

Item 3.**Section 4.55 Application: 100 Bayswater Road, Rushcutters Bay - D/2012/939/K**

File No.: D/2012/939/K

Summary**Date of Submission:** 29 November 2023**Applicant:** Goran Iliev**Architect/Designer:** Antoniadis Architects**Developer:** Dedico Development Services**Owner:** RHS Hotel Investments**Planning Consultant:** BBC Consulting Planners**Cost of Works:** \$39,754,000.00**Zoning:** MU1 Mixed Use

Proposal Summary: S4.55(2) modification for the consolidation of six ground floor apartments into four apartments and the consolidation and replacement of six wintergardens to four ground floor external terraces. Modifications also include changes to ground floor fenestration on the northern elevation, replacement of glass wintergarden roofs with awnings, changes to level 5, 6 and 7 roof finishes from synthetic turf to river pebbles and metal sheeting, a revised lobby design, lobby glazing, driveway amendments and landscape amendments.

The application is referred to the Local Planning Panel as the application has received over 25 unique objections and therefore meets the criteria of contentious development under the Minister's Local Planning Panels Direction 2023.

Council staff requested the submission of additional information and amendments to the application on 9 February 2024. The request required the removal of reference to public art modifications on the plans, clarification of proposed garden fencing height and style, clarification regarding glazing modifications, box gutter details, minor plan amendments, and a written address of Chapter 4 of SEPP (Housing) 2021. The applicant

responded to the request on 1 March 2024 with the requested information and amendments.

A total of 150 properties were notified and 42 submissions were received. The submissions comprise 42 objections, which principally relate to concerns regarding impacts to residential amenity from the proposed removal of the six approved wintergardens and replacement with four outdoor terraces.

As amended, the proposed modifications are considered to be substantially the same as previously approved. Subject to recommended conditions the proposal is not likely to negatively impact the amenity of surrounding sites.

The proposed modifications are supported subject to recommended conditions of consent.

Summary Recommendation: The Section 4.55(2) modification application is recommended for approval, subject to conditions.

Development Controls:

- (i) Sydney Local Environmental Plan 2012
- (ii) Sydney Development Control Plan 2012
- (iii) SEPP (Resilience and Hazards) 2021
- (iv) SEPP (Biodiversity and Conservation) 2021
- (v) SEPP (Housing) 2021
- (vi) SEPP (Sustainable Buildings) 2022

Attachments:

- A. Recommended Conditions of Consent
- B. Selected Proposed Drawings
- C. Selected Approved Drawings (D/2012/939/J)

Recommendation

It is resolved that consent be granted to Section 4.55 Application Number D/2012/939/K subject to the amendment of the conditions in Attachment A to the subject report (with modifications shown in ***bold italics*** (additions) and ~~striketrough~~ (deletions)).

Reasons for Recommendation

The application is recommended for approval for the following reasons:

- (A) The development, as modified, is substantially the same development as that originally approved and is consistent with Section 4.55(2)(a) of the Environmental Planning and Assessment Act, 1979.
- (B) The proposal is consistent with the relevant provisions of Chapter 4 of SEPP (Housing) 2021.
- (C) The proposal is consistent with the aims, objectives and relevant provisions of the Sydney Local Environment Plan 2012 and Sydney Development Control Plan 2012 for the reasons set out in the report.
- (D) The proposal satisfies Clause 6.21C Design excellence provisions of the Sydney Local Environment Plan 2012.
- (E) The development, as modified, is in the public interest.

Background

The Site and Surrounding Development

1. The site has a legal description of Lot 101 DP 1006908, and is known as 100 Bayswater Road, Rushcutters Bay. It is irregular in shape with an area of approximately 3,616 square metres. It is bounded by Bayswater Road to the south (the primary frontage), Clement Place to the northwest, a residential development known as Marina One to the north, and the Rushcutters Bay stormwater canal and Rushcutters Bay Park to the east. The site is located close to the intersection of Waratah Street, McLachlan Avenue and Neild Avenue with Bayswater Road. Levels on the site fall by approximately 5 metres from west to east.
2. The site contains a four to seven storey building which is currently under construction in accordance with development consent D/2012/939. The building is formerly known as the Vibe Hotel which was constructed in the late 1990s. The hotel consisted of a four storey western wing that runs parallel to Bayswater Road and a seven storey eastern wing that curves away from Bayswater Road to the north. The building has a basement level / back of house area and a level previously used for car parking below.
3. The surrounding area is characterised by a mixture of land uses, primarily being residential, mixed use and commercial premises. Surrounding development in the vicinity includes:
 - A residential flat complex known as Marina One is located to the immediate north of the site. Marina One was built at the same time as the subject site and formed part of the same development consent. It consists of a wedge shaped six-storey building and contains 90 residential apartments.
 - To the south of the site, on the opposite side of Bayswater Road, is an eleven storey early 1980s residential flat building known as the Bayswater Apartments.
 - To the west at 1 McLachlan Avenue, is an eight storey residential flat building with ground floor commercial premises.
 - Retail premises are located to the west of the site on Bayswater Road, and residential apartments are located further to the west and northwest.
4. The site is not identified as being listed as a heritage item but is partly located within the Elizabeth and Rushcutters Bays heritage conservation area (C20). The site is identified as a detracting building within the conservation area.
5. A site visit was carried out on 31 January 2024. Photos of the site and surrounds are provided below:



Figure 1: Aerial view of site (orange) and surrounds



Figure 2: View of subject site from across Bayswater Road, facing northeast



Figure 3: View of neighbouring properties immediately west of the site, viewed facing north from across Bayswater Road



Figure 4: Rushcutters Bay stormwater canal which borders the east of the site, viewed facing north



Figure 5: Rear of Subject site (right) and neighbouring Marina One apartment (left) viewed from Clement Place, facing southeast



Figure 6: Waratah Street, which lies west of the subject site, viewed, facing northeast



Figure 7: Marina One apartments north of the subject site, viewed facing southeast



Figure 8: Existing 5-6 metre wall fronting a proposed terrace location (Lot 10) on the northeast side of the site, viewed from the ground floor facing northeast



Figure 9: Existing view from a proposed outdoor terrace location (Lot 12), with Marina One seen top left, viewed facing northeast



Figure 10: View of proposed terrace locations (Lots 13.A and 15) (at ground level) with existing 5-6 metre wall shown to the left between subject site and neighbouring Marina One apartments



Figure 11: Proposed location of the two terraces on the northeast side of the development, with Marina One apartments seen in background, viewed facing northeast

History Relevant to the Development Application

Development Applications

6. The following applications are relevant to the current proposal:
 - **D/2012/939** – Development consent was granted by Council on 11 December 2012 for alterations and extension to the Vibe hotel and use as a residential flat building containing 125 apartments, 102 parking spaces and retail space.
 - **D/2012/939/A** – A modification application was approved by Council on 17 March 2014 for an increase in building height, addition of external balconies to the eastern elevation, reduction in the number of apartments and change of dwelling mix, modifications to parking allocation, modifications to private open space and minor internal and external modifications.
 - **D/2012/939/B** – A modification application was approved under delegation of Council on 21 March 2014 for retention of the existing vehicle entry and exit arrangement onto Bayswater Road.
 - **D/2012/939/C** – A modification application was approved under delegation of Council on 5 May 2015 to stage the construction process into three stages (being CC1A, CC1B and CC2).

