



AMENDED CLAUSE 4.6 – BUILDING HEIGHT

Major alterations and additions to an existing part seven, part nine storey residential flat building

20-22 Waruda Street,
Kirribilli

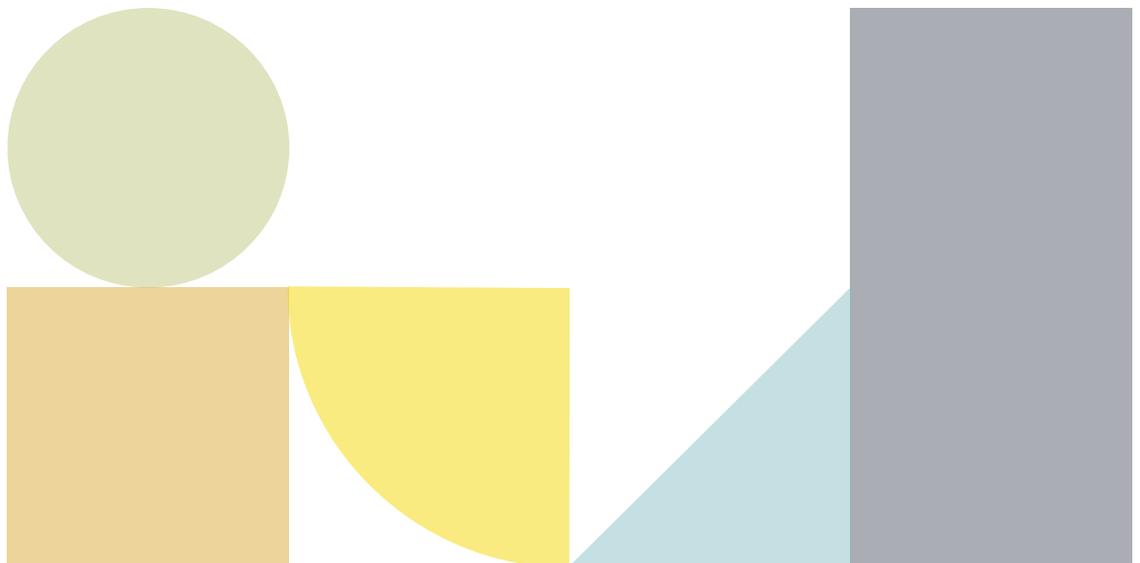
Prepared for: Stable Innovations Sydney Harbour Pty Ltd

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**Clause 4.6 Variation -
Building Height**





Clause 4.6 Variation Statement – Height of Buildings (Clause 4.3)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of *North Sydney Local Environmental Plan 2013* to accompany the DA which seeks 'major alterations and additions to an existing part seven, part nine storey residential flat building' at No. 22 Waruda Street, Kirribilli ('the site').

2. PROPOSED VARIATION

Clause 4.3 of NSLEP 2013 prescribes the maximum building height for the site and refers to the *Height of Buildings Map*. Building height is defined as:

'...building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like...'

The relevant maps (HOB_004) indicates that the maximum building height permitted at the subject site is 12m.



Figure 1 Extract from Height of Buildings Map [M=12m]

The maximum height control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.



3. PROPOSED VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

The proposed development has a maximum height of 29.08m from the existing excavated ground floor (RL 6.33) to the proposed roof top structures (RL35.41) and is therefore non-compliant. The non-compliance is a maximum of 17.08m or 142%. This measurement is consistent with the definition of building height, in which this is measured from the existing excavated floor level per the findings in *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC158*. The proposal also contains additional non-compliant heights as measured from the existing floor level, as follows:

- 28.08m to the level 8 parapet roof;
- 25.23m to the level 7 parapet roof fronting Waruda Street; and
- 25.23m to the level 7 parapet roof to the northern (rear) boundary.

Of relevance, the proposal will not alter the floor level of the existing lower ground, being RL 6.33. Furthermore, the proposal will involve major alterations and additions to the existing residential flat building which currently contains a maximum height non-compliance of 30.7m to roof structures, 29.8m to the lift overrun and 26.10m to the parapet fronting Waruda Street, as measured from the existing excavated ground level.

It is noted that the extent of the variation is skewed, predicated on how the building height is measured, as is discussed in further detail below. That is, the extent of non-compliance varies when measured from the finished floor level or as measured from the topography around the periphery of the building, as is consistent with *Bettar v Council of the City of Sydney (2014) NSWLEC 1070*.

In particular, in *Bettar v Council of the City of Sydney (2014) NSWLEC 1070*, Commissioner O'Neil stated as follows:

41 I prefer Mr Chamie's approach to determining the existing ground level because the level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site and remains relevant once the existing building is demolished.

In this regard, when measuring the maximum height of the proposed development from natural ground level on the periphery of the site and extrapolating between periphery levels, that is, without the variations to the landform created by the existing excavated floor level (RL 6.33), the proposal attains a maximum height of 27.1m (15.1m or 125% variation) to the highest point, being the roof top structures. The remaining non-compliant heights as measured from the extrapolated topography are as follows:

- 26.95m to the level 8 parapet roof;
- 24.65m to the level 7 parapet roof fronting Waruda Street; and
- 19.95m to the level 7 parapet roof to the northern (rear) boundary.

Notwithstanding and where the extent of the variation is greatest, this is lessened with the consideration given by *Bettar v Council of the City of Sydney*. Commissioner O'Neil goes onto states as follows:

42 However, nothing turns on which definition I prefer, as the amended proposal exceeds the building height development standard on both experts' determination of the existing ground level (the difference between the experts being the quantum and location of the exceedance) and the applicant has provided a written request for the contravention of the building height development standard, pursuant to cl 4.6 of LEP 2012.

The same conclusion applies in this instance, however regardless of the definition, the proposal will exceed the 12m height development standard under NSLEP 2013. Therefore, in the interest of abundant caution, this variation has considered the maximum height of the building when measured from the lowest finished floor level of the existing building.

Figure 2 below is a height blanket showing the topography as extrapolated around the periphery of the site, when comparing the existing and proposed building. **Figure 3** demonstrates building height in relation strict application of the building height definition, that is, from existing excavated floor level and topography around the site.

