

Clause 4.6 variation - Height of buildings (clause 4.3 NSLEP 2013)
Proposed residential flat building
24 East Crescent Street, McMahons Point

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

This clause 4.6 variation request has been prepared in relation to Amended Architectural plans (Revision F) prepared by PBD Architects and the accompanying view analysis prepared by Urbaine Architecture.

2.0 North Sydney Local Environmental Plan 2013

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of North Sydney Local Environmental Plan 2013 (NSLEP) the height of a building on the subject land is not to exceed the height shown on the height of buildings map. In the case of the subject land, the height shown on the map is 12 metres.

The objectives of this standard are as follows:

- (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) *to promote the retention and, if appropriate, sharing of existing views,*
- (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) *to ensure compatibility between development, particularly at zone boundaries,*

- (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*
- (g) *to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

ground level (existing) means the existing level of a site at any point.

I note that We note that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* where at paragraphs 73 and 74 O'Neill C found:

- 73. *The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.*
- 74. *The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.*

It has been determined that the north-eastern corner of the proposed building breaches the height standard by 1.67 metres as a consequence of a small and constrained subfloor area located below the existing residential flat building as depicted in Figure 1 over page.

This represents a variation of 13.9%. The balance of the development complies with the 12 m height of building standard.

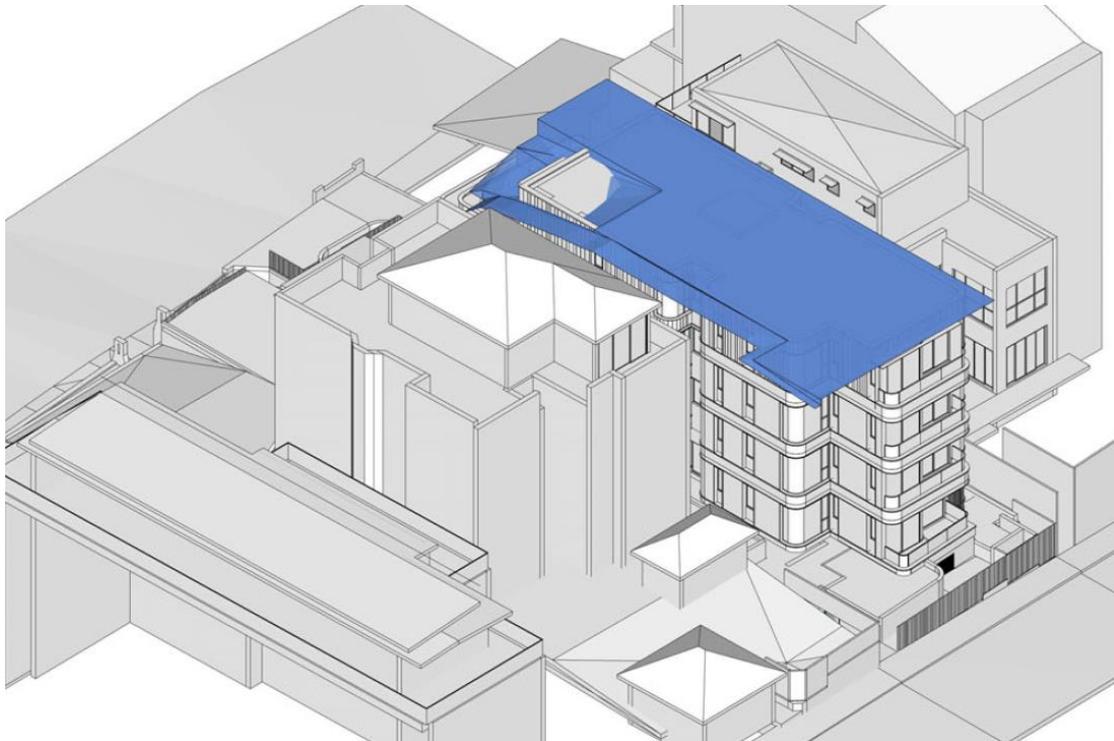
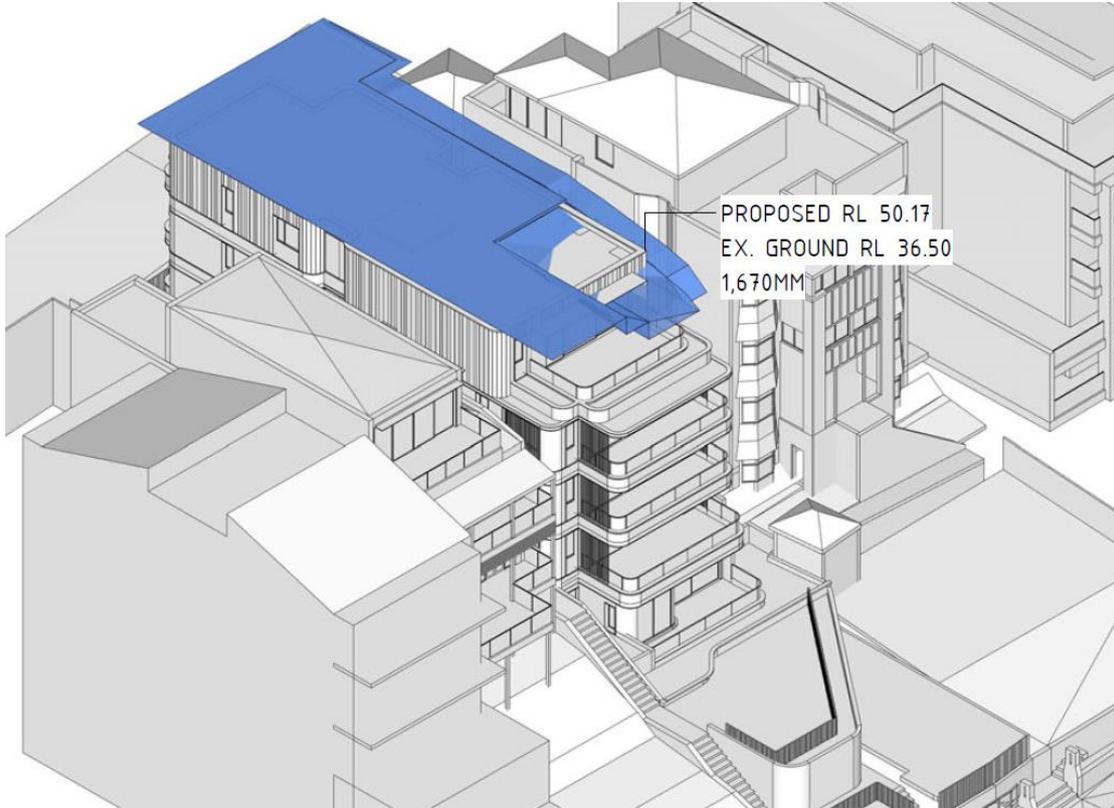