- **D/2012/939/D** – A modification application was approved under delegation of Council on 29 July 2015 to alter the stage at which various conditions were required to be satisfied.
- **D/2012/939/E** – A modification application was partially approved under delegation of Council on 14 February 2022 to alter the stage at which various conditions were required to be satisfied, and amend Condition 1A to change CC2 into 5 stages, being:
 - CC2: Internal strip out and demolition;
 - CC3: Structural works;
 - CC4: Building services and internal fit-out;
 - CC5: upgrade of architectural façade; and
 - CC6: Remainder of the works, including external works and public domain works.
- **D/2012/939/F** – A modification application to amend the internal configuration of all apartments and the main entry lobby design, reconfigure exhaust risers and basement bicycle parking, storage cages, waste and plant rooms, reduce motorbike parking numbers from 26 to 9 and delete level 7 roof slab was withdrawn 10 April 2022.
- **D/2012/939/G** – A modification application was approved on 21 June 2022 to alter the stage at which various conditions were required to be satisfied. The Notice of Determination contained errors made by Council staff as it did not include all the amendments requested and supported.
- **D/2012/939/H** – A modification application was approved on 30 June 2022 to correct errors made by Council staff during the assessment and determination of modification application D/2012/939/G.
- **D/2012/939/I** – A modification application was approved on 9 December 2022 to amend Condition 100 to permit alternative waste collection arrangements.
- **D/2012/939/J** – A modification application was approved on 1 August 2023 for various internal and external design changes relating to parking layout, internal apartment configuration, and amendments to security camera requirements and waste management.

Compliance Action

7. The site is not subject to an ongoing compliance action.

Amendments

8. Following a preliminary assessment a request for additional information and amendments was sent on 9 February 2024. The applicant was requested to provide the following details:
 - (a) Revised landscape drawings which identify the extent and type of the garden fencing proposed around the proposed terraces;

- (b) The removal of references to public artwork modifications from the proposal due to no information being provided explaining the modifications. It was noted to the applicant that public artwork is regulated through an existing condition of consent, and that this same issue was raised during assessment of D/2012/939/J, which also resulted in the removal of reference to public art modifications from that modification.
 - (c) Clarification regarding the scope of proposed amendments to glazing, i.e. whether materiality or form is proposed to be modified.
 - (d) Additional design details in relation to the newly proposed terrace awnings and the proposed metal roof replacement.
 - (e) A written response addressing the criteria of Schedule 9 of SEPP (Housing) 2021;
 - (f) A solar access study, including sun's eye diagrams and a calculation of the number of apartments receiving direct solar access; and
 - (g) A written response addressing the loss of cross ventilation in the ground floor apartments that would result from the modification.
9. The applicant responded to the request on 1 March 2024, and submitted the following information:
- (a) Revised landscape plans.
 - (b) Removal of reference to public artwork from proposed plans, and clarification over the scope of proposed glazing modifications.
 - (c) Details of the proposed box gutter on the proposed metal roof.
 - (i) A written response to Schedule 9 of the SEPP (Housing) 2021; and
 - (d) A solar access study and a natural ventilation study in accordance with the criteria described in the Apartment Design Guide.

Proposed Development

10. The application seeks consent for the following:
- Consolidation of four two-bedroom and two single-bedroom apartments into four two-bedroom apartments on the ground floor.
 - Consolidation and replacement of six ground floor wintergardens with four ground floor terraces in association with the above apartment reconfigurations.
 - Amended ground floor apartment glazing from bifold doors to sliding doors in association with the introduced terraces.
 - Introduction of metal awnings with integrated acoustic baffling over the proposed terraces.

- Replacement of synthetic grass with metal roof sheeting on level 6, and replacement of synthetic turf with river pebbles on levels 5 and 7.
- A revised lobby layout and associated glazing configuration amendments (with no glazing materiality changes proposed).
- An adjustment to the driveway layout and associated planter to accommodate for a retained concrete column.
- Revised landscaping details including addition of fencing around proposed terraces.
- Introduction of additional storage cages throughout the basement carpark
- Amendment to 'Condition 85 - Landscaped (Green) Roof' to be revised in title to 'Condition 85 - Landscaped **(Green) Roof Pool Deck**' and reference to 'landscaped pool deck' instead of the current references to 'Green Roofs' throughout the condition.

11. Plans and elevations of the proposed development are provided below.



Figure 12: Site Plan



Figure 13: Proposed Basement 2 (proposed storage cages shown in red)

