2. Prescribed Vegetation</b>	N/A

## Statement of Environmental Effects

5 & 5A Lawrence Street and 18 Marmora Street, Freshwater

Part E: The Natural Environment	
Control	Comment
E3. Threatened species, populations, ecological communities listed under State or Commonwealth legislation, or High Conversion Habitat	N/A
E4. Wildlife Corridors	N/A
E5. Native Vegetation	N/A
E6. Retaining unique environmental features	N/A
E7. Development on land adjoining public open space	N/A
E8. Waterways and Riparian Lands	N/A
E9. Coastline Hazard	N/A
E10. Landslip Risk	<p>The site is predominantly located within Area A which is defined by a slope of less than 5°.</p> <p>Any excavation works on the site will be required to be analysed and supported in a Preliminary Geotechnical Report prepared by a suitably qualified geotechnical engineer. A Geotechnical Report is submitted with this Section 96AA Application (see <b>Appendix M</b>).</p>
E11. Flood Prone Land	N/A

Part F: Zones and Sensitive Areas	
Control	Comment
F1. Local and Neighbourhood Retail Centres	N/A
F2. Brookvale Brickworks	N/A
F3. SP1 Special Activities	N/A
F4. Infrastructures Zone	N/A

Part G: Special Area Controls	
Control	Comment
G1. Dee Why Mixed Use Area	N/A
G2. R3 Medium Density Residential bound by Sturdee Parade, Pacific Parade and land zoned B4 Mixed Use.	N/A
G3. Belrose Corridor	N/A
G4. Warringah Mall	N/A
G5. Freshwater Village	<p>Applies to B2 Zone part of the site only.</p> <p>The controls included within the Freshwater Village DCP are to be satisfactorily addressed, in addition to the above part of WCDP 2011, in any development application for this site.</p> <p>The Freshwater Village DCP includes sections on the following matters which are addressed in this report:</p> <ol style="list-style-type: none"><li>1. Built form in Freshwater (refer to 6.1.2, 6.1.5, 6.1.6 &amp; Table 3 (Part D) of this report);</li><li>2. Number of storeys (refer to Table 2 (Part 3) of this report);</li><li>3. Street activation (no change in street activation proposed as part of this s96(AA));</li><li>4. Street facades and shopfront design (refer to Table 2 of this report);</li><li>5. Access and loading (refer to 6.1.5 &amp; 6.3.5 of this report);</li><li>6. Lighting (refer to condition 36 of consent);</li><li>7. Signage (no signage proposed at this time);</li><li>8. Awnings (street awning is incorporated into</li></ol>

## Part G: Special Area Controls

Control	Comment
	<p><i>Lawrence Street shopfront design);</i></p> <p>9. Front setback (<i>no change proposed to front setback in this s96(AA)</i>);</p> <p>10. Side and rear setbacks (<i>refer to Table 3 Part B in this report</i>);</p> <p>11. Roofs and building form (<i>refer to Table 3 in this report; buildings lift overruns are low and will not be visible from ground level or the public domain; colours and materials are considered appropriate</i>);</p> <p>12. Building massing (<i>refer to Table 3 Part D; the design of the buildings promotes modulation with no one element exceeding 20m in length</i>);</p> <p>13. Building sustainability (<i>refer to updated BASIX Certificate</i>);</p> <p>14. Materials and colours (<i>the updated materials and finishes (Dw No. A-1612) have been selected specifically to complement the architecture and is expected to create visual interest</i>);</p> <p>15. Pedestrian and cyclist links (<i>no change as a consequence of this S.96(AA)</i>); and</p> <p>16. Development in the vicinity of heritage items (<i>N/A</i>).</p> <p>The Section 96AA Application retains the Court approved three (3) storey retail and commercial building with basement level car parking fronting onto Lawrence Street and the Freshwater Village Centre.</p>

## Other Relevant Controls within WDCP 2001

## Appendix 1 – Car Parking Requirements

Compliant off-street parking is to be provided within the site boundaries in accordance with Appendix 1 under WDCP 2011 which requires 27 spaces. The development, as presented, provides for 36 spaces representing a surplus of 9 spaces.

Figure 10 Compliance Table for WDCP 2011

In the circumstances, it is considered that the amended DA plans for the residential component of the mixed use proposal generally satisfies the objectives and relevant planning controls as specified under the WDCP 2011. The minor variations to the wall height, rear boundary setback and building envelope control for the detached dwelling (Building D) are supported on merit and are similar to the variations of these planning controls agreed to as shown on the Court approved DA plans for the proposed development.