Figure 1 - 12 metre building height standard blanket diagram showing location and extent of building height breaching element

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of NSLEP provides:

- (1) *The objectives of this clause are:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of NSLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of NSLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of NSLEP which specifies a maximum building height however strict compliance is considered to be both unreasonable and unnecessary in the circumstances of this case. There are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant analysis is set out later in this written request.

Clause 4.6(4) of NSLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 20-002 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice. Clause 4.6(5) of NSLEP provides:

(5) *In deciding whether to grant concurrence, the Director-General must consider:*

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of NSLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].*

The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of NSLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of NSLEP?

4.0 Request for variation

4.1 Is clause 4.3 of NSLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Clause 4.3 prescribes height provisions that relate to certain development. Accordingly, clause 4.3 is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, which has been adopted in relation to all objectives, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*

Comment: The land upon which the development is proposed is crescent shaped with the landform falling away to the east towards East Crescent Street and to the west towards the constructed Middle Street road pavement. Section AA demonstrates that notwithstanding the proposed excavation the proposed ground floor RL remains approximately 1.4 metres above the level of Middle Street with the lower ground floor level consistent with the pre-existing levels established by the tennis court which extended across 24 and 26 East Crescent Street.

The proposed excavation facilitates floor levels which strike a contextually appropriate balance having regard to the levels established adjacent to both street frontages with the ground floor level proposed providing a greater level of streetscape consistency and activation compared to the levels currently established on-site. The proposed excavation will facilitate the re-establishment of pre-existing natural ground levels adjacent to the East Crescent Street frontage with the excavation required through the centre of the site facilitating ground floor levels which are more compatible with the levels established on Middle Street without compromising the ability to provide landscaping adjacent to both frontages of the property.

The non-compliant building height elements arise due to a localised change in ground level (existing) in the north-eastern corner of the development where a small and constrained subfloor area has been identified below the existing residential flat building.

In this regard, I am satisfied that the development conforms to/ relates to and reflects natural/ pre-existing landforms/ ground levels and to that extent satisfies this objective notwithstanding the building height breaching elements proposed.

(b) *to promote the retention and, if appropriate, sharing of existing views,*

Comment: For the purpose of this objective, I have carried out an assessment of potential view loss associated with the non-compliant elements of the development from both the public and private domains.

In relation to public views, I confirm that I have walked the surrounding streets to identify existing view lines over and across the development site. This includes walking approximately 100m along each street frontage in both directions from the subject site. During such inspection I was unable to identify any public views which would be affected by the non-compliant building height breaching elements of the proposed development.

In relation to private views, It has been determined that the proposed development may impact on views available from 22 and 26 East Crescent Street.