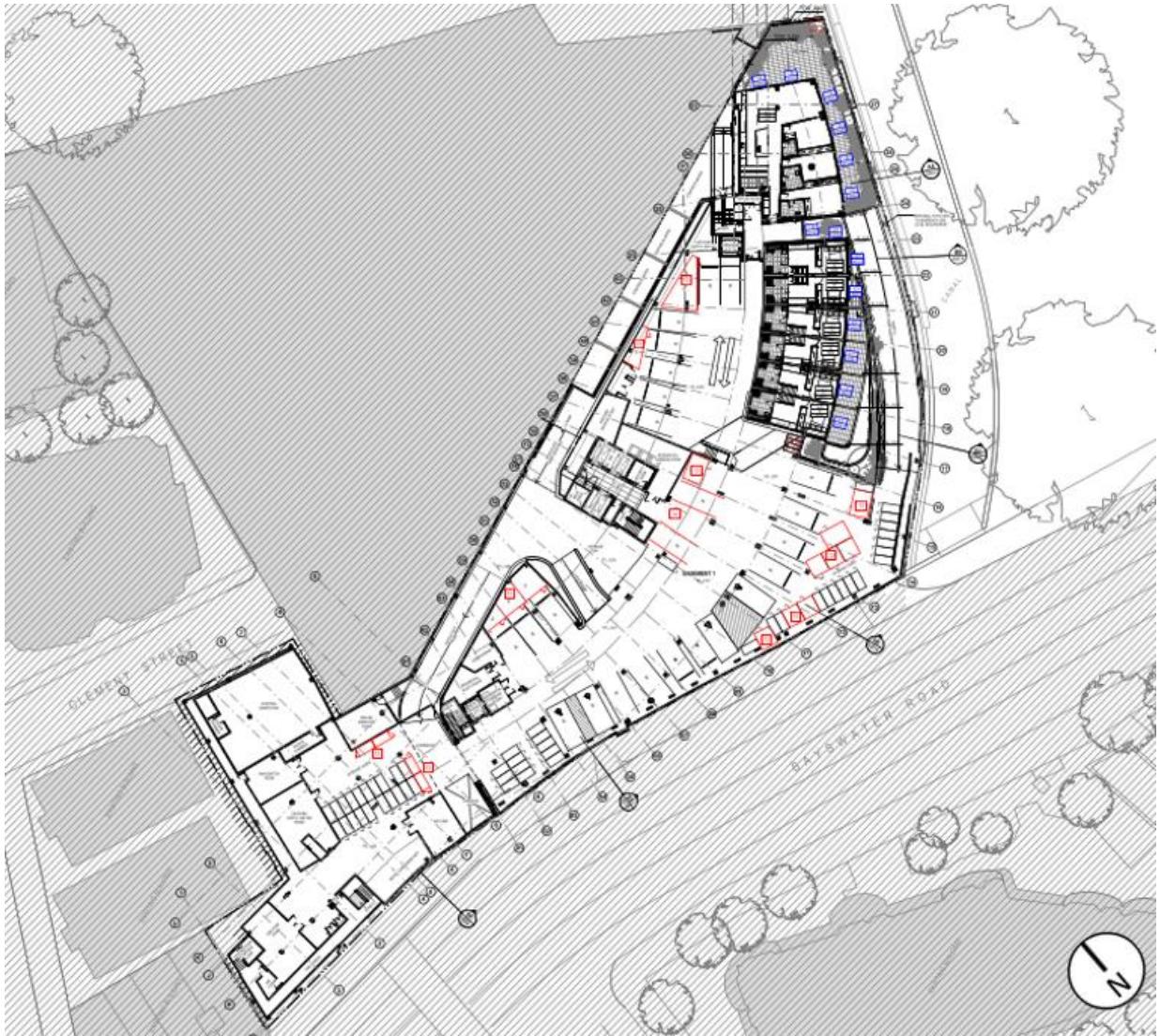


Figure 14: Proposed Basement 1 (proposed storage cages shown in red)



Figure 15: Proposed Ground Floor (proposed modifications including revised driveway layout, apartment configuration, terraces, landscaping, and lobby design shown in red)



Figure 16: Proposed Level 1 (with mezzanine level proposed to be removed, and ground floor modifications being visible in the void)



Figure 17: Proposed Level 5 (with proposed roof modification from synthetic turf to river pebbles shown in red)



Figure 18: Proposed Level 6 (with proposed roof modification from synthetic turf to metal sheeting shown in red)

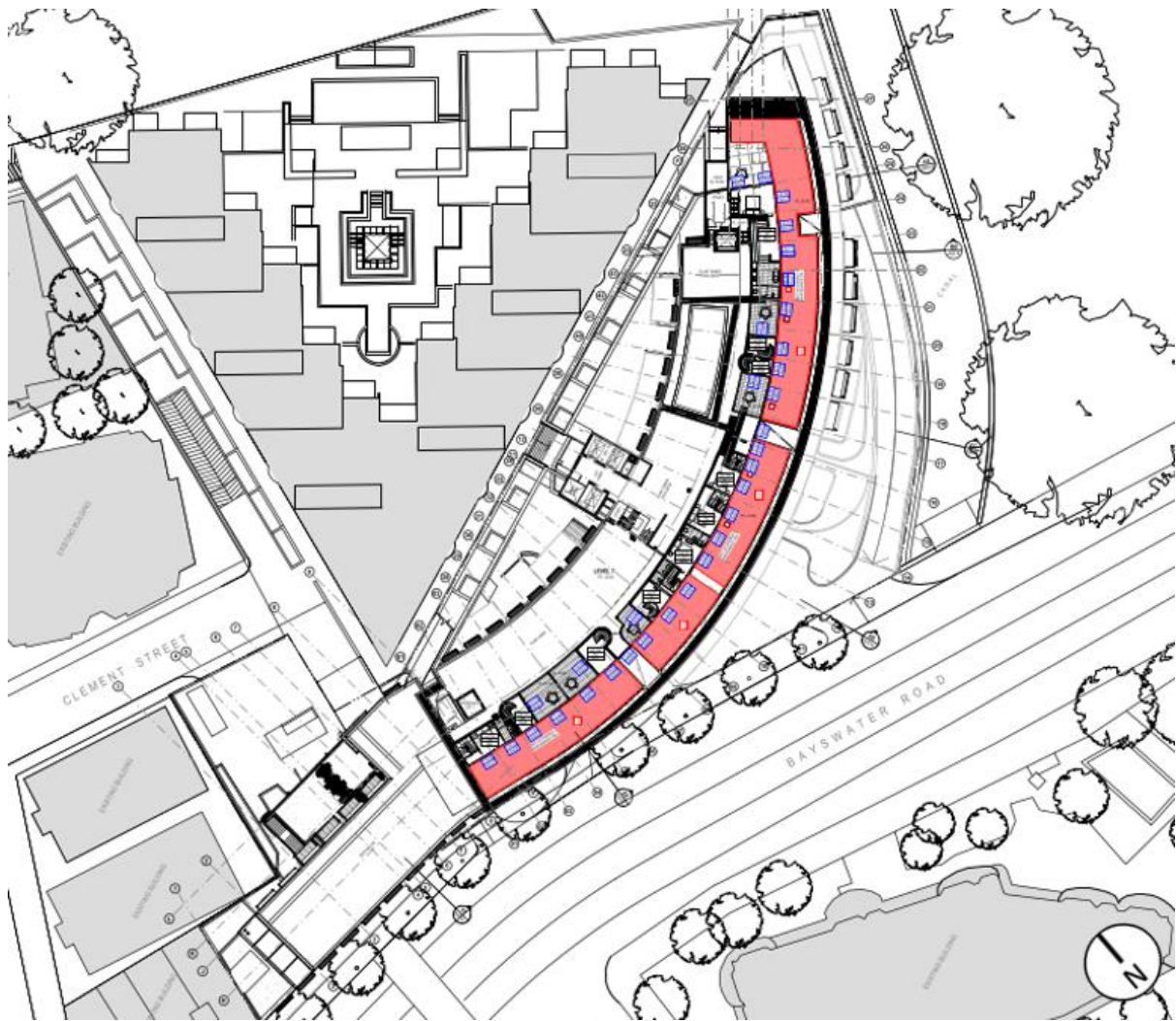


Figure 19: Proposed Level 7 (with proposed roof modification from synthetic turf to river pebbles shown in red)



Figure 20: Proposed South Elevation (with lobby glazing modifications shown in red)