#### 6.1.7 AS2601 – Demolition of Structures

Clause 92 of the EP&A Regulation designates AS2601-1991: Demolition of Structures as a prescribed matter for consideration in the determination of a Development Application.

All demolition work at the site will be carried out in accordance with AS2601. The amended architectural DA plans for the proposal include demolition plans (see **Appendix G**). A Waste Management Plan in accordance with Council's Waste Management Policy is also provided with this Section 96AA Application submission (See **Appendix O**).

Further details on demolition practices, identification and management of any hazardous substances and recycling of materials will be provided in the form of a Work Plan and a Hazardous Substances Audit and Management Plan in accordance with AS2601 with an application for a Construction Certificate.

#### 6.1.8 Building Code of Australia

A BCA Compliance Assessment Report proposed by A.E. & D on the amended architectural DA plans for the residential component of the mixed use proposal has been

provided with this Section 96AA Application submission (see **Appendix L**). The matters relating to fire resistance, access and egress, services and equipment, health and amenity, ancillary provisions and energy efficiency are all matters which will be appropriately addressed with an application for a Construction Certificate.

## **6.2 Section 79C(1)(b) – Natural Environmental Impacts**

The impacts of the mixed use proposal on the natural environment in the Freshwater Locality were considered in Council's Assessment report on the original DA 2007/0856 which concluded as follows:

*"The environmental impacts of the proposed development on the natural and built environment are addressed in detail under the General Principles of Development Control in this report and are found to be acceptable and reasonable."*

Furthermore, this Section 96AA Application does not seek to modify any conditions imposed by Council and the Court on Development Consent DA2007/0856 (as modified) for the mixed use proposal to protect the natural environment of the site, neighbouring properties and the Freshwater Locality.

### **6.2.1 Stormwater Drainage and Flooding**

Meinhardt Infrastructure and Environment Pty Ltd have prepared Stormwater Drainage Plans including details of on-site detention tank facilities and a Flood Potential Statement for the residential component of the amended mixed use proposal (see **Appendix I**) and which provides the following conclusion:

*"A review of the Overland flow arriving from the upstream Oliver Street car park and surrounds has been undertaken by Meinhardt and a new 3 metre wide easement with a vegetated swale is proposed along the Northern boundary of the development at 18 Marmora Street, Harbord to convey the 100 year flow. The swale has been designed to safely contain the 100 year flow without spillage into the surrounding properties. The existing Council stormwater pipe is to remain unchanged."*

*A new stormwater system is proposed for the development with OSD tanks to control discharge. This system is not affected by the upstream overland flow or the proposed swale."*

### **6.2.2 Erosion and Sediment Control**

Meinhardt Infrastructure and Environment Pty Ltd have prepared Erosion and Sediment Control Plans for the amended DA plans for the residential component of the mixed use proposal (see **Appendix I**). The erosion and sediment control measures include:

- Sedimentation fences;
- Nominated soil stock pile areas and wind erosion fence;
- Sand filter and sediment traps; and
- Stabilised site access, truck shaker and wash down area to prevent soil tracking on the local roads.

### **6.2.3 Air Quality**

The amended mixed use proposal is for a mixed retail, commercial and residential development that does not contain any hazardous industries or uses that are likely to generate adverse air quality impacts in the Freshwater locality.

### **6.2.4 Landscaping**

The amended DA plans for the residential component of the mixed use proposal will involve the removal of existing trees within the site as previously approved by Council and the Court.

**Appendix H** to this report are amended Landscape plans for the residential component of the mixed use proposal prepared by Spirit Level Designs Pty Ltd Landscape Architects, which shows the proposed landscaping treatment of the communal open space areas as

well as private open space areas within the development proposal and which includes extensive screen tree and shrub planting along the northern and eastern site boundaries adjoining neighbouring properties (including No. 20 Marmora Street) and to the Marmora Street frontage of the proposed development.

### **6.3 Section 79C(1)(b) – Built Environment Impacts**

The impacts of the amended DA plans for the residential component of the mixed use proposal on the built environment in this Freshwater locality were considered in the Council's Assessment Report on the original DA 2007/0856 as well as in the Court judgement of Commissioner Bly in *Minnici v Warringah Council* [2009] NSWLEC 1098 (see **Appendix B**) and have been further addressed in this report in respect to the Section 96AA Application for the amended proposal and are considered to be satisfactory.