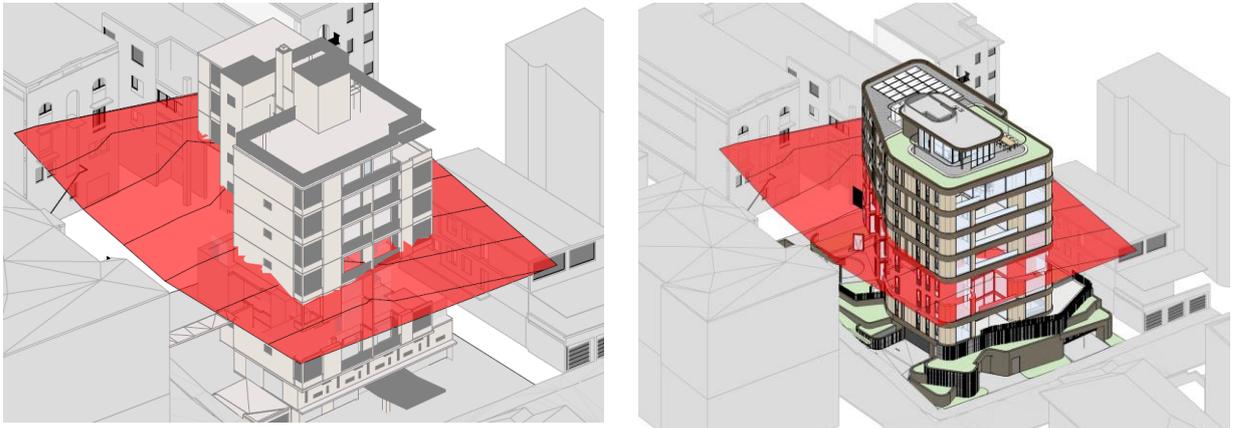


Figure 2 Height Blanket Diagrams; existing (left), proposed (right)

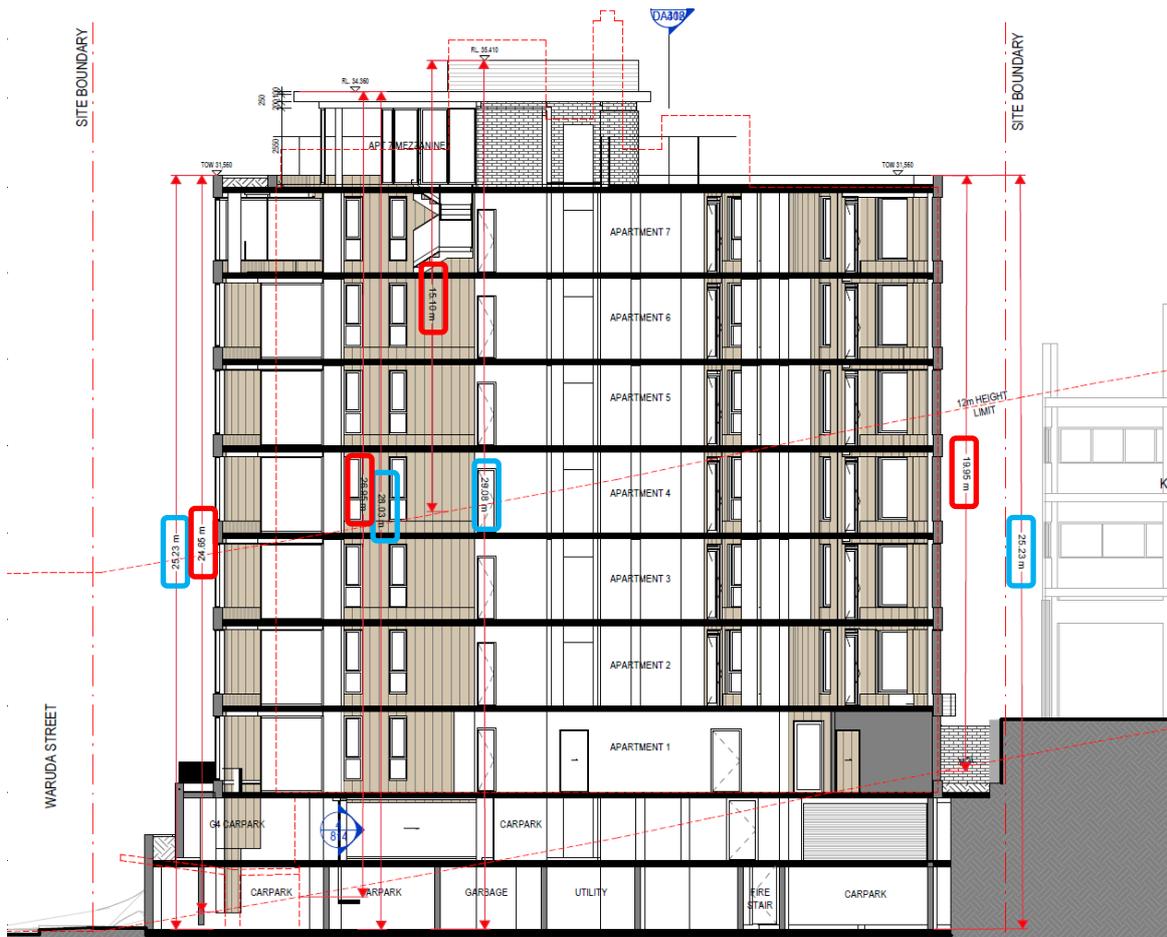


Figure 3 Section illustrating maximum height non-compliance (Blue indicates height from existing floor level, red indicates height from extrapolated topography)

4. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

- (1) *The objectives of this clause are as follows—*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (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.*
- (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.*
- (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 Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 4.3 in relation to land identified as "Area 1" on the Special Provisions Area Map, other than subject land within the meaning of clause 6.19C,

(cab) clause 4.4, 5.6 or 6.19C in relation to land identified as "Area 1" on the Special Provisions Area Map,

(cb) clause 6.3(2)(a) and (b),

(cba) clause 6.19A,

(cc) clause 6.20.

(8A) (Repealed)

The development standards in Clause 4.3 are not "expressly excluded" from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building height of 29.08m which equates to a numerical variation of 17.08m and a percentage variation of 142%, noting that the maximum height relates to the proposed roof structures as measured from existing excavated floor level.

5. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The judgment goes on to state that:

“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgment then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 and 5 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

In addition to the above and in accordance with 5 of *Wehbe V Pittwater Council*, strict compliance with all current planning provisions, namely building height, is incompatible as it applies to land that should have not been included in

the zoning. That is, at the time the NSLEP 2013 was adopted, the existing development on the site, and numerous developments within the surrounding locality, did not comply with the maximum building height of 12m. The adopted NSLEP 2013 did not take into account the height of the existing built forms, and importantly, that it is improbable that existing buildings of this scale would be demolished and rebuilt with a compliant building height of 12m. If the NSLEP 2013 was prepared with detailed consideration of the existing building heights in the locality, it would have included controls which are more reflective of that already established on-site and within the surrounding locality.