An assessment of potential view impacts having regard to the view analysis prepared by Urbaine Architecture (a copy of which is at Attachment 1) and the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 is as follows.

First Step - Assessment of views to be affected

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

26 East Crescent Street

Views are available from the east facing windows at each level within this adjoining property to the east, across East Crescent Street to Sydney Harbour, Milsons Point and the Sydney Harbour Bridge beyond.

Views also obtained from the uppermost apartment in a southerly direction across the subject property and the properties beyond to the Sydney CBD skyline. Views are also obtained in a south-westerly direction towards the harbour Goat Island, Mort Bay, Snails Bay and Birchgrove in the middle distance, with a view to Anzac Bridge in the far distance to the south-west. These views include the land water interface on the southern edge of the harbour.

22 East Crescent Street

This property enjoys views from the east facing living room and adjacent balcony areas across the harbour to Milsons Point sweeping around in a north-easterly direction towards the North Sydney CBD skyline. Views are also obtained across the rear western boundary of the property generally as outlined above.

Second Step - From what part of the property are the views obtained

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.

Comment: The views to be affected as identified in the view analysis prepared by Urbaine Architecture are obtained from both a seated and standing position from the living areas and adjacent balconies and in each case directly across the side boundary of the respective properties.

Third Step – Assessment of extent of the impact

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. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless.

For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

Comment: The extent of view impact is depicted in the view analysis prepared by Urbaine Architecture.

26 East Crescent Street

The proposal will have no impact on views currently obtained from this property in an easterly direction towards Sydney Harbour, Milson's Point and the Sydney Harbour Bridge beyond nor the views currently available from the upper level apartment in a southerly direction towards the Sydney CBD skyline.

Whilst some views available from the living areas and adjacent terrace towards the land water interface around Goat Island will be obscured by the proposed development we note that all remaining critical view elements will be retained including views towards Mort Bay, Snails Bay and Birchgrove in the middle distance with the view of the Anzac Bridge also retained. Given the totality of views retained in a northerly, easterly, southerly and westerly direction from this upper level apartment the view impact is qualitatively described as minor particularly in circumstances where these views are only obtained from an apartment located above the prescribed building height standard.

22 East Crescent Street

The proposal will have no impact on views currently obtained from this property in an easterly direction towards Sydney Harbour and Milson's Point. The view analysis diagrams demonstrate that whilst some views available from the mid-level living area and adjacent terrace in a northerly direction, across the side boundary, towards the North Sydney CBD and associated skyline will be obscured that such view impact is appropriately described as minor in the context of the totality of views retained from each level of this property.

Fourth Step – Reasonableness of the 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.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: As previously indicated, the proposed development has been setback from East Crescent Street to align with the existing residential flat building on the subject property with such alignment consistent with that established by the 2 immediately adjoining properties. The view obstruction identified above in relation to views from the mid-level living room and adjacent balcony of 22 East Crescent Street are not caused by any non-compliant building element.

In relation to the view impact on 26 East Crescent Street from the upper-level apartment in a south westerly direction we note that the elements of the proposal causing the impact are compliant with the 12 metre building height standard with both the rear (Middle Street), side boundary setbacks and associated wall height (building envelope) contextually appropriate and consistent with the objectives of the applicable setback controls. We also note that the views to be impacted are from an apartment located wholly above the 12 metre height standard and to that extent there can be no reasonable expectation in relation to the absolute protection of views. Under such circumstances, the consent authority can be satisfied that a view sharing outcome is achieved.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140.

Notwithstanding the non-compliant building height elements, I am satisfied that the proposal provides for the retention and sharing of both public and private views and to that extent this objective is satisfied.

- (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*

Comment: The shadow diagrams at Attachment 2 indicate that in relation to No. 22 East Crescent Street:

- Solar access is maintained to the lower level east facing living room windows between 9am and 10am on 21st June with solar access maintained to a significant portion of the adjacent east facing balcony between 9am and approximately 11:15am on 21st June.
- Solar access is maintained to the east and/or north facing upper level living room windows and adjacent east facing balcony between 9am and 1pm on 21st June with solar access maintained to the upper area of the north facing living room windows at this level through to 3pm.
- Solar access is maintained to the west facing ground floor living room and adjacent courtyard between approximately 1pm and 3pm on 21st June.

Such quantum of solar access is considered acceptable having regard to the solar access provisions at clause 1.3.7 of the NSDCP particularly given that No. 22 East Crescent Street is located immediately to the south of the development site where it is highly vulnerable to shadowing impact from any development on the subject property.

The view from the sun solar diagrams clearly demonstrate that reasonable access to sunlight and daylight is maintained to No. 22 East Crescent Street consistent with the objective of the clause 1.3.7 NSDCP solar access control being to ensure that all dwellings have reasonable access to sunlight and daylight. Importantly, the shadow diagrams demonstrate that the non-compliant building height component of the development does not give rise to any additional shadowing impact on the southern adjoining property.