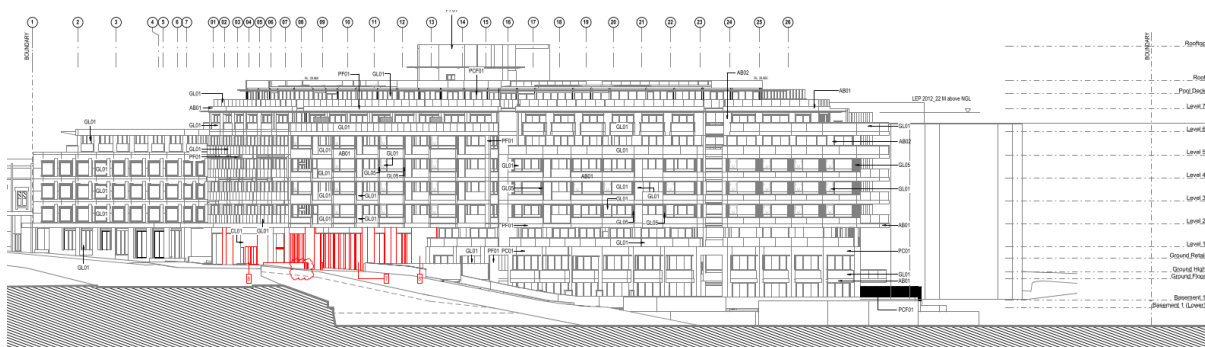


Figure 21: Proposed Southeast Elevation (with lobby glazing modifications shown in red)

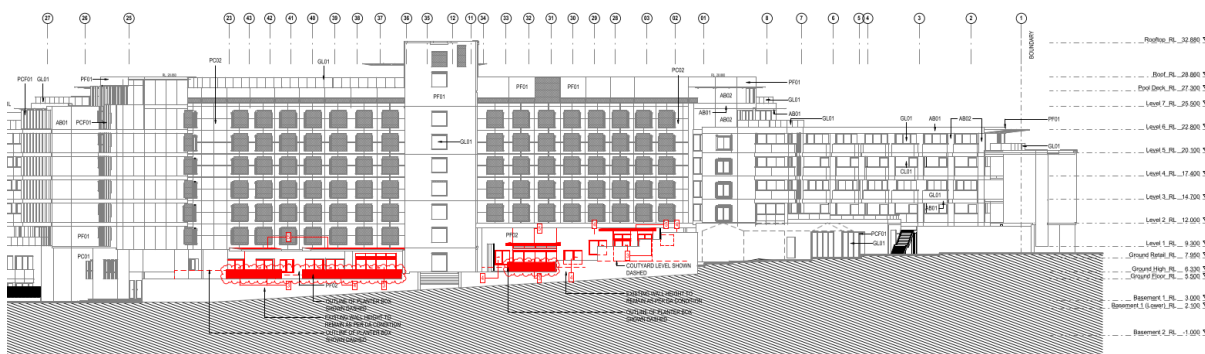


Figure 22: Proposed North Elevation (with lobby glazing modifications, and new terrace awnings shown in red)

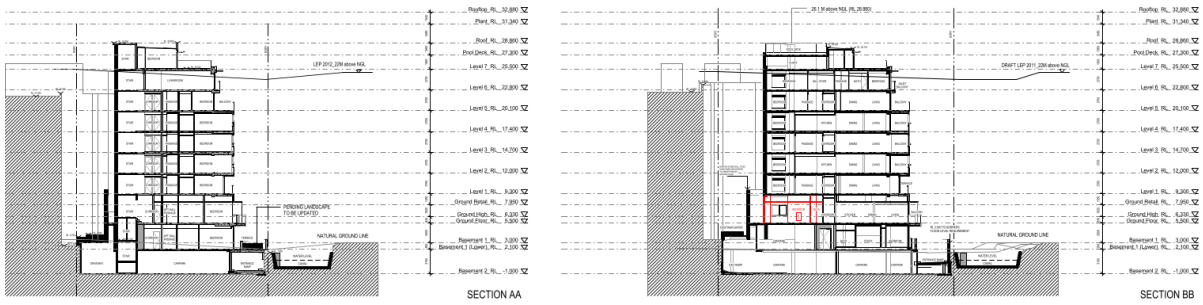


Figure 23: Proposed Section AA and Section BB

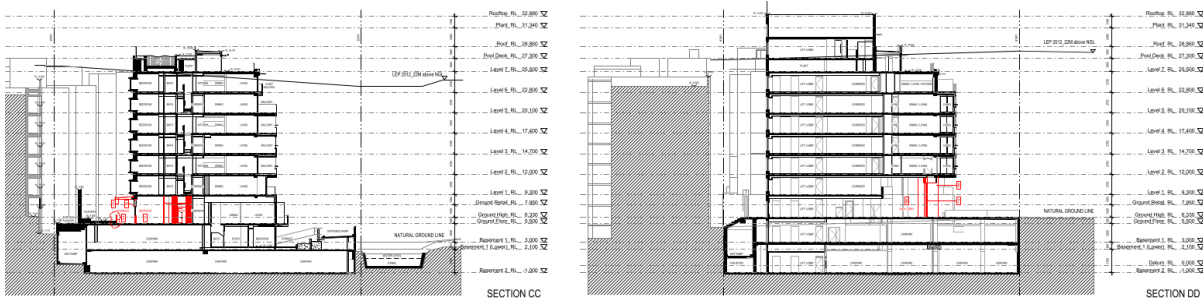


Figure 24: Proposed Section CC and Section DD

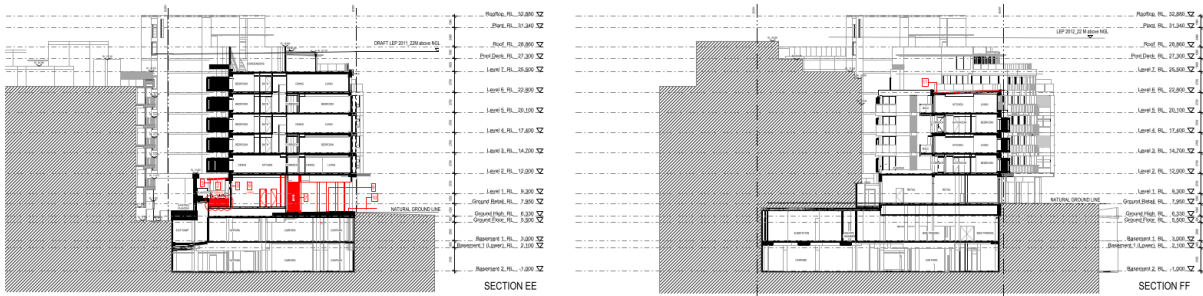


Figure 25: Proposed Section EE and Section FF

Assessment

12. The proposed development has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

State Environmental Planning Policies

State Environmental Planning Policy (Housing) 2021

Chapter 4 - Design of residential apartment development

13. The aim of Chapter 4 of the SEPP is to improve the design quality of residential apartment development in New South Wales.
14. When determining a modification application for a residential flat development of three or more floors and containing four or more apartments, the SEPP requires the consent authority take into consideration a number of matters relating to design quality, including the design quality principles as set out in Schedule 9.
15. The applicant has submitted a design verification statement and design report prepared by PTW Architects with the application, addressing the design quality principles. The statement is deemed to satisfy Clause 102 of the Environmental Planning and Assessment Regulation 2021.
16. An assessment of the proposal against the design quality is provided as follows:
 - (a) Principle 1: Context and Neighbourhood Character

Consistent: The proposed development remains consistent with the character of the area which is predominantly residential and includes residential flat buildings.
 - (b) Principle 2: Built Form and Scale

Consistent: The approved development is a major refurbishment and change of use of an existing building, which neighbours an existing residential flat building of similar scale. The proposed modifications do not alter the scale of the approved development.
 - (c) Principle 3: Density

Consistent: The density of the development will decrease slightly as a result of the proposal which seeks to remove two single-bedroom apartments. The resulting reconfiguration of the ground floor apartments will result in increased amenity for residents resulting from an improved solar access to bedroom spaces. The density of the building remains generally consistent with the original development approval and neighbouring development.