In this regard, the current 12m maximum building height is illogical and inappropriate at the time it was implemented as part of the NSLEP 2013, failing to consider the context of the locality and contribution of the existing building on-site to the height of buildings development standard.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

- 1. The building height has already been established for the subject site**
 - a. The existing building on-site contains a height non-compliance of 30.7m (RL37.086) to the uppermost portion of the building and 26.1m to the parapet of level 7 (fronting Waruda Street), as measured from the existing excavated ground floor. As the building has been in-situ for a considerable period of time, the height, bulk and scale on the subject site has been established and is an integral part of the Kirribilli locality. Whilst the maximum height of a locality is not established by a single building, the existing development has undoubtedly defined the corner of Waruda and Beulah Street. Further, the 12m standard is also not reflective of the height of surrounding developments, as numerous buildings exceeded this control upon adoption of NSLEP 2013. This results in an eclectic mix of heights and built forms. As such, flexibility to the

standard should be applied as the height of buildings on site and within the locality pre-date the implementation standard.

- b. As such, the proposal is designed to maintain the established building height, however, will form part of a cohesive vision for the site. Specifically, the height breach is at its greatest for the roof structures as measured from the existing ground floor level, with a maximum height variation of 29.63m. The extent of variation also includes parapet of level 8, being 28.22m, and parapet of level 7, being 25.23m.
- c. The proposed development seeks to rebirth the existing residential flat building through major alterations and additions. As the proposal will retain the general envelope and footprint of the existing building, with sympathetic increases in floor area, the existing height established on the subject site will be maintained (**Figure 4**). That is, the extension of the footprint centrally and to the south will not substantially alter the established building height on-site. The existing building as it corresponds to the site boundaries, particularly to the north and east where it relates to the neighbouring properties, will not be altered. Whilst the extent of variation increases, the proposal will enable major improvements to architectural character which neutralises the impact of any increase in building height.

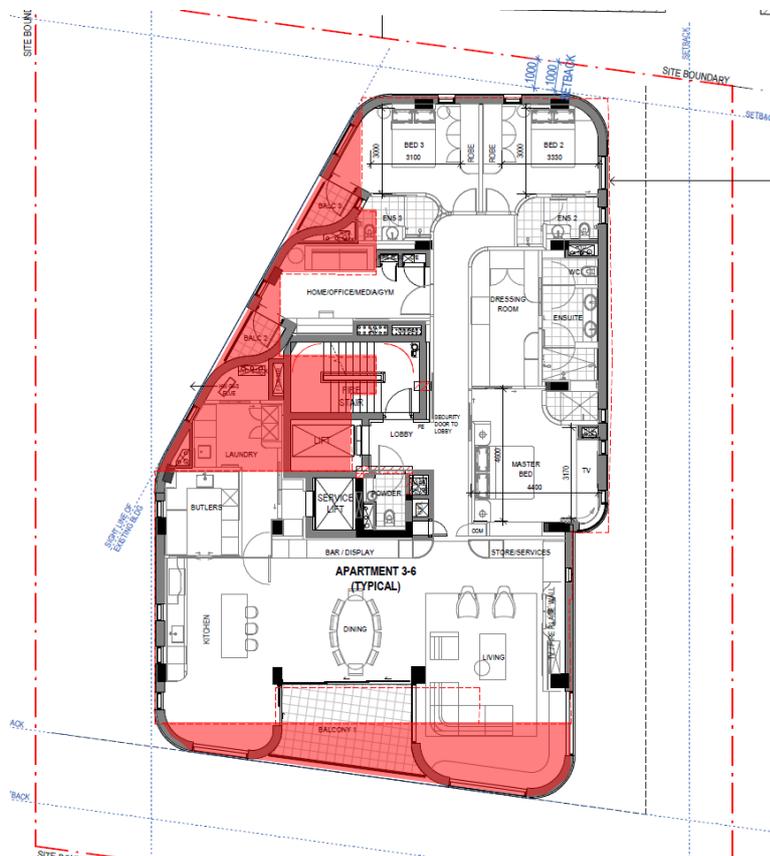


Figure 4 Floorplate of proposed development, with additional area highlighted in red



- d. The proposal will also involve the provision of a lobby space on level 8 and alterations to the rooftop building services, as to align with the contemporary design. This therefore increases the overall area of height non-compliance on the uppermost level, as shown in **Figure 5**. Whilst the proposal will result in an increased height on the uppermost level, this is recessed and will generally align with the overall extents of the existing building, to ensure that it will be predominately obscured as viewed from Waruda and Beulah Street (**Figure 6**).

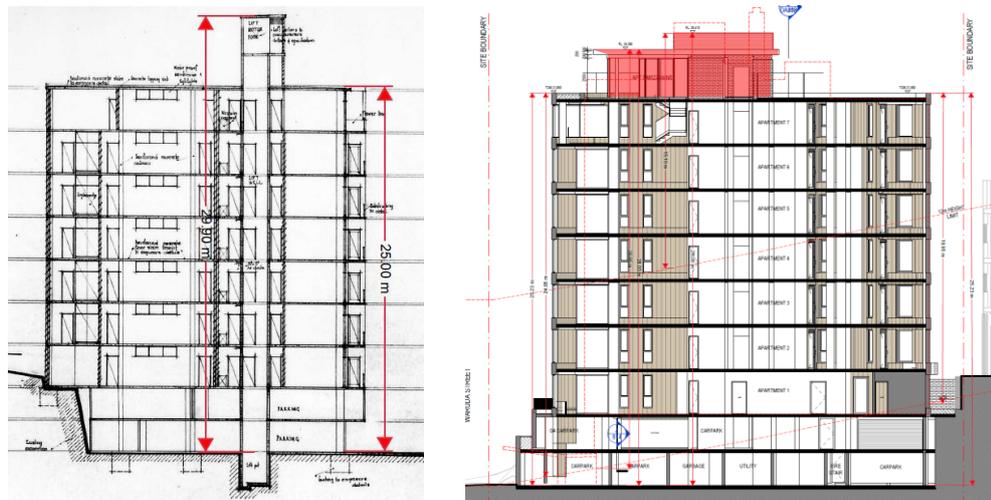


Figure 5 Existing section (left), proposed section (right), with new components highlighted red