#### **6.3.1 Relationship to Streetscape and Character**

The amended Architectural and Landscape plans (see **Appendices G and H**) are substantially the same development as the original DA plans for the mixed use proposal as approved by the Court in granting Development Consent DA 2007/0856. The amended architectural plans for the residential flat buildings (Buildings B and C) and the detached dwelling (Building D) designed by Benson McCormack Architects is of a high quality, modern, well-articulated built form which will blend in and visually complement the low to medium density residential character of the Freshwater locality and provide a suitable transition between the mixed retail, commercial and shop-top housing development in the nearby Freshwater Local Centre.

As viewed from the public domain in Marmora Street, the amended mixed use proposal will visually present as a 2 storey detached dwelling and 2 x three (3) storey residential flat buildings well set back from the street frontage and with an extensive landscaped garden setting and having a single driveway access to Marmora Street.

The amended architectural DA plans (see **Appendix G**) and Photomontages (see **Appendix V**) demonstrate the positive contribution that the proposed residential flat buildings (Buildings B and C) and the detached dwelling (Building D) will make to the streetscape of Marmora Street as well as to the mixed land use character of the Freshwater Village and wider locality. Accordingly, the amended proposal is considered to be satisfactory with regard to its relationship with the existing and emerging character and streetscapes of the Freshwater locality.

#### **6.3.2 Relationship to Neighbouring Properties**

##### **6.3.2.1 Visual and Acoustic Privacy**

The amended DA plans for the residential component of the mixed use proposal will not result in unsatisfactory loss of visual or acoustic privacy amenity to adjoining and adjacent residential properties, as well as to any neighbouring shop-top housing developments in this Freshwater locality.

The design and orientation of the Court approved retail/commercial building (Building A) as well as the proposed residential flat buildings (Buildings B & C) and the proposed detached dwelling (Building D) have been carefully considered to ensure the protection of the visual and acoustic privacy of neighbouring properties (particularly No. 20 Marmora Street) as well as a high standard of internal visual and acoustic privacy amenity to the future occupants of the proposed mixed use development.

The Court approved retail/commercial building fronting onto Lawrence Street (Building A) has fixed privacy louvre screens to the glazed windows and doors on all 3 floor levels to the rear northern elevation of the proposed building in order to achieve satisfactory visual privacy amenity to the proposed dwellings in the residential flat building (Building B) and with additional screen landscaping of the private open space areas of these units.



Furthermore, the main living areas and private open space areas of the dwellings in the proposed residential flat building (Building B) are all positioned and oriented to the north away from the adjoining commercial properties and the proposed retail/commercial building (Building A).

The dwellings in the proposed residential flat building (Building C) are oriented to the east facing the large central landscaped communal open space area or otherwise to the north with a landscaped screen setback area along the site boundary and, accordingly, will have satisfactory visual and acoustic privacy amenity from adjoining properties and internal to the development proposal.

The proposed detached dwelling (Building D) has been oriented to the north and with the placement of windows, courtyards and balconies to prevent direct overlooking of neighbouring properties, particularly to No. 20 Marmora Street which adjoins the development proposal to the east.

Where there is the potential for any loss of visual privacy between habitable rooms and/or terraces and balconies of the residential buildings (Buildings B, C and D) as shown on the amended DA Plans, provision has been made for fixed privacy screens as shown on the amended architectural DA plans for the mixed use proposal (see **Appendix G**).

The amended Landscape Plan for the residential component of the mixed use proposal (see **Appendix H**) provides for screen tree planting of the landscaped setback areas along the site boundaries and the communal open space areas to further improve the visual privacy of the development proposal, particularly to the main living areas and private open space areas of the dwellings in proposed residential flat buildings (Buildings B and C) as well as the detached dwelling house (Building D).

#### **6.3.2.2 Access to Sunlight**

The amended architectural DA plans prepared by Benson McCormack Architects includes shadow diagrams (see **Appendix G**) which demonstrates that the amended proposal complies with the solar access requirements of WDCP 2011 in respect to neighbouring residential properties as well as solar access to the dwellings within the proposed residential flat buildings (Buildings B and C) and the detached dwelling (Building D) as required under SEPP 65 and the RFDC as well as WDCP 2011. More specifically, whilst the afternoon shadows of the proposed detached dwelling (Building D) will extend across the rear yard of the adjoining residential property at No. 20 Marmora Street to the east, there will be no overshadowing from the proposed detached dwelling (Building D) onto No. 20 Marmora Street in the morning period up to midday in mid-winter.

