Clause 4.6 Variation Request

Mixed Use Development

Height of Buildings Development Standard

142-148, 160 Oxford Street, 13 Gipps Street and 6 Shadforth Street, Paddington

Submitted to the Department of Housing, Planning and Infrastructure on behalf of The Trustee for TM No. 8 Development Unit Trust

Prepared by Colliers Urban Planning

17 June 2026 | 2250501

'Gura Bulga'