(d) Principle 4: Sustainability

Consistent: The proposed modifications maintain appropriate cross ventilation within the building. The proposal also seeks to replace approved synthetic turf on the building's rooftop, with metal sheeting and river pebbles, which is an improved environmental outcome.

(e) Principle 5: Landscape

Consistent: The approved landscaping is of a high quality design, and proposed modifications to landscaping are minor – generally relating to amended plant species and accommodating minor changes to the driveway layout and winter garden removal. The introduction of ground floor terraces improves landscaping integration with the occupation of the modified ground floor apartments.

(f) Principle 6: Amenity

Consistent: The proposed modifications will improve amenity amongst the reconfigured ground floor dwellings as it will provide an outdoor space to these units. The proposal will maintain visual privacy to the outdoor spaces and living rooms through the use of a metal awning, which is also proposed to be acoustically baffled to ensure neighbouring acoustic amenity. The subject apartments generally comply with applicable ADG criteria for internal amenity.

(g) Principle 7: Safety

Consistent: The safety of the development as approved is maintained under the current proposal.

(h) Principle 8: Housing Diversity and Social Interaction

Consistent: While the proposal results in a reduction of two single-bedroom apartments the remaining proposed 117 apartments retain an acceptable mix of apartment sizes, configurations, and bedroom numbers, and do not propose modifications to the approved communal areas and features.

(i) Principle 9: Aesthetics

Consistent: The proposal replaces approved synthetic turf roof covers with metal sheeting and river pebbles and is an approved aesthetic outcome for the building.

17. The development is acceptable when assessed against the SEPP including the above stated principles and the associated Apartment Design Guide. These controls are generally replicated within the apartment design controls under the Sydney Development Control Plan 2012. Consequently, compliance with the SEPP generally implies compliance with Council's own controls. A detailed assessment of the proposal against the relevant ADG criteria is provided below.

4A Solar and Daylight Access	Consistency	Comment
70% of units to receive a minimum of 2 hours of direct sunlight in midwinter to living rooms and private open spaces.	No, but supported	As a result of the proposed modification, the proposal will reduce solar access from the current approved development's 36.1% solar access to 35%. See 'Discussion'
Maximum of 15% of apartments in a building receive no direct sunlight between 9am and 3pm at midwinter.	No, but supported	As a result of the proposed modification the proposal will increase the percentage of apartments receiving no direct sunlight from 23.5% to 23.9%. See 'Discussion'

4B Natural Ventilation	Consistency	Comment
All habitable rooms are naturally ventilated.	Yes	The reconfigured apartments are naturally ventilated.
Minimum 60% of apartments in the first nine storeys of the building are naturally cross ventilated.	Yes	The proposal continues to provide at least 60% of naturally cross ventilation apartments across the development.

4D Apartment Size and Layout	Consistency	Comment
<p>Minimum unit sizes:</p> <ul style="list-style-type: none"> two bed: 70 square metres <p>The minimum internal areas include only one bathroom. Additional bathrooms increase the minimum internal area by 5 square metres each.</p>	Yes	The reconfigured apartments each contain two bathrooms and each apartment is at least 75 square metres.
Every habitable room is to have a window in an external wall with a minimum glass area of 10% of the floor area of the room.	Yes	The reconfigured apartments are consistent with this criteria.

4D Apartment Size and Layout	Consistency	Comment
Habitable room depths are to be no more than 2.5 x the ceiling height.	Yes	The reconfigured apartments are consistent with this criteria.
8 metres maximum depth for open plan layouts.	Yes	The reconfigured apartments are consistent with this criteria.
<p>Minimum area for bedrooms (excluding wardrobes):</p> <ul style="list-style-type: none"> • master bedroom: 10 square metres • all other bedrooms: 9 square metres <p>Minimum dimension of any bedroom is 3 metres (excluding wardrobes).</p>	Yes	The reconfigured apartments are consistent with this criteria.
<p>Living and living/dining rooms minimum widths:</p> <ul style="list-style-type: none"> • Studio and one-bedroom: 3.6 metres • Two-bedroom or more: 4 metres 	Yes	The reconfigured apartments are consistent with this criteria.

4E Private Open Space and Balconies	Consistency	Comment
Private open space for apartments on ground level, on a podium, or similar, must have a minimum area of 15 square metres and a minimum depth of 3 metres.	Partial consistency, supported	<p>Two of the proposed terraces are consistent with the criteria, however, two terraces achieve 14.2 square metres and 13.2 square metres each. It is noted that these terraces are constrained by an existing wall, existing building, and the modified garden. While the terraces could be slightly wider to accommodate the extra square meterage, they are designed with an awning, which if wider, would diminish solar access to adjacent bedrooms.</p> <p>As the terraces are newly introduced through the proposal and replace</p>

4E Private Open Space and Balconies	Consistency	Comment
		currently approved wintergardens that would otherwise enclose these apartments, the minor inconsistency with the ADG is supported.

4J Noise and Pollution	Consistency	Comment
Have noise and pollution been adequately considered and addressed through careful siting and layout of buildings?	Yes	Noise impacts to the subject site are not likely to be increased by the proposed modification. Despite the removal of the wintergardens, the proposed terraces are on the opposite side of the building to Bayswater Road, and are located behind an existing concrete wall, separating residents from the neighbouring residential flat building.

State Environmental Planning Policy (Sustainable Buildings) 2022

18. A BASIX Certificate (1417679M) been submitted with the application. The BASIX certificate lists measures to satisfy BASIX requirements which have been incorporated into the proposal. An existing condition of consent will ensure the measures detailed in the BASIX certificate are implemented.

Sydney Environmental Planning Policy (Biodiversity and Conservation) 2021 – Chapter 6 Water Catchments

19. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SEPP. In deciding whether to grant development consent to development on land in a regulated catchment, the consent authority must consider the controls set out in Part 6.2, Division 2, of the above SEPP, and for land within 100 metres of a natural waterbody in a regulated catchment the consent authority must consider the provisions of Part 6.2, Division 3.
20. While the proposal is within the Sydney Harbour Catchment, and within 100 metres of a natural water body within the Sydney Harbour Catchment, the proposal is considered to be satisfactory with regard to the provisions of Part 6.2 of the SEPP, subject to recommended conditions of consent.
21. The proposal is also located in the Foreshores and Waterways Area, and as such the consent authority must consider the provisions of Division 3 of Part 6.3 of the SEPP. The proposal, being a residential flat building, is considered to be satisfactory having regard to the considerations of Part 6.3.