82% of the proposed dwellings in the residential flat buildings (Buildings B and C) will receive a minimum of 3 hours direct sunlight between 9:00am and 3:00pm in mid-winter to the main living rooms and private open space areas and, accordingly satisfies the daylight access requirements under the RFDC.

The main living areas and private open space areas (ie. courtyard and balcony) of the proposed detached dwelling (Building D) are oriented to the north and will receive full daylight access between 9:00am and 3:00pm in mid-winter.

#### **6.3.2.3 Views**

The Council's Assessment Report on the original Development Application DA 2007/0856 provided the following comments on the mixed use proposal in relation to allowing for the reasonable sharing of views to neighbouring properties:

*"Due to the topography and location of the site, it is unlikely that the proposed development will affect any significant views.*

*No submissions have identified view loss as a concern.*

*For these reasons it is considered that the proposed development is consistent with the provisions of Clause 61 (of the former WLEP 2000)."*

It is noted that the amended DA plans for the residential component of the mixed use proposal involves 2 x 3 storey residential flat buildings (Buildings B and C) and a 2 storey detached dwelling (Building D) which have a similar building footprint, building envelopes and slightly lower overall building heights than the Court approved DA plans for the proposed development. Therefore, the amended proposal will result in no additional view impacts on surrounding residential properties in the Freshwater locality compared with the Court approved DA plans for the mixed use proposal.

Notwithstanding, in accordance with the request made by Council's Planners following the Pre-Application Meeting on 23 January 2013, a view sharing analysis based on the Court's Principles in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC 140 has been undertaken from residential properties to the west along Oliver Street. **Appendix U** to this report is a series of 6 photographs taken from the high western side of Oliver Street between Lawrence Street and Wilson Street showing the view lines to the east towards Freshwater Beach and the Pacific Ocean, as well as photomontage overlays of the amended proposal (Buildings B and C) at locations 5 and 6.

The following comments are provided in respect to the Tenacity Court Principles on view sharing analysis in respect to the impact of the amended proposal on residential properties in Oliver Street to the west of the site:

*"The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (e.g. 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, e.g. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured."*

The view analysis photos and the photomontages of the amended proposal taken from the public footpath level on the western high side of Oliver Street (See **Appendix U**) indicates that in all of the photo locations there are filtered or, otherwise, totally blocked views of Freshwater Beach and the Pacific Ocean. There is a small, long distance view line from photo locations 5 and 6 of distant ocean views along the horizon line.

*"The second step is to consider from 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."*

The views to the east, towards Freshwater Beach and the ocean from residential properties along Oliver Street, is obtained from the front boundaries of these properties.

*"The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected."*

It is considered that the view loss is negligible (if any at all) as demonstrated by the photos 1 to 6 and the photomontages showing the amended proposal (See **Appendix U**) which clearly show that there is either no existing water views or otherwise the proposed residential flat buildings (Buildings B and C) sit below the water view line towards Freshwater Beach and the Pacific Ocean. Indeed, from the few existing two (2) storey dwellings along the western side of Oliver Street there would be no impact on existing water views towards Freshwater Beach from the amended proposal.

*"The fourth step is to assess 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 that breaches them."*

The amended proposal complies with the 11m building height and building setback controls for the residential flat buildings (Buildings C and D) under the former WLEP 2000 as well as WLEP 2011 and WDCP 2011.

In the circumstances, it is considered that the amended DA plans for the residential component of the mixed use proposal will not have any adverse impact on views of

Freshwater Beach and the Pacific Ocean from residential properties along Oliver Street or other surrounding properties in the Freshwater locality.

### 6.3.3 Traffic and Parking Assessment

A traffic and parking assessment report of the amended DA plans for the residential component of the mixed use proposal has been prepared by Colston Budd Hunt and Kafes Pty Ltd (See **Appendix J**) which provides the following comments:

*“...the proposed development (comprising 1 x 1 Bedroom Unit, 7 x 2 Bedroom Units, 8 x 3 Bedroom Units and 1 x 4 Bedroom Unit) would require 28 spaces including 4 visitor spaces and 3 disabled parking bays.*

*The proposed parking provision is 36 spaces, including 4 visitor, 3 disabled and 1 small car space. Tandem spaces should be allocated to the same unit and the small car space and the adjacent space should be allocated to the same unit.*

*Therefore, the proposed parking provision satisfies Council's requirements and is considered appropriate.*