Notwithstanding the building height breaching elements, the proposal maintains reasonable solar access to existing dwellings, maintains solar access to public reserves and streets, and promotes solar access for future development. Accordingly, the proposal complies with this objective.

- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*

Comment: Having reviewed the plans in the context of the juxtaposition of adjoining residential development I am satisfied that the building height breaching element will not give rise to adverse visual or aural privacy impacts to any surrounding residential property nor compromise the privacy of future occupants of the proposed development.

Notwithstanding the building height breaching elements the proposal is consistent with this objective.

- (e) *to ensure compatibility between development, particularly at zone boundaries,*

Comment: The subject property is not at a zone boundary.

Assistance as to building compatibility in a broader urban context is obtained from the planning principle established by the Land and Environment Court in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191.

In this judgement Senior Commissioner Roseth indicated:

22. *There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though the difference in these attributes increases, harmony is harder to achieve.*
24. *Where compatibility between a building and its surroundings is desirable, its 2 major aspects are physical impact and visual impact. In order to test whether a proposal is compatible with its context, two questions should be asked.*
- Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.*
 - Is the proposal's appearance in harmony with the buildings around it and the character of the street?*

25. *The physical impacts, such as noise, overlooking, overshadowing and the constraining development potential, can be assessed with relative objectivity. In contrast, to decide whether or not a new building appears to be in harmony with its surroundings is a more subjective task. Analysing the existing context and then testing the proposal against it, however, reduced the degree of subjectivity.*
26. *For a new development to be visually compatible with its context, it should contain, or at least respond to, the essential elements that make up the character of the surrounding urban environment. In some areas, planning instruments or urban design studies have already described the urban character. In others (the majority of cases), the character needs to be defined as part of a proposal's assessment. The most important contributor to urban character is the relationship of built form to surrounding space, a relationship that is created by building height, setbacks and landscaping. In special areas, such as conservation areas, architectural style materials are also contributors to character.*
27. *Buildings do not have to be the same height to be compatible. Where there are significant differences in height it is easier to achieve compatibility when the change is gradual rather than abrupt. The extent to which height differences are acceptable depends also on the consistency of height in the existing streetscape.*

In this regard, I have formed the opinion that the elements of the development that breach the building height standard will not give rise to unacceptable physical impacts on surrounding development in relation to views, privacy, overshadowing or development potential. Further, most observers would not find the building height proposed, in particular the non-compliant building height element, offensive, jarring or unsympathetic in a streetscape context or incompatible with the built form characteristics of development within the site's visual catchment. Such outcome is depicted in Figure 2 over page.

Accordingly, it can be reasonably concluded that notwithstanding the building height breaching elements that the proposal is able to co-exist in harmony with surrounding development, will not give rise to any adverse streetscape or residential amenity impacts and accordingly is compatible with its surroundings.

The development, notwithstanding the building height breaching elements, ensures compatibility between development at the zone boundary interface and accordingly satisfies this subjective.

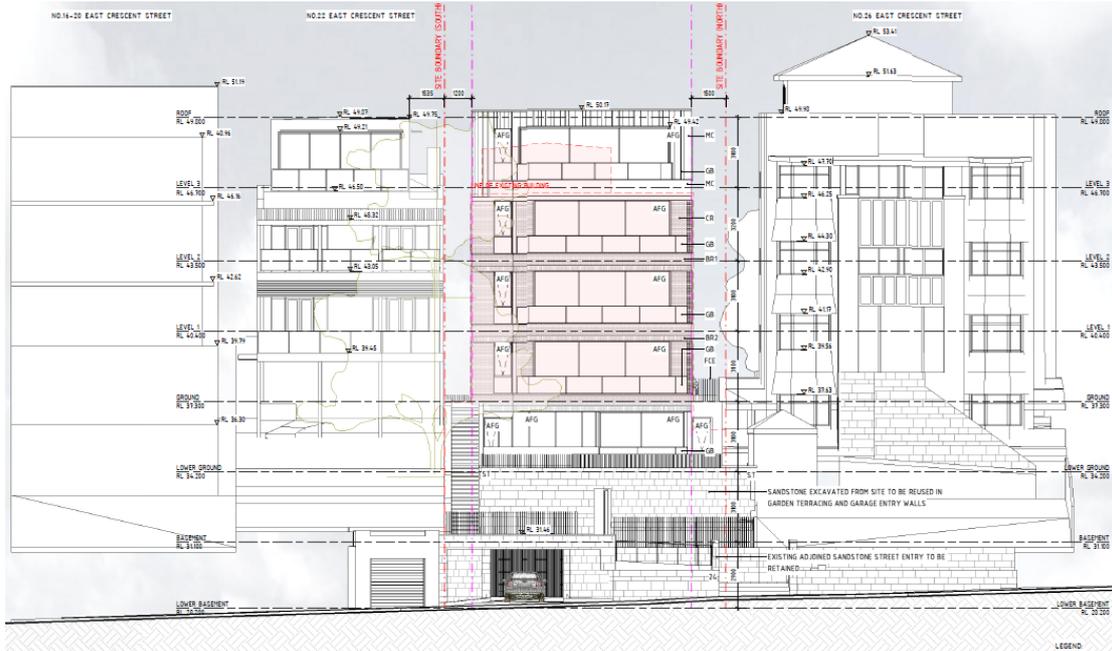


Figure 2 - Plan extract showing the complimentary and compatible building height proposed notwithstanding the building height breaching element