Local Environmental Plans

Sydney Local Environmental Plan 2012

22. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 is provided in the following sections.

Part 2 Permitted or prohibited development

Provision	Compliance	Comment
2.3 Zone objectives and Land Use Table	Yes	The site is located in the MU1 Mixed Use zone. The proposed development is defined as a residential flat building and is permissible with consent in the zone. The proposal generally meets the objectives of the zone.

Part 4 Principal development standards

Provision	Compliance	Comment
4.3 Height of buildings	No, but supported	A maximum building height of 22 metres is permitted. The development is currently subject to an approved building height of 26.2 metres. The subject section 4.55(2) modification does not propose to modify the building's approved height.
4.4 Floor space ratio	No, but supported	A maximum floor space ratio of 2.5:1 or 9,040 square metres is permitted. The development is currently subject to an approved floor space ratio of 3.23:1, which is also specified in an existing condition of consent. As a result of the removal of the wintergardens, and mezzanine of Lot 12, the proposed development will reduce the approved floor space ratio by 0.01:1 or 129.9 square metres. Therefore, Condition 35 - Floor Space Ratio - All Other Areas is recommended to be modified accordingly to refer to an FSR of 3.22:1 instead of the currently approved FSR of 3.23:1.

Part 5 Miscellaneous provisions

Provision	Compliance	Comment
5.10 Heritage conservation	Yes	<p>The site is partially located within the Elizabeth and Rushcutters Bays heritage conservation area (C20).</p> <p>The proposed modifications are not within the heritage conservation area, and the proposal does not present any heritage impacts to the area.</p>

Part 6 Local provisions – height and floor space

Provision	Compliance	Comment
Division 4 Design excellence		
6.21 Design excellence	Yes	<p>The proposed development is of a high standard and uses materials and detailing which are compatible with the existing development along the street and will contribute positively to the character of the area.</p> <p>The development achieves the principle of ecologically sustainable development and has an acceptable environmental impact with regard to the amenity of the surrounding area and future occupants. The development therefore achieves design excellence.</p>

Part 7 Local provisions – general

Provision	Compliance	Comment
Division 1 Car parking ancillary to other development		
7.5 Residential flat buildings, dual occupancies and multi dwelling housing	No, but supported	<p>The maximum number of resident car parking spaces applicable to the proposed development is 74.</p> <p>The number of resident car parking spaces currently approved is 90.</p> <p>90 car parking spaces are proposed, which does not comply with the development standard.</p>

Provision	Compliance	Comment
		See 'Discussion'
Division 4 Miscellaneous		
7.15 Flood planning	Yes	The proposed modifications are not flood affected and do not have any impact on flooding.

Development Control Plans

Sydney Development Control Plan 2012

23. An assessment of the proposed development against the relevant provisions within the Sydney Development Control Plan 2012 is provided in the following sections.

Section 2 – Locality Statements

24. The site is located within the 'The Bays' locality (2.4.6). The overall development remains in keeping with the unique character and the design principles of the locality which is predominantly a residential area with a diversity of housing styles.

Section 3 – General Provisions

Provision	Compliance	Comment
3.5 Urban Ecology	Yes	The modified landscape plans have been reviewed by Council's Landscape Specialist who has raised no objections to the application. The proposal continues to generally satisfy urban ecology controls.
3.6 Ecologically Sustainable Development	Yes	The proposal has been submitted with an updated BASIX certificate and satisfies BASIX and environmental requirements.
3.9 Heritage	Yes	The site is partially located within the Elizabeth and Rushcutters Bays heritage conservation area (HCA) (C20), and the building is identified as being 'detracting' to the HCA. However, the proposed modifications are not within the boundary HCA and the proposed modification do not present any heritage impacts to the area.

Provision	Compliance	Comment
3.11 Transport and Parking	No	While a development of this scale would be required to provide additional bicycle spaces than what is currently approved, the control is not triggered by the proposed modification, and the existing bicycle storage is supported.
3.12 Accessible Design	Yes	The application is accompanied by an Access Report and the modifications are deemed to be accessible.
3.14 Waste	Yes	The development will continue to utilise waste measures as approved.

Section 4 – Development Types

4.2 Residential Flat, Commercial and Mixed Use Developments

Provision	Compliance	Comment
4.2.1 Building height		
4.2.3 Amenity		
4.2.3.5 Landscaping	Yes	The modified landscape plans have been reviewed by Council's Landscape Specialist and are considered satisfactory.
4.2.3.6 Deep Soil	Yes	The modified landscape plans do not affect the site's deep soil provision.
4.2.3.10 Outlook	Yes	The proposed modification has no impact on any approved outlook.
4.2.3.11 Acoustic privacy	Yes	The application has been reviewed by Council's Environmental Health Unit who raised no issues regarding internal acoustic privacy.
4.2.3.12 Flexible housing and dwelling mix	No, but supported	The currently approved development does not comply with the dwelling mix under this control, however, the proposed reduction in one bedroom apartments will cause closer conformity with this control and is supported.

Provision	Compliance	Comment
4.2.3.14 Apartments with setback bedrooms	Yes	The proposal decreases the number of setback bedrooms from the current approval. The removal of two single-bedroom apartments and the reconfiguration of the four remaining two-bedroom apartments will result in each of the subject bedrooms being located adjacent to a window.

Threshold test - substantially the same

25. The proposed modifications primarily seek to:
- (a) Reconfigure approved apartments on the ground floor of the building, including reducing the apartment count by two units.
 - (b) Remove approved ground floor wintergardens from the development and introduce four terraces to the north facade of the building.
 - (c) Adjust the layout of the approved driveway and reconfigure the adjacent lobby and glazing.
 - (d) Modify approved landscaping to account for the proposed driveway and terraces.
 - (e) Modify approved synthetic turf roof covers with metal sheeting and river pebbles.
 - (f) Add additional storage cages to the basement car parks; and
 - (g) Amend Condition 85 to refer to 'landscape pool deck'.
26. The development as proposed to be modified is substantially the same as that originally approved. This is because:
- (a) The development continues to constitute alterations and extensions to an existing building which will result in the adaptive reuse of an existing hotel into a residential flat building.
 - (b) The proposal predominantly involves the minor modifications, such as the reconfiguration of approved building elements including approved floorplans and fenestration, or in regard to the roof, involves the replacement of approved building materials.
 - (c) Building elements which are introduced within this proposal such as storage cages and terraces with awnings remain within the scope of the original development description, and are minor additions, particular with regard to the scale of the subject development.
 - (d) The development remains consistent with the objectives of the statutory instruments and planning controls applying to the site.

- (e) The proposed modifications to the approved development present acceptable environmental impacts when compared to the original approval.

The original approval (D/2012/939) did not include any reasons for the recommendation. In the circumstances, the requirement to take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified under s. 4.55(3) of the Act does not apply.