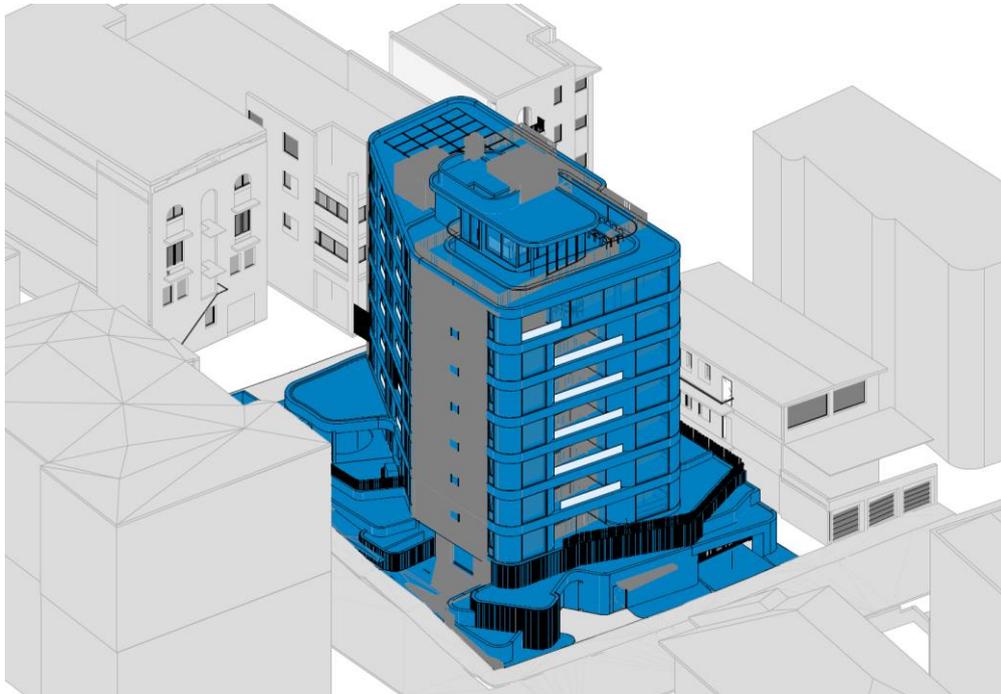


Figure 6 Comparison of existing and proposed built forms (perspective)



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- e. When compared to the existing building on-site and a fully compliant built form (with both LEP and DCP requirements) the following is apparent:
- The proposal will not result in any adverse impact to the amenity of surrounding properties when compared to the existing building, as discussed;
 - The proposal will significantly improve the amenity of future occupants, which cannot be achieved by retaining the existing building;
 - The proposal will result in wholesale improvements to the design, landscaping and character of the building only achievable through the proposed works;
 - Demolition of existing structures and construction of a compliant development will not be a sustainable outcome, as discussed in this Variation;
 - A compliant development will result in a loss of residential apartments and create subterranean dwellings which result in poorer amenity; and
 - Demolition and construction is not economically feasible and it would be more efficient (and a substandard outcome) to simply satisfy the fire order.

2. The non-compliance will contribute to the character of the locality

- a. Object 1.3(g) of the EP&A Act 1979 is “to promote good design and amenity of the built environment”. As detailed, the proposal will generally maintain the building height and envelope, however, substantially improves and enhances the architectural design and character of the building. Whilst the building will remain as non-compliant, there will be a significant improvement to the visual and physical appearance of the development which will reduce the apparent height, bulk and scale and ultimately contribute to the character of the locality, future residents and surrounding properties. Importantly, the existing building and its non-compliances are visually obtrusive and jarring and do not provide any benefit to the character of the locality.
- b. As considered in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115*, the desired future character is subjective and can be set by the existing, recently approved and proposed buildings within the neighbourhood. In this regard, the existing building, which has been in-situ for a considerable period of time, has established the building height and character of development on the subject site. Although the proposed development maintains the established height, bulk and scale, it provides an architectural design which will significantly improve the character of the development. It is also noted that other buildings in the locality do not comply (to varying degrees) with the development standard..
- c. The existing building on-site is identified as an ‘uncharacteristic’ item within the *Kirribilli Heritage Conservation Area*. The proposal will reimagine the existing building to provide a development which is to be identified as ‘neutral’ within the conservation area and appropriately relate to the surrounding heritage items. As identified in the Heritage Impact Statement prepared by *Heritage 21*, the proposed architectural design and selected materiality will positively contribute to the streetscape character of the locality.

3. The non-compliances facilitate an ecologically sustainable development

- a. Object 1.3(b) of the EP&A Act 1979 is “to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment”. In this regard, strict compliance with the development standard would require significant or complete demolition of the existing building, removing the distinct benefits afforded by the proposal. Specifically, the proposal seeks to deliver major alterations and additions to reuse the embodied energy contained within the floor slabs and structural components. The retention and reuse of these structural components ensures the delivery of an ecologically sustainable development and avoids unnecessary demolition, waste and consumption. The revitalisation of the existing building also maintains economic feasibility whilst managing environmental impacts. It would be contrary to the objects of the EP&A Act to demolish the entire building to achieve strict compliance, particularly given that the extent of non-compliance and building height has already been established on the subject site and within the locality.
- b. To substantiate the above, a Sustainability Assessment Report has been prepared by *Napier and Blakeley* and is submitted with this Variation. As detailed in this Report, it is found that the proposed scheme will result in superior ecologically sustainable benefits, particularly as the scheme will result in significantly lower energy and embodied carbon output. The proposed retention and major refurbishment of the existing building will provide for a demonstrable saving, as follows:
 - **Electricity:** Significant saving in electricity equating to approximately 87 family homes for a year. This results in 20.67% less electricity usage when compared to full demolition and reconstruction; and
 - **Carbon:** The proposal will result in 20.07% less carbon emissions and content than a development which will seek to fully demolish and construct a new building.
- c. In addition to the above, it is also estimated that the complete demolition of existing structures and further excavation for the alternative two lower basement levels, would result in an additional 850 truck movements to those necessary for the removal of materials based on the proposed scheme. A further 850 truck movements are estimated to bring the material in addition to that material to carry out the construction works. In this regard, the combination of electricity, carbon and truck movements reduced through the proposed retention and reuse of existing structures, resulting in the proposed height non-compliance, will bring with it substantial, wholesale benefits to sustainability. It is therefore considered an inferior outcome to demolish the entirety of the existing building and construct a new building due to the significant environmental and sustainability impacts emanating from these works, to simply ensure strict compliance with the development standard.

4. Orderly and economic use of the land

- a. Object 1.3(c) of the EP&A Act 1979 is “*to promote the orderly and economic use and development of land*”. As discussed, strict compliance with the development standard would require significant demolition of the existing building and a considerable loss to the established gross floor area. The cost associated with demolishing a considerable portion of the building and resultant loss of the embodied energy contained within the slabs and structural components is both uneconomic and disorderly. The proposal seeks to rebirth the existing building, inclusive of the non-compliant height, satisfies Object 1.3(c).
- b. In addition, the social benefits of providing high quality housing stock within a highly sought after location should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and promote fire upgrades to the existing building which contains 26 sub-par apartments within an already non-compliant building envelope. To simply retain these apartments and satisfy the fire order (avoiding a Development Application and need for a Clause 4.6) will continue to deliver inferior residential accommodation that contributes little to the area character. In contrast, submission of this application, requiring variation to maximum building height, will result in the delivery of seven high quality residential apartments that will provide for a significant social benefit to the locality in terms of built form, landscaped network, sustainability, architectural merit and visual impact which is significantly improved when compared to the existing, at the same time as appropriately managing amenity impacts.
- c. A compliant envelope will only be provided upon demolition of the existing building, resulting in an inferior sustainability outcome as discussed in this Variation statement. Further to this, a compliant envelope will only be capable of providing four apartments of a similar scale to that proposed, and will not achieve the same level of amenity given that the built form would be lesser in height and scale than surrounding properties, thus compromising solar access and views. As a result, the proposal seeks to provide seven generously sized residential apartments within an envelope which already contravenes the building height standard, which cannot be achieved by a strictly compliant development. As shown in **Figure 7** below, a compliant envelope will result in an inferior outcome with only four apartments, of which two will be subterranean. It is not a beneficial outcome, nor orderly and economic development of land, to demolish part of an existing building to provide for apartments with lesser opportunities for amenity.