- (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

Comment: The subject site is located within the Lavender Bay Planning Area and specifically the McMahons Point Neighbourhood Neutral Neighbourhood as depicted in Figure 3 over page.

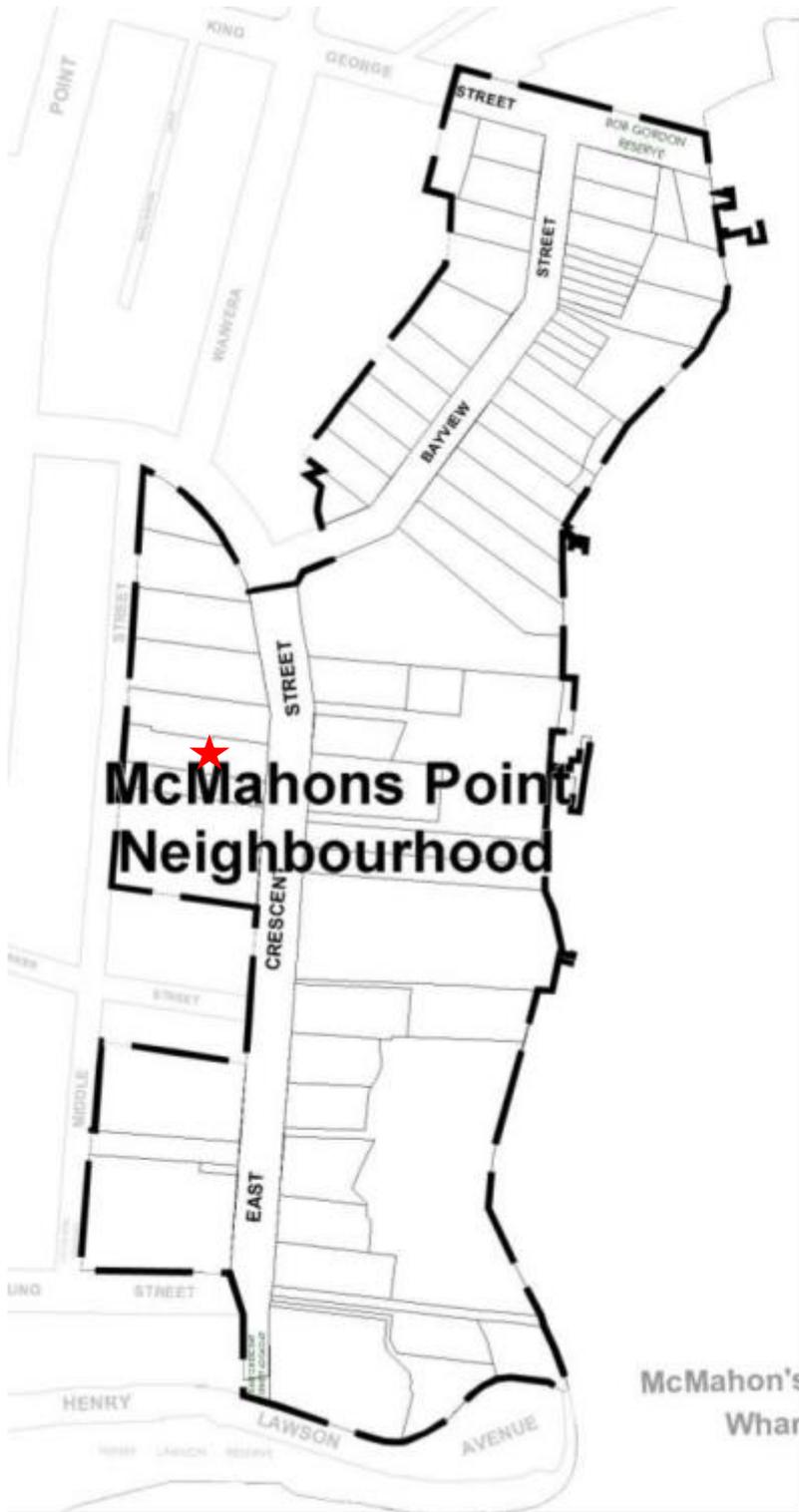


Figure 3 – Lavender Bay Planning Area (McMahon's Point Neighbourhood) (NSDCP)

I have formed the considered opinion that the proposed development is consistent with the Desired Future Character for the precinct given the residential flat building topology proposed which generally conforms with the provisions contained within the DCP and which includes natural materials and colours consistent with those established by surrounding development.