Discussion

Solar Access

The proposed removal of the wintergardens will result in a reduction of the number of ground floor apartments with direct solar access in mid-winter. As a result of the proposal, the following solar access will be achieved across the whole development when considered against the design criteria of Part 4A-1 of the Apartment Design Guide (ADG):

- 35.0 per cent (41 out of 117) of apartments will achieve 2 hours solar access across the assessment window, which is inconsistent with the ADG minimum criteria of 70 per cent.
 - 23.9 per cent (28 out of 117) of apartments will receive no solar access across the assessment window, which is inconsistent with the ADG maximum criteria of 15 per cent.
27. It is noted that the original development application achieved 37.3 per cent solar access across the assessment window when compared with the ADG criteria, while the current approved development achieves 36.1 per cent.
28. Council assessment staff consider that although the proposal presents further inconsistency with the ADG criteria, the proposed removal of the wintergardens and replacement with outdoor terraces will offer improved amenity to residents by affording an outdoor area to apartments that are currently entirely enclosed. The proposal will also improve internal amenity as the reconfigured layout of the subject apartments will now reduce the number of setback bedrooms and improve internal solar access. The proposed modification is therefore supported.

Parking

29. Based on the proposed apartment count and unit mix a maximum of 74 residential car parking spaces are permitted under Part 7, Division 1 of the Sydney LEP 2012.
30. It is noted that this is the same amount which would apply to the unit mix under the current approval (D/2012/939/K) despite the subject application's proposed reduction in unit mix by two single-bedroom apartments. This occurs as Clause 7.5 of the LEP requires rounding of the maximum permissible parking spaces to whole numbers.
31. The development is currently approved with 90 residential parking spaces, which is a result of the original development application having been assessed against a predecessor development control plan and having not been reduced in previous modifications.

32. Despite the reduction in single-bedroom apartments from the previous approval (D/2012/939/K) and while the currently approved parking numbers exceed that of the maximum permissible amount for the development, the current approved number of spaces is not recommended to be reduced by any amount for the following reasons:
- The reduction of spaces across to the maximum permissible number of 74 spaces is unreasonable with regard to the limited scope of the modification application, and because the discrepancy largely derives from a difference between a predecessor DCP and the current Sydney LEP 2012.
 - The maximum car parking rate for the currently approved unit mix which constitutes 119 units is 74 spaces. The applicable maximum parking rate for the proposed apartment mix which constitutes 117 units is also 74 spaces. As such, the removal of any car spaces to bring the proposal closer to the relevant maximum is not proportionally warranted where specifically measured against the parking rate applied to unit mix.

Awnings

33. Drainage details for the proposed awnings have not been submitted. A condition of consent is recommended which requires the submission of further drainage details of the awnings.
34. In order to ensure neighbouring acoustic amenity, a condition of consent is also recommended which requires the proposed terrace awnings to be treated with acoustically absorptive lining, with a minimum performance of NRC 0.5 as recommended in the E-Lab Consulting Acoustic Report.

Condition 6 - Winter Gardens

35. Condition 6 of the current development consent requires that light sources from the winter gardens must be removed where Council deems that the light adversely impacts upon the amenity of adjoining properties. The condition is recommended to be retained but amended to refer to the newly proposed terraces instead.

Consultation

Internal Referrals

36. The application was discussed with Council's;
- (a) Environmental Health Unit
 - (b) Transport and Access Unit
 - (c) Urban Design Unit
 - (d) Landscape Unit
 - (e) Public Art Unit

37. Council's Environmental Health Unit have reviewed the submitted Acoustic Report and have advised that the report's acoustic modelling is representative of the proposed development and that the proposed modifications are capable of complying with relevant acoustic criteria. The Environmental Health Unit support the application subject to recommended conditions of consent.
38. The Transport and Access Unit have noted that the development exceeds the maximum number of parking spaces applicable to the site, and that the development would be required by the DCP to provide 134 bicycle spaces instead of the currently approved amount of 14. The unit have therefore suggested the utilisation of surplus parking spaces for bicycle storage.
39. The matter has been further assessed since the Traffic and Access Unit's comments were received. As outlined in the discussion section of the report, the reduction of approved parking spaces to the maximum permitted amount would be unreasonable with regard to the scope of the subject modification application, and that a reduction of parking is not proportionate to the scope of the proposal and is also not significant where compared to the latest approval (D/2012/939/J). Additionally, the scope of the subject modification does not trigger any DCP requirement to amend the bicycle storage rate within the rest of the development. As such, amendments to the approved parking and bicycle spaces are not recommended by planning assessment staff.
40. Remaining referral teams advised that the proposal is acceptable subject to conditions. Where appropriate, these conditions are included in the Notice of Determination.

Advertising and Notification

41. In accordance with the City of Sydney Community Engagement Strategy and Community Participation Plan 2023 and EP&A Act 1979, the proposed development was notified and advertised for a period of 37 days between 19 December 2023 and 25 January 2024. A total of 150 properties were notified and 42 submissions were received, each of which were objections.
42. The application was not renotified after the receipt of additional information on 1 March 2024 as only minor amendments to the architectural plans were made, and further information provided to clarify details and satisfy technical requirements of the ADG and SEPP (Housing) 2021. As such, the submitted information did not raise additional environmental impacts which would warrant renotification to surrounding neighbours.
43. Submissions can be viewed at:
<https://eplanning.cityofsydney.nsw.gov.au/Common/Integration/FileDownload.ashx?id=!!Yavq3bGrFnYFBZovGa0j0NDyqfHDoQLetdMwNQ%3d%3dCODrr9GM57Q%3d&ext=PDF&filesize=18383489&modified=2024-02-07T21:27:21Z>
44. The submissions raised the following issues:
 - (a) **Issue:** The proposed replacement of the six approved winter gardens with four outdoor terraces will result in adverse impacts to neighbouring acoustic amenity along the south facade of the Marina One apartments at 1A Clement Place, Rushcutters Bay which is in very close proximity to the north facade of the subject site. The objections particularly raise concerns with parties, music, pets and children being within the terrace gardens.

Response: The modification application has been accompanied by an Acoustic Report prepared by E-Lab Consulting which identifies a predicted noise level of up to 41dB at the most affected facade of the Marina One apartments, which is well below the maximum criteria noise level established under the acoustic modelling of 50dB. The submitted Acoustic Report has been reviewed by Council's Environmental Health Unit and is considered satisfactory. As such, the Environmental Health Unit support the proposal subject to recommended conditions of consent.

It is noted that an objection submitted by the Marina One strata committee is accompanied by an Acoustic Report prepared by Acoustic Dynamics. Council's Environmental Health Unit have also reviewed this report and note that the report utilises scenarios to demonstrate exceedance of their noise criteria, which are not representative of the proposal. In this regard, the Acoustic Dynamics report assumes the use of the terraces with one person standing per every square metre. This does not align with the expected use of the terraces as the private open space to a residential apartment. It is noted that the terraces are for residential use, and that existing condition of consent – Condition 47 - Restriction on Residential Development – prescribes a maximum occupancy rate of two adults per bedroom. Additionally, the existing condition – Condition 42 Noise - General – will continue to apply to this development.