*Access to the development will be provided from Marmora Street as per the original approved Development Application. Modifications are proposed to the layout of the basement car park and internal access ramp.*

*The car park will be accessed by a 3.5m wide (Category 1) driveway off Marmora Street, with a 3.5m wide one lane ramp providing internal access to the car park*

*Within the car park, car parking spaces will be a minimum of 2.4m wide by 5.4m long with a minimum aisle width of 5.8m. Spaces located next to walls will be a further 300mm wider. Aisle widths will be widened by 300mm adjacent to parking spaces located opposite structures. Dead end aisles will have a 1m aisle extension to facilitate access to end spaces. Height clearances will be a minimum of 2.2m for standard spaces and 2.5m for disabled parking bays. These dimensions are considered appropriate, being in accordance with AS2890.1-2004.*

*Waste collection will be on street from Marmora Street.*

*Based on RMS guidelines the Section 96 modification would increase the traffic generation at the site by approximately 3 vehicles (from 6 to 9 vehicle) per hour (two way) during peak periods, which equates to an increase of 1 vehicle every 20 minutes. The location of the access driveway on Marmora Street will be the same as the approved development. Thus, the traffic effects of the S96 Modifications will be negligible*

#### **Summary.**

*In summary, the key findings for the Section 96 Modifications to the approved residential development at 18 Marmora Street are:*

- (i) Provision of increased population (associated with the provision of 6 additional units) will strengthen the demand for existing public transport services;*
- (ii) The proposed parking provision complies with Council's parking code and is considered appropriate;*
- (iii) Access, circulation and servicing arrangements are considered appropriate;*
- (iv) The proposed modification will have a negligible effect on traffic compared to the approved development.”*

### 6.3.4 Waste Management

A waste management plan report for the amended proposal in accordance with Council's waste management policy is provided as **Appendix O** in this report.

### 6.3.5 Accessibility

**Appendix K** is an Accessibility Report on the amended mixed use proposal prepared by Accessible Building Solutions which concludes “*that the proposal can achieve compliance with the access provisions of BCA, DCP and AS4299 Adaptable Housing.*”

#### 6.4 Section 79C(1)(b) - Social and Economic Impacts

The Council Assessment Report on the original Development Application DA2007/0856 provides the following comments in respect to the social and economic impacts of the mixed use proposal in the Freshwater Locality:

*"The proposed development will not have a detrimental social impact in the locality considering the uses proposed are considered to be consistent with the desired future character statement for the relevant localities and subject to conditions the proposed development will not result in any adverse amenity impacts on the locality"*

*"The proposed development will increase the commercial floor space within the locality and the development will contribute to the revitalisation of the Freshwater Village. As such it is considered that the proposal will have a positive economic impact."*

Similarly, the amended DA plans for the residential component of the mixed use proposal will also have positive social and economic impacts in the locality."

**Appendix T** in this report is a CPTED report prepared by DFP Planning in respect to the amended mixed use proposal which concludes that the proposed Section 96AA Application does not propose to modify the approved development in a way that is expected to increase the opportunities for crime. As such the proposed modifications to the approved development are anticipated to retain a safe environment for future occupants.

#### 6.5 Section 79C(1)(c) - The Suitability of the Site for the Development

The site is considered to be well located for the proposed mixed use retail, commercial and residential development, being located centrally within the Freshwater Village Local Centre, close to public bus services, a range of shops, commercial services and community facilities as well as Freshwater Beach and several public reserves.

The site has sufficient area and appropriate dimensions including two road frontages, is gently sloping and the amended mixed use proposal has a northerly and easterly orientation and can be adequately drained.

The amended DA plans for the residential component of the mixed use proposal has considered the local context of the site with the Court approved proposed three (3) storey retail/commercial building fronting onto to Lawrence Street orientated towards the Freshwater Village Local Centre. The proposed mixed use development achieves a desirable transition by locating the proposed 2 x three (3) storey residential flat buildings (Buildings B and C) and the proposed two (2) storey detached dwelling (Building D) towards the northern rear section of the site facing onto Marmora Street which is characterised by low and medium density residential development as part of the wider Freshwater locality.

The vehicular access to the residential basement car park for the residential component of the amended mixed use proposal is via Marmora Street which is consistent with the Court approved DA plans for the proposed development.