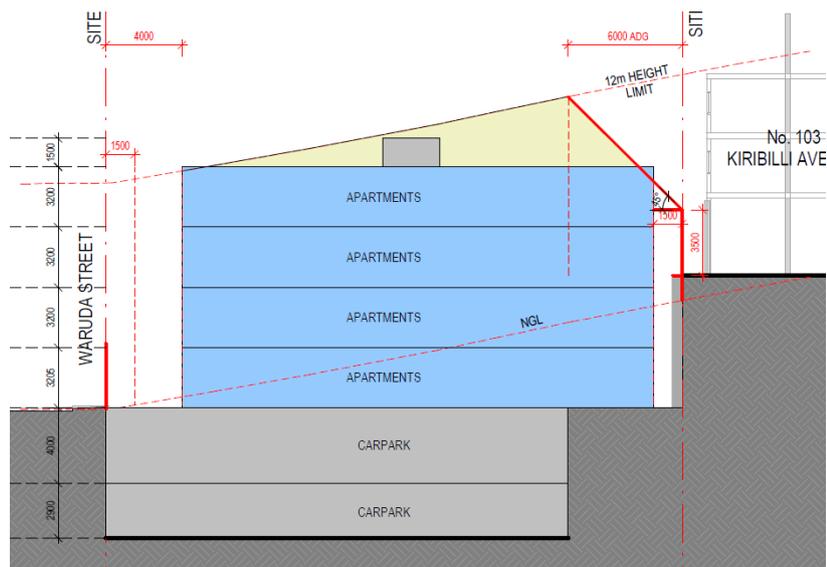


Figure 7 Compliant envelope scheme

5. The range of amenity impacts have been established by the existing development

- a. As detailed, the proposed development will maintain the height, bulk and scale established by the existing building. Where the proposal results in changes to the building envelope above the maximum height, these are sensitively located and placed to ensure the perimeter of the building as it relates to the site boundaries, where neighbours will be affected, is unchanged (per **Figure 4**). This similarly applies to the roof top structures, in which the proposal will reduce the maximum height of the non-compliant elements existing on-site. Resultantly, the range of amenity impacts created by the proposed development are consistent with those already established on-site.
- b. Following this, it is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The are of height non-compliance creates no adverse additional overshadowing impacts to adjoining properties when compared to the existing building envelope. That is, despite the additional shadow cast by the non-compliances, this is very minor thus ensuring that the proposal will not impact the solar gain of the surrounding locality. Importantly, it is noted that the proposal will reduce, in-part, the extent of overshadowing where the maximum extent of non-compliance has been reduced, when compared to the existing building. As such, additional overshadowing caused by the non-compliant elements would be insignificant; and
 - ii. The height breach does not result in any adverse additional privacy impacts. Where the non-compliance pertains to the glazed openings, these have been designed with specific orientation of living areas to the front boundaries and Sydney Harbour. To the northern and eastern boundaries, the non-compliance pertains predominately to blank facades, and where openings are proposed, non-habitable and lower trafficked bedrooms limit any visual or aural privacy impact. The northern and eastern openings are also designed with a limited size as to reduce the opportunity for overlooking. As such, any additional loss of privacy caused by the non-compliant elements would be insignificant; and
 - iii. The height of building breach does not result in adverse view loss when compared to the existing building on-site. When considering the extent of view sharing, it is noted that the height breach is consistent with the existing building and the additional extent of variation will not result in any adverse view loss to Sydney Harbour. The proposal will increase the horizontal width, but reduce the overall height, when compared to the existing roof top structures. In this regard, the proposal (where non-compliant) strikes an appropriate balance in increasing and reducing the non-compliances, ultimately resulting in a net zero impact from the surrounding properties, particularly to the north. As shown in the Visual Impact Assessment prepared by *Urbaine*, the view impact to surrounding properties created by the building height will be minor. Where this impact is minor, it will be offset

through the reduction in built height resulting in the abovementioned net zero impact. When considering the non-compliances as they relate to the residential floors below, as discussed, the proposal will not alter the perimeter of the built form where it would create an additional impact to the views of properties to the north. As such, it is anticipated the extent of view loss caused by the non-compliant element would be insignificant or nil.

6. Compliance with Fire Order

- a. The proposed alterations and additions are the most appropriate and feasible response to the existing site conditions. That is, the existing building is subject to a fire order enforced by North Sydney Council. Whilst the building can be modified to comply with the fire order, this will require significant works and will not result in any improvements to the aesthetic quality of the development, particularly as the existing non-compliance will be retained within its 'uncharacteristic' form. Furthermore, compliance with the fire order will also not allow for the internal rearrangement and wholesale improvements proposed as part of this application. That is, compliance with the fire order will not improve the amenity of the existing residential accommodation and will not result in the same outcome as is proposed.
- b. In addition, as the fire order can be satisfied without the submission of a development application (which will maintain the building height), this will not form part of a cohesive architectural design, as is proposed. In this regard, the distinctive benefits afforded by this development application (and the associated variations) would not be realised if the proponent simply sought to satisfy the fire order. Specifically, the rationalisation of the façade, improvement to fenestration, balcony articulation, materiality and landscaping, cannot be achieved by only resolving the fire order. Ultimately, the improvements proposed, both internally and externally, are beyond the ambit of the fire order. As such, the subject application and subsequent variation to maximum building height is therefore necessary.
- c. If the fire order were satisfied, the extent of non-compliance would be unchanged and the visual impact greater as the existing building form and character would be substantively retained. That is, the extensive alterations and additions proposed, whilst in-part increasing the extent of non-compliance, rationalises and redefines the architectural design to deliver an improved built form. This is the most superior response to the existing site conditions and provides demonstrable public benefits as discussed throughout the Variation. Importantly, an entirely height compliant development would require full demolition and reconstruction which would be an environmentally inferior outcome and economically unfeasible. As outlined in the table below, compliance with the fire order will not deliver the amenity, landscaping and character improvements achieved through the proposed development.