Notwithstanding the above, if any adverse impacts to neighbouring acoustic amenity occur due to unreasonable use of the development, residents are able to raise a complaint with Council.

- (b) **Issue:** The proposed terraces will incur air quality and general amenity impacts resulting from smokers, and smoke from the use of barbeques in these spaces.

Response: An existing condition of consent – Condition 81 - Emissions – requires that the use of the premises must not give rise to the emission of gases, vapours, dusts, or other impurities which are a nuisance, injurious or prejudicial to health. Where uses of the terraces do not contravene this condition, they are considered to be reasonable on planning grounds.

- (c) **Issue:** The proposed terraces will incur visual privacy impacts to the Marina One apartments.

Response: The proposed terraces are set below the adjacent Marina One apartments and are also located behind a 4 to 5 metre tall concrete wall. The proposal therefore does not present any privacy impacts to the neighbouring building. Conversely, the subject terraces are afforded privacy from the neighbouring building by the same built form elements, and the proposed awnings. A section which shows the typical relationship of the proposed terraces to the neighbouring building is provided below.

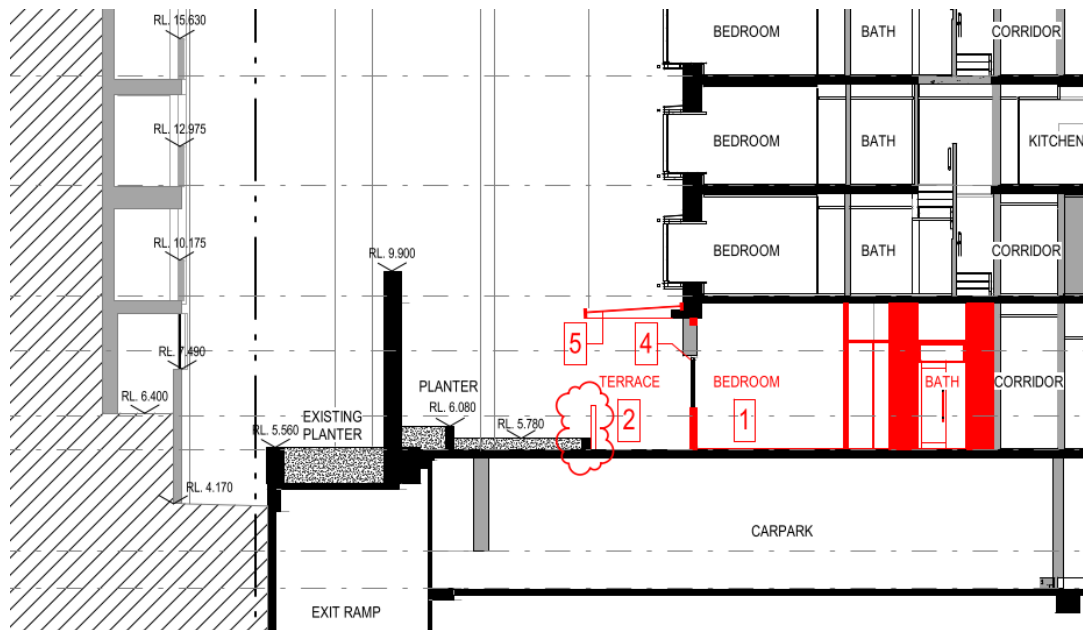


Figure 26: Section CC, demonstrating typical proposed terrace proximity and sight lines to neighbouring Marina One apartments

- (d) **Issue:** The proposal which comprises the subject S4.55(2) modification will result in the approval of a development which is not substantially the same as the original development application.

Response: Council staff consider that while the proposed modifications are significant, the development as proposed to be modified is still materially, substantially, and essentially the same development as originally approved. Despite the decrease in proposed apartment count, materiality and minor layout changes, the development remains as alterations and extensions to the Vibe Hotel and use as a residential flat building with a retail space. This matter is discussed further in the 'Discussion' section of the report.

- (e) **Issue:** The proposed development represents a deviation from prior consent which did not present the acoustic impacts subject of the submissions.

Response: The S4.55(2) modification process under the EP&A Act 1979 enables applicants to propose modifications to prior development consents. The proposed modifications are subject to Council assessment and are assessed against relevant statutory and non-statutory controls.

- (f) **Issue:** The development and subject proposal breach relevant requirements regarding residential building proximity.

Response: The proposal is a modification of the approved development for the change of use and associated alterations and extension of the existing building from a hotel to a residential flat building. It is recognised that this objection is made in relation to the proposed terraces and in concern of perceived amenity impacts, however, this assessment has reviewed the applicable statutory and non-statutory controls, relevant ADG design criteria, existing conditions of consent, existing and approved built form, and makes both a qualitative and technical assessment of potential impacts of the proposal. A site visit has also been conducted. This assessment concludes that the proximity of the proposed terraces to the neighbouring residential flat building is appropriate in this instance.

- (g) **Issue:** The application was submitted over the Christmas period to avoid proper notification of neighbouring residents.

Response: The proposal was notified and advertised for a period of 37 days between 19 December 2023 and 25 January 2024 as per the City's Community Engagement Strategy and Community Participation Plan 2023, and the EP&A Act 1979. Typically, this Section 4.55 modification would be notified for a period of 14 days, as per the Community Participation Plan. However, this period was extended to account for the Christmas period as required by the EP&A Act 1979.

- (h) **Issue:** The proposed terraces will enable residents to access the surrounding gardens, which are required to be inaccessible.

Response: The proposed landscaped gardens will remain inaccessible as required by existing condition of consent – Condition (5) - Landscaping – as a 1,050 millimetre high fence is proposed to be located around each terrace area.

- (i) **Issue:** The subject apartments and terraces will not receive adequate solar access.

Response: This matter is discussed in the 'Discussion' section above.

- (j) **Issue:** Housing supply should not be decreased.

Response: While the proposal decreases the approved unit count by two single-bedroom apartments, the matter is not an assessment criterion under Section 4.15 of the EP&A Act 1979.

- (k) **Issue:** The proposal will decrease the market value of the units in the Marine One apartments.

Response: Property valuation is not an assessment criterion under Section 4.15 of the EP&A Act 1979.

Relevant Legislation

45. Environmental Planning and Assessment Act 1979.

Conclusion

46. Having regard to all of the above matters, the proposed modification will not result in any adverse impacts on both the natural and built environment and the locality and is suitable for the site, subject to appropriate conditions of consent being imposed.
47. The development as proposed to be modified is substantially the same as that originally approved and will have minimal environmental impacts.
48. The proposed modification generally satisfies the relevant provisions of the applicable State Environmental Planning Instruments including the Sydney Local Environmental Plan 2012 and the Sydney Development Control Plan 2012.

49. The proposed modifications are therefore in the public interest and are recommended for approval subject to the conditions in Attachment A.

ANDREW THOMAS

Executive Manager Planning and Development

Thomas Walters, Specialist Planner