Furthermore, the Council's Assessment Report on the original Development Application DA 2007/0856 provides the following comments in relation to the suitability of the site for the mixed use proposal:

*"The site does not contain any significant constraints and therefore subject to the provision of adequate drainage, the site is considered suitable for the uses proposed."*

*"In relation to the proposed residential access from Marmora Street, the physical and amenity impacts are considered to be reasonable and the design has satisfactorily addressed the nature of the surrounding development and the streetscape."*

The above Council Assessment Report comments are also applicable to the amended DA plans for the residential component of the mixed use proposal which is the subject of this Section 96AA Application.

## 6.6 Section 79C(1)(d) - Submissions

The Section 96AA Application for the amended mixed use proposal and proposed modification to various conditions of Development Consent DA 2007/0856 (as modified) as outlined in this report is required to be publicly notified in accordance with Council's adopted WDCP 2011.

Pursuant to Section 79C (1)(d) of the EP & A Act, Council will be required to give due consideration to any submissions made during that notification period.

The Council's Assessment Report on the original Development Application DA2007/0856 states as follows in relation to the public interest assessment of the mixed use proposal:

*"The provision of apartment style dwellings will contribute to the diversity of housing within the locality thus ensuring the housing stock caters for a broad cross section of the community. It is therefore considered that the proposal serves the broader public interest.*

*The proposal is in the narrower public interest as the development is generally consistent with the planning controls which apply to the site and subject to conditions to address matters raised by the surrounding residents, the proposal will not result in any unacceptable amenity impacts on the surrounding properties."*

This Section 96AA Application in respect to the amended DA plans for the residential component of the mixed use proposal along with the Court approved retail/commercial building will provide a significant positive contribution to the mixed land use streetscapes and to the economic revitalisation of the Freshwater Village Local Centre.

The amended proposal will provide for sixteen (16) instead of ten (10) residential apartments in the two (2) residential flat buildings (Buildings B and C) as well as a detached dwelling (Building D) which will achieve a better planning outcome by providing for more affordable, smaller sized mix of residential apartments. The proposed two (2) residential flat buildings and the detached dwelling are more compliant with WLEP 2011, WDCP 2011, SEPP65 and the RFDC as well as Council's current drainage and flood level requirements which apply to the site and the Freshwater locality than is the case with the original Court approved mixed use proposal.

Accordingly, it is considered that the amended mixed use proposal is in the public interest.

## 7 Conclusion

This planning report accompanies an application under Section 96AA of the EP&A Act to modify the description of the proposed development relating to amended DA plans for the residential component of the mixed use proposal at the site as well as proposed modifications to conditions 1, 23, 27 and 94 of Development Consent DA2007/0856 and MOD 2013/0112 originally approved by the Court in *Minnici v Warringah Council* (2009) NSW LEC 1098 issued on 3 April 2009.

This Planning Report demonstrates that the proposed design modification to the residential component of the mixed use proposal as shown on the amended architectural plans (see **Appendix G**), amended landscape plans (see **Appendix H**) and the amended stormwater drainage plans (see **Appendix I**) for the demolition of existing buildings and construction of a mixed use development comprising of basement car parking, three (3) storey retail/commercial building, sixteen (16) dwellings in two (2) by three (3) storey residential flat buildings and a two (2) storey detached dwelling and subdivision into two (2) lots and the staged construction and occupation of the development at the site generally satisfies all of the relevant objectives and planning controls under the applicable SEPP's, the former WLEP 2000, WLEP 2011, WDCP 2011 and the "rules of thumb" provisions under the RFDC.

The amended proposal will require minor variations to the rear building setback, wall height and building envelope controls for the proposed detached dwelling (Building D) under WDCP 2011 and to the building separation "rule of thumb" between the 2 x three (3) storey residential flat buildings (Buildings B and C) under the RFDC which are all planning control variations which were approved by the Court in granting Development Consent DA 2007/0856 to the original mixed use proposal.

The amended DA plans for the residential component of the mixed use proposal and the proposed modification to various conditions of the Development Consent DA 2007/0856 (as modified) will not result in any adverse impacts to the natural or built environment nor any adverse traffic and parking impacts, or amenity impacts on neighbouring properties and the Freshwater locality which would warrant refusal of this Section 96AA Application.

In conclusion, it is the opinion of DFP Planning that the proposed modifications the subject of this Section 96AA Application, including the amended DA plans for the residential component of the mixed use proposal, satisfy the requirements to enable these modifications to be approved by Council pursuant to Section 96AA of EP&A Act. The proposed modifications to Development Consent DA2007/0856 and MOD 2013/0112 for the mixed use proposal will have an acceptable environmental impact and are worthy of approval by Council in the circumstances of this case.