Table 1 Changes required to comply with the fire upgrade order and the relevant codes and standards

Item	Standard	Breach	Description and Works	Required Works
Fire Upgrade Order				



Table 1 Changes required to comply with the fire upgrade order and the relevant codes and standards

Metal Cladding	-	Failure to comply	Confirm that any metal cladding that has been installed within the external wall of the building to ensure that it is a non-combustible product and will not reduce the fire resistance of the element below.	Inspect, remove and replace any existing cladding.
Fire Stair	BCA Clause D1.7, D1.8	Failure to comply	Upgrade existing stairway to a fire isolated exit in accordance with BCA clause D1.7 or similar to an external stairway in lieu of a fire-isolated exit minimum in accordance with BCA clause D1.8.	Demolish existing and construct a new fire stair to comply with relevant standards.
Balustrades	BCA Clause D2.17	Failure to comply	Modify the existing external balustrade to the walkway to achieve a height not less than 1000mm to comply with BCA clause D2.17.	Remove and replace all balustrades to comply.
Windows	BCA Clause C2.6 and C3.4	Failure to comply	Install a form of vertical separation to each of the openings throughout the building in accordance with BCA Clause C2.6 and provide protection to openings within 3m of northern boundary per Clause C3.4.	Ensure protection to openings within 3m of northern boundary and ensure vertical separation between openings.

BCA Compliance and Construction Standards

Fire Stair	BCA Clause D1.7, D2.13, D2.17	Failure to comply	As above, construct a new fire stair to comply with BCA clause D1.7, D2.13 and handrail D2.17	Demolition of existing and construction of a new fire stair.
Balcony Balustrades	BCA Clause 2.17	Failure to comply	Replace balustrades to balconies and walkways to comply with BCA clause D2.17 for height and safety.	Removal and replacement of all balustrades.
Lift Shaft	BCA Clause D1.7,	Failure to comply	Construct new lift shaft to accommodate a stretcher lift to comply with BCA clause	Demolish and reconstruct existing lift shaft according to the





Table 1 Changes required to comply with the fire upgrade order and the relevant codes and standards

		D2.13, D2.17		D1.7, D2.13 and handrail D2.17	relevant standards.
				Lift shaft and car to also comply with the relevant DDA requirements.	
Doors and Windows		BCA Clause C1.a and C1.9 (Class A)	Failure to comply	Replace existing timber door and window frames with aluminium frames in accordance with BCA clause C1.9 for Class A construction, as required by BCA clause C1.1.	Remove and replace all existing timber doors and window frames to comply with BCA and standards.
Glazing		-	Failure to comply	Replace all glazing window panels with laminated glass to comply with current standards for glazing and wind loadings	Remove and replace all existing glazing.
Brick Façade		AS1170.4 and AS3700, Section 10	Failure to comply	Replace brick façade panels to comply with current earthquake codes referenced by the BCA, in addition to AS1170.4 and AS3700 (Section 10).	Demolish and reconstruct brick facades to comply with relevant standards.

- d. It is also prudent to note that the amount of work required to satisfy the fire order would cast doubt as to whether those works would be classified as alterations and additions or a new building. In any case, the building height has been established on-site and the proposed development will maintain the bulk and scale, albeit with a significantly improved architectural character and design.

7. The non-compliances achieve a high level of design excellence, based on site analysis

- a. The areas of non-compliance have been purposefully designed as well articulated, recessed residential levels with appropriate setbacks from podium level and the respective boundaries. Specifically, the greatest area of non-compliance (being the roof elements) have been designed with a 11.7m setback from the Waruda Street boundary and 8.2m setback from the Beulah Street boundary.
- b. Where non-compliant on the residential levels below, the proposal provides a 4m setback to Waruda Street and 4.21m to 11m setback to Beulah Street. The residential levels are designed with a simplified and recessive character setback beyond the defined podium base. The additional floor area provided for the residential levels, located to the west, will be within the perimeter of the established envelope as to minimise any impact to bulk and scale. Where additional floor area



is located to the south, this aligns with the setback of properties to the east and west and is articulated through curved elements and an appropriate glazed to solid ratio. The specific location of floor area and setbacks to the non-compliant elements ensures that visual and physical bulk and scale of the development, as viewed from the public domain and neighbouring properties, will be compatible with the existing streetscape.

- c. Importantly, the non-compliant roof top structures and level 8 parapet form part of the recessed uppermost level which is predominantly obscured as viewed from Waruda and Beulah Street. Where visible from the public domain or Sydney Harbour, these elements are lightweight in nature to limit visual impacts. The remaining built form which exceeds the height limit is part of a highly articulated built form which is setback from the defined podium.
- d. As outlined, the setback elements to the roof structures contribute to the net zero impact to the views of surrounding properties. The balance between the horizontal increase and vertical decrease of roof top structures is considered to maintain the views of surrounding properties. Similarly, the proposal also has negligible impact to the solar access and privacy of neighbours, as discussed above.

8. The topography contributes to the extent of non-compliance

- a. The topography is an additional site-specific reason that contributes to the extent of this variation. Specifically, the topography steeply falls from the northern (rear) boundary to southern (front) boundary. This results in a maximum height non-compliance as measured from Waruda Street, utilising the extrapolated topography in accordance with the methodology set out in *Bettar v Council of the City of Sydney*. Despite this, this is considered acceptable given the proposed development has been designed with a suitable podium fronting the public domain and recessed residential floor levels above. The defined podium provides an appropriate response to the topography delivering a contemporary architectural design which will rationalise the established non-compliance. That is, in its current form, the subject site and non-compliances form a sheer part seven, part nine storey façade which creates a much greater visual impact to the locality compared to the proposed.

9. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard and meets the objectives of the R4 High Density Residential zone (as further detailed in Section 7 below);
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - ii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).



- c. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
- i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the development seeks to rebirth an existing building maintaining the structural components and slabs of the residential flat building. The proposal maintains the building height already established on the subject site, within a built form which is substantially improved over the existing. Furthermore, the site contains a steep and undulating topography from the northern rear to southern front setback. The additional height does not adversely impact the amenity of the neighbouring properties (when compared to the existing development) and has been designed in such a way to ensure the additional height is not visually jarring from the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ 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:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

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.



As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7. CLAUSE 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

8. 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 (CLAUSE 4.6(4)(a)(ii))

8a. Objectives of Development Standard

The objectives of clause 4.3 height of buildings 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.*

In order to address the requirements of subclause 4.6(4)(a)(ii), the relevant objectives of clause 4.3 are addressed in turn below. It is noted that objective (g) does not apply to the proposal and is not considered.

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

The proposed development will retain the existing floor levels and structural components, which were originally designed to nestle within the topography of the subject site. As indicated in this Variation, the site has a steep decline from the northern (rear) to southern (front) boundary. Accordingly, the extent of non-compliance varies across the entirety of the development due to the topographical characteristics and existing excavated floor levels.

The proposed alterations and additions are designed to improve the character of the existing building and its response to the topography of the site, as to ultimately limit the physical and visual impact of the non-compliance. The proposal requires additional excavation within the northern portion of the site to accommodate revised parking levels and provides a well-considered podium which is responsive to the sloping topography. The proposed podium represents an improvement over the existing site conditions which contain sheer building facades, unattractive voids and unarticulated facade. The compliant podium levels improve the modulation and overall design of the development, responding to the topography and defining the streetscape as to reduce the perceived bulk and scale of the non-compliant residential levels above.