The form and massing of the development maintains the rhythm of development within the street and an appropriate spatial relationship with surrounding development. The proposal provides for a significant betterment in terms of landscape outcome for the site with the building sitting within a landscaped setting.

I have also formed the considered opinion that the height, form, massing and setbacks of the proposed development are complimentary and compatible with the existing character of development established on the site and within the sites visual catchment. In forming such opinion, I note:

- But for a small breach of the building height standard in the north-eastern corner of the subject site the proposal is compliant with the building height standard with the number of storeys proposed complimentary and compatible with those established by adjoining development as viewed from both street frontages.
- The front and side setbacks are consistent with those established by the existing residential flat building on the site and compatible with those of development on surrounding land within the same zoning. The breach of the building height control will not give rise to any adverse streetscape or residential amenity consequences.
- The contextually appropriate nature of the proposed building heights and setbacks lead to a conclusion that the resultant floor space is acceptable particularly in circumstances where no FSR standard applies to development on surrounding land.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its height, footprint and setbacks offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment as depicted in Figure 2.

Having regard to the above, the non-compliant building height component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard.

- (g) *to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.*

Comment: N/A

This objective is satisfied notwithstanding the building height breaching elements proposed. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned R4 High Density Residential pursuant to the provisions of NSLEP. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage the development of sites for high density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.*
- *To ensure that a reasonably high level of residential amenity is achieved and maintained.*

I consider the development to be consistent with the zone objectives as follows:

To provide for the housing needs of the community within a high density residential environment.

Response: The proposal will provide for a reduction in residential density on this particular site although the quality of housing is significantly improved. This objective is satisfied notwithstanding building height breaching elements proposed.

To provide a variety of housing types within a high density residential environment.

Response: The proposal reinstates a residential flat building use and built form outcome on the site and to that extent maintains the established variety of housing types within the high density residential zone. The proposal achieves this objective notwithstanding the building height breaching elements proposed.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

Response: The building height breaching elements will not inhibit the development of other permissible land uses within the R4 High Density Residential zone. This objective is achieved notwithstanding building height breaching elements proposed.

To encourage development of sites for high density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.

Response: The proposed development provides an opportunity to significantly enhance the amenity of the accommodation on the site whilst not compromising the amenity of the surrounding area or the natural or cultural heritage of the area as detailed within this request. This objective is achieved notwithstanding building height breaching elements proposed.

To ensure that a high level of residential amenity is achieved and maintained.

Response: As previously indicated, the proposed development provides an opportunity to significantly enhance the amenity of the accommodation on the site whilst not compromising the amenity of the surrounding area or the natural or cultural heritage of the area as detailed within this request. This objective is achieved notwithstanding the building height breaching elements proposed.

Accordingly, the consent authority can be satisfied that the proposal is consistent with the R4 High Density Residential zone objectives. Under such circumstances, the proposal is not antipathetic to the objectives as outlined notwithstanding the building height breaching elements proposed.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R4 High Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

4.2B Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient Environmental Planning Grounds

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

Ground 1 – Small and localised variation in ground level (existing)

The north-eastern corner of the proposed building breaches the height standard by 1.67 metres as a consequence of a small and localised variation in ground level (existing) created by an accessible subfloor area located below the existing residential flat building. If this subfloor area was inaccessible, ground level (existing) would be measured from the existing ground floor level slab whereby the entire development would comply with the 12 metre height of buildings standard.

Ground 2 – Minor nature of breach

The extent of building height breach is confined to the north-eastern corner of the development which as a percentage of the overall building footprint is considered to be quantitatively and qualitatively minor. The building height breaching component of the development does not give rise to adverse streetscape or residential amenity impacts in terms of views, solar access or privacy.

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Ground 3 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use and development of the land by enabling a consistent building parapet height and alignment as viewed from East Crescent Street. Strict compliance would compromise the design quality and overall amenity of the upper-level apartment in circumstances where the building height breaching element does not give rise to adverse streetscape, heritage conservation or residential amenity impacts. Approval of the variation. Approval of the building height variation will achieve this objective.

Objective (g) to promote good design and amenity of the built environment

For the reasons outlined in this submission, approval of the variation to the building height standard will promote good contextually appropriate design and facilitate enhanced design quantity and amenity outcomes for the development. Approval of the building height variation will achieve this objective.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test.*

The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in *Initial Action* (Para 27) described the relevant test for this as follows:

“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

4.5 Has the consent authority considered the matters in clause 4.6(5) of NSLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development and for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

28.2.2023

Attachment 1 View analysis diagrams
Attachment 2 Shadow diagrams

Attachment 1 View analysis diagrams



aerial view, indicating viewpoint locations



VP1 - existing photo



VP1 - block photomontage of new proposal



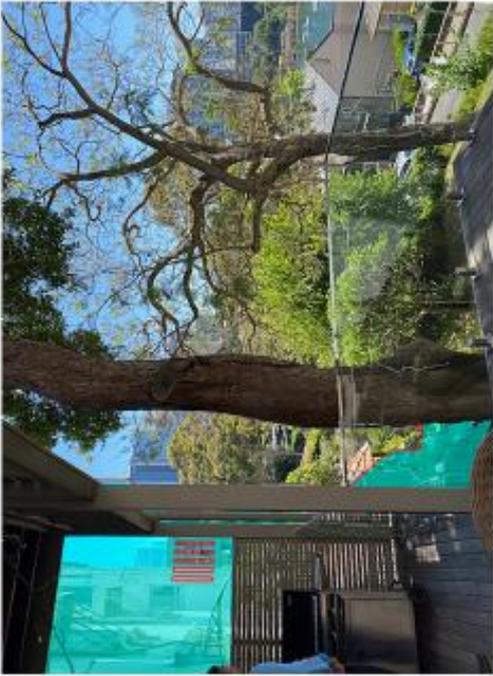
VP1 - visual impact shown in cyan overlay



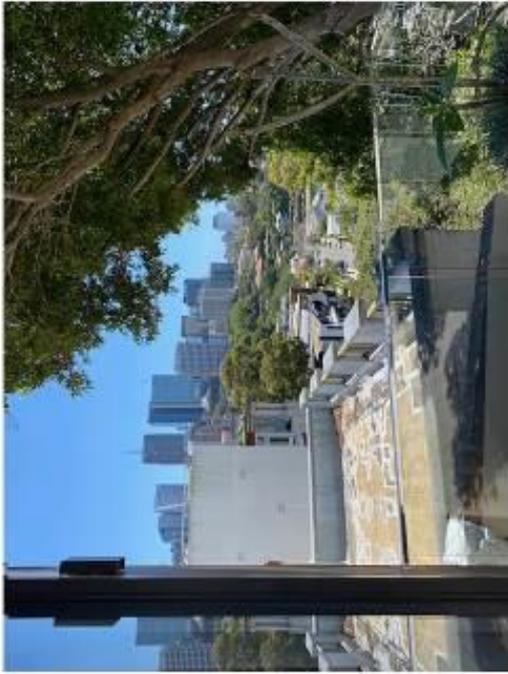
VP1A - existing photo



VP1A - block photomontage of new proposal



VP1A - visual impact shown in cyan overlay



VP2A - existing photo



VP2A - block photomontage of new proposal



VP2A - visual impact shown in cyan overlay



VP3A - existing photo



VP3A - block photomontage of new proposal



VP3A - visual impact shown in cyan overlay



VP4 - existing photo



VP4 - block photomontage of new proposal

VP4 - existing photo



Viewpoint 4



A-2.2023



VP4 - visual impact shown in cyan overlay



VP4A - existing photo



VP4A - block photomontage of new proposal



V4A - visual impact shown in cyan overlay



VP16 - existing photo



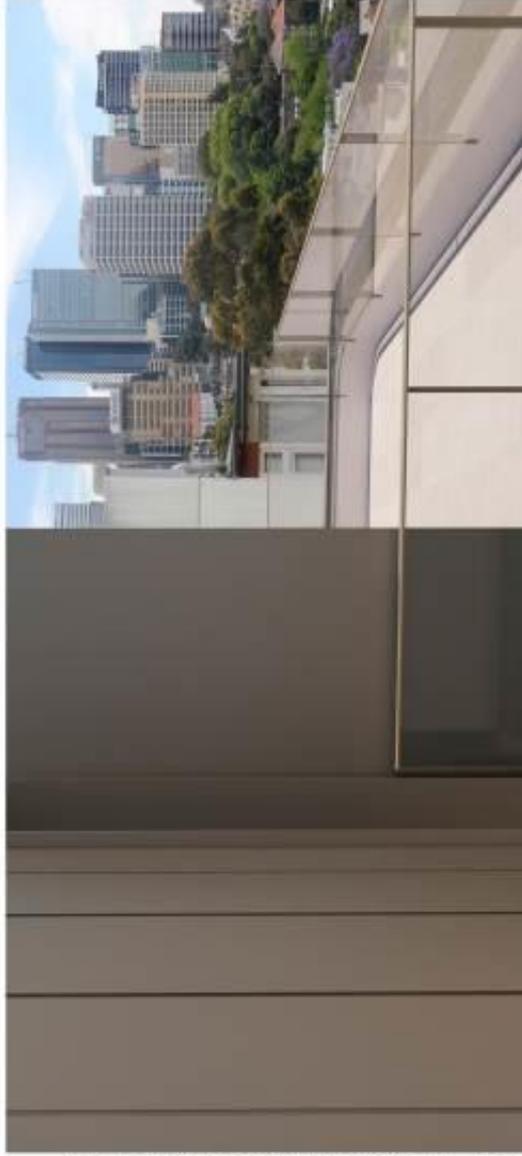
VP16 - block photomontage of new proposal