The podium resultantly reduces the impact of the non-compliant residential levels above, which provide increased setbacks from the site boundaries. The non-compliant residential levels are designed with a bulk and scale predetermined on site and within the locality, integrated with a sympathetic architectural design and materiality. The use of curved facades, horizontal elements, glazing and balcony articulation, in conjunction with the complementary materiality and colour scheme, ensures that the extent of non-compliance is acceptable. This demonstrates that despite non-compliance, the proposal is compatible with the topography of the site and surrounding properties.

As such, the proposal satisfies objective (a) despite non-compliance.

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

In terms of view loss, the proposed variation will not result in any significant loss of views or outlook compared to the existing building. The current building on-site is situated beyond the 12m height limit and as such, any loss of views is created by the existing site conditions. The proposed development, as described, seeks to reuse the existing structural elements and floor slabs to provide a revised architectural character. Where changes to the residential envelopes are proposed centrally and to the south (resulting in additional non-compliances), this has been sensitively designed as to mitigate any adverse view loss from the surrounding properties or public domain.

In terms of the additional building height which forms part of the level 8 lobby and roof top services, this is similarly designed to ensure that there will be no loss of views to the Sydney Harbour Bridge, Sydney Opera House, Sydney CBD and land and water interface. As discussed, the proposal will increase the horizontal width, but reduce the overall height, when compared to the existing roof top structures. In this regard, the proposal (where non-compliant) strikes an appropriate balance in increasing and reducing the non-compliances, ultimately resulting in a net zero impact from the surrounding properties, particularly to the north. As shown in the Visual Impact Assessment prepared by *Urbaine*, the view impact to surrounding properties created by the building height will be minor. Where this impact is minor, it will be offset through the reduction in built height resulting in the abovementioned net zero impact. Importantly and as shown in the accompanying architectural plans, the uppermost elements are also consistent with the envelope of the existing building and have been refined throughout the development application process.

As such, any potential view impact is a result of the existing building envelope which currently exceeds the maximum building height. Whilst the proposal will modify the building envelope and therefore in-part increase the extent of non-compliance, there will be no additional adverse view loss. It is therefore considered that the proposal satisfies objective (b).

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

The proposed development has been purposefully designed to protect the solar gain of the residential properties to the south and east of the subject site, specifically, Nos. 23, 24, 25 and 27 Waruda Street. Despite the variations, the proposal has been designed to align with the floorplate and envelope of the existing building as to ensure that the range of amenity impacts are consistent with those already established by the existing building. Where the proposal increases the area and extent of variation, this does not result in any significant increase to overshadowing when compared to the existing building. As demonstrated on the submitted architectural plans, the extent of non-compliance created by the proposed building envelope varies only slightly when compared to the existing. That is, the design measures implemented ensure that the solar gain of neighbouring properties will not be adversely impacted despite the additional variations.

Each property as listed above will not be adversely impacted by the proposal, when compared to the existing envelope. Specifically, Nos. 23, 25 and 27 Waruda Street will only be impacted for 2 hours during mid-winter, with the variations proposed as part of this application not being any greater than existing. Although No. 24 Waruda Street will be affected for 3 hours during mid-winter, this is also consistent with the existing situation. In each regard, the proposal will have no further impact to the neighbouring building when compared to the existing envelope.

Given the siting and location of the existing building, north-south orientation and steep topographical incline, it is reasonably anticipated that unavoidable overshadowing will occur to the neighbouring buildings. Notwithstanding and as discussed above, despite non-compliance, the proposal will ensure that adequate levels of solar access will be provided to the neighbouring properties. It is also noted that the proposal will not result in any adverse impact to the solar gain of the public domain beyond what is existing. Of relevance, Beulah Reserve will only be overshadowed from 9am to 10am, of which the vast majority of shadow is cast by the existing envelope.

As such and despite non-compliance, the proposal will satisfy objective (c).

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

The proposal has been purposefully designed to protect the visual privacy of surrounding properties through the orientation of living areas and balcony spaces to the front boundaries, addressing Waruda Street, Beulah Street and Sydney Harbour. When considering the non-compliant elements as they oppose the northern and eastern boundaries, these are predominantly limited to blank facades and non-habitable openings. This ensures that any impact created by the non-compliant building height (per the revised building arrangement), will not impact the privacy of neighbouring properties or future residents.

Where habitable openings are proposed to the northern and eastern boundary, these are limited to lower trafficked bedrooms. By virtue of their lower use, the openings from the bedrooms will not adversely impact the privacy of neighbouring properties. With regards to the openings from the living areas, these are purposefully designed to capture views of Sydney Harbour as to limit any impact. Of relevance, the height difference between the proposed development and property to the east ensures that views will be directed over and above No. 24 Waruda Avenue.

Accordingly, the proposal is considered to be acceptable with regards to objective (d).

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

It is noted that objective (e) refers to being “compatible” with adjoining development. It is well established that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of *Roseth SC in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*:

“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 as the difference in these attributes increases, harmony is harder to achieve.”

In accordance with the above, the subject site is located within the ‘Kirribilli Conservation Area’ under Part C – Character Statements of the NSDCP 2013. The ‘Description’ of the Kirribilli Conservation Area (Section 8.4.2) is reproduced below:

The Kirribilli Conservation Area is located on the lower section of the Kirribilli peninsula and has a long waterfront to Sydney Harbour.

The landform slopes to the Harbour with an irregular pattern of streets that follow the contours and slopes. The subdivision pattern varies with irregular lots that follow the topography.

The Conservation Area is characterised by a mix of small, medium and substantial late Victorian, Federation era houses with Inter-War dwelling houses and residential flat buildings with modern residential flat buildings on some of the waterfront sites. Buildings are integrated with the slope and generally have a homogenous scale with established gardens. Some earlier Victorian villas survive in Kirribilli Street and Upper Pitt Street. Also located on the waterfront are Kirribilli and Admiralty Houses.

As detailed further below, the proposal is consistent with the above-mentioned description. The existing building on-site is identified as an ‘uncharacteristic item’ per Appendix 1 of the NSDCP. The proposal seeks to rebirth the existing building to provide a high-quality contemporary development to resultantly deliver a ‘neutral item’. The development maintains the established (non-compliant) building height and provide an environmentally sustainable, contemporary development sympathetic to the heritage character of the locality and nearby heritage items. The existing non-compliances are redesigned to limit the perceivable visual and physical impact of the non-compliance. This is achieved by virtue of a defined podium, sympathetic and recessive curved residential levels and recessed uppermost floor. In its current arrangement, the site contains sheer seven and nine storey face brick facades, unarticulated forms and unattractive void elements. The proposal, despite in-part increasing the extent of non-compliances, will resolve these issues.