VP16 - visual impact shown in cyan overlay



VP22 - existing photo



VP22 - block photomontage of new proposal



VP22 - Visual impact shown in cyan overlay

Attachment 2 Shadow diagrams

GENERAL NOTES

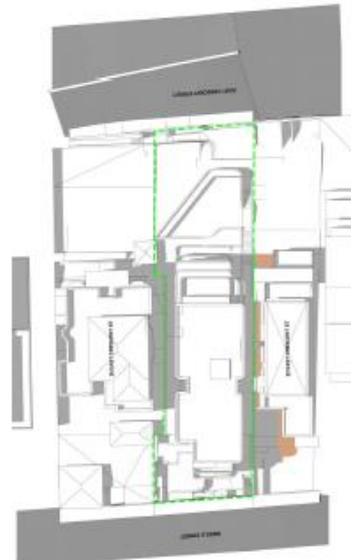
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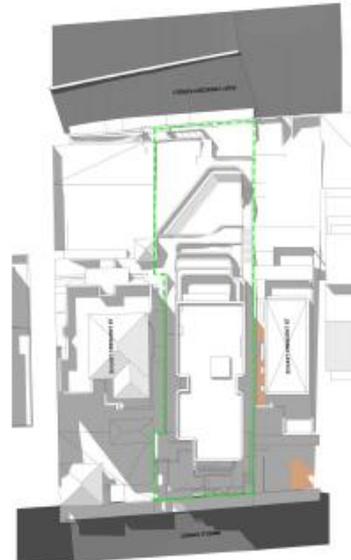
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REVISIONS

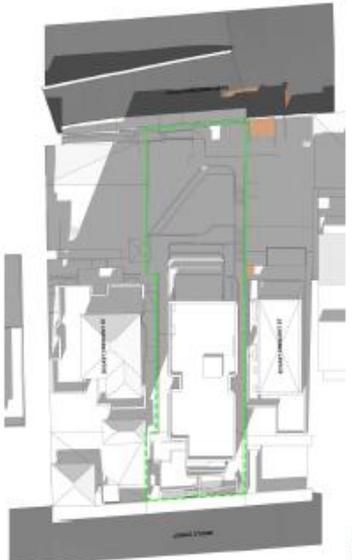
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10:00 AM - 21 MARCH



11:00 AM - 21 MARCH



12:00 PM - 21 MARCH

PROJECT INFORMATION

PROJECT: **PERMIT ARCHITECTS**

CLIENT: **PERMIT ARCHITECTS**

ADDRESS: **1000 WEST 10TH AVENUE, SUITE 1000, DENVER, CO 80202**

DATE: **10/10/2017**

SCALE: **1/8" = 1'-0"**

PERMIT ARCHITECTS

1000 WEST 10TH AVENUE, SUITE 1000, DENVER, CO 80202

TEL: (303) 733-1000

WWW.PERMITARCHITECTS.COM

SHADOW DIAGRAM - 21 MARCH

DATE: 10/10/2017

SCALE: 1/8" = 1'-0"

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DATE: 10/10/2017

SCALE: 1/8" = 1'-0"

GENERAL NOTES

- 1. CONSULT ALL APPLICABLE LOCAL, STATE & FEDERAL CODES.
- 2. PROVIDE ALL NECESSARY MATERIALS, FINISHES & LABOR.
- 3. VERIFY ALL EXISTING CONDITIONS PRIOR TO CONSTRUCTION.
- 4. MAINTAIN ALL UTILITIES UNLESS OTHERWISE NOTED.
- 5. PROTECT ALL ADJACENT AREAS FROM DAMAGE.
- 6. OBTAIN ALL NECESSARY PERMITS PRIOR TO CONSTRUCTION.
- 7. VERIFY ALL DIMENSIONS AND LOCATIONS PRIOR TO CONSTRUCTION.
- 8. MAINTAIN ACCESS TO ALL ADJACENT PROPERTIES.
- 9. PROTECT ALL EXISTING TREES AND LANDSCAPE.
- 10. VERIFY ALL FOUNDATION CONDITIONS PRIOR TO CONSTRUCTION.
- 11. PROVIDE ALL NECESSARY SAFETY MEASURES.
- 12. MAINTAIN ALL RECORDS OF CONSTRUCTION.

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