Whilst the proposal seeks to reimagine the existing building on-site, it has also considered the existing buildings which surround it. The immediate locality comprises of residential flat buildings with varying heights, architectural styles and ages within the *Kirribilli Heritage Conservation Area*. Further to this, numerous heritage items also contribute to the established character of the locality. The proposal, including the areas of non-compliance, has therefore been designed to appropriately respond to the character of the locality through the provision of a form which does not mimic or compete with the conservation area. The architectural design and selective materiality has been vital to minimising the extent of non-compliance. Whilst it is noted that the existing building is greater in height than its surroundings, it forms part of the established streetscape not considered upon adoption of NSLEP 2013.

Given the above, the proposal revitalises the existing building to ensure the currently dilapidated and uncharacteristic item is immensely improved. The burden on maintaining the existing building envelope and footprint (to ensure no additional extent of non-compliance) would result in an incoherent design which would include tokenistic and artificial improvements not considered to result in a development which is compatible with the established character of the locality. Furthermore, the proposal will not adversely impact the amenity of neighbouring properties or the public domain.

As such, the proposal will positively contribute to the character of the Kirribilli locality when viewed with against the surrounding buildings through a sympathetic design which is inclusive of landscaping and complementary materiality and colour scheme respecting the heritage fabric. The defined base and recessive residential levels will reduce the sense of perceived bulk and scale created by the non-compliance and ensure compatibility character of the locality.

Therefore objective (e) is achieved despite the variation.

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

The 12m height of buildings control effectively anticipates a four storey building can be constructed on the site. Whilst the proposal provides a part seven, part nine storey building, this has been established by the existing structures. The proposal will rationalise and reimagine the existing building to vastly improve its character and form where it exceeds the standard. The existing building is currently unarticulated, dilapidated and does not contribute to the character of the locality.

To the casual observer along Waruda and Beulah Street, the proposal will represent an immense improvement over the existing site conditions. Whilst exceeding the height of surrounding properties, as is existing, the proposal will improve the relationship to the streetscape and surrounding locality to ensure that the bulk, scale and density of the development is consistent with the character of the *Kirribilli Heritage Conservation Area*. The proposed building arrangement provides for a significant visual improvement when compared to the existing sheer (and unarticulated) part seven, part nine storey façades. The various height breaches form part of a form which will not be alarming to the visual aesthetic of the streetscape. Furthermore, where the proposal breaches the height it is predominantly located within the envelope of that which is existing. As found in the documentation prepared by Heritage 21, the overall development, including the non-compliances, will be of an urban and architectural design which will sit comfortably within the conservation area.

The burden of insisting on maintaining the existing envelope would result in an inferior outcome which would not afford the same streetscape, amenity and substantiality benefits. In fact, the removal of additional (proposed) non-compliances would maintain the existing envelope which is dominative and unsympathetic to the heritage character of the locality. Furthermore, strict compliance is not an economically feasible outcome and the only (inferior) alternative approach is tokenistic and artificial upgrades to the existing building, as mentioned above. A strictly compliant development is also considered to create subpar residential apartments.

As such, the proposal will positively contribute to the established character of the *Kirribilli Heritage Conservation Area* when viewed in conjunction with surrounding buildings. To the casual observer, the proposal will maintain the established bulk and scale on the site, however within a reenvisioned built form which provides numerous streetscape and public benefits. Accordingly, the proposal satisfies Objective (f).

8b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R4 are as follows:

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

The proposal will provide seven x three bedroom apartments which will meet the housing needs of the community within the R4 Zone. These apartments are generously sized and designed within a highly suitable development. The proposed apartment mix will cater for families and downsizers, who are moving away from large, detached dwellings. Within the locality and wider LGA, there is a strong demand for larger residential apartments and an evident undersupply of this dwelling typology. The increase in price per square meter for this sector is an indicator of such a supply shortage. As such, the proposed three-bedroom apartments will cater for the demand of locality and is acceptable, despite non-compliance.

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

As above detailed above, the proposal will provide 7 x 3 bedroom apartments to meet the demand for larger apartments within the Kirribilli locality and wider lower north shore. The proposal will remove 26 sub-par apartments which do not

provide for an acceptable level of amenity for occupants. The existing apartments are to be replaced with generously sized and well-designed dwellings within a highly suitable development. The proposal will also provide for 2 adaptable apartments which will increase diversity and accessibility in the locality.

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

The proposal is not antipathetic to this objective and will provide residential accommodation which will support surrounding facilities.

- *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.*

The proposal has been purposefully designed to ensure the amenity of neighbouring properties or the public domain will be appropriately retained, in addition to the character of the *Kirribilli Heritage Conservation Area* and nearby heritage items. In terms of natural or cultural heritage, the proposal, including the non-compliant elements, has been refined through architectural measures, such as an improved glazed to solid ratio, landscaping and materiality, to minimise impact on the character of the surrounding locality.

With regards to amenity, the non-compliance will not result in any adverse privacy or overshadowing when compared to the existing development, as discussed in this Variation. In terms of view loss, the proposal will have a net zero impact on the surrounding properties, particularly to the north. The view impact is shown in the View Loss Assessment prepared by *Urbaine*. Solar access, privacy and views, as they pertain to the non-compliances, are discussed under the Planning Grounds of this Variation.

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

The proposal will provide high levels of amenity for future residents through the provision of generously sized three-bedroom apartments which will replace the existing, subpar apartments on-site. With regards to the neighbouring properties, as detailed, the extent of non-compliances as they relate to building height are consistent with the parameters of the building envelope and footprint established on-site. This includes the envelope as it applies to both the residential floor levels and roof top structures, which are entirely consistent with the existing building ensuring that there will be no adverse impact to the amenity of neighbouring properties. As above, this is discussed in the Planning Grounds of this Variation.

For these reasons the development proposal meets the objectives for development in Zone R4. The height variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

9. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 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.

10. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning. The existing building contains a non-compliance of 30.7m to roof structures (variation of 18.7m or 155%) which is greater than what is proposed by the development. Whilst the



variation is numerically significant, the proposal does not result in a built form which substantially differs from that existing on the subject site. This ensures that the proposal, which considerably improves the architectural and landscaped character of the site, will not create a bulk, scale or impact which would trigger any matters of State or regional significance. Further to this and as detailed, the extent of variation is already established on the subject site. As the proposal will not increase the maximum height on the subject site, the submission of a Planning Proposal is both unreasonable and unnecessary. This is supported by the fact that there is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6 (*GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]).

11. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by 17.08m (142%), 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. Furthermore and as outlined in this Variation, the extent of non-compliance is entirely consistent with that established by the existing building on the subject site. 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.

12. CONCLUSION

This written request has been prepared in relation to the proposed variation to the height of buildings development standard contained in Clause 4.3 of NSLEP 2013.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach. Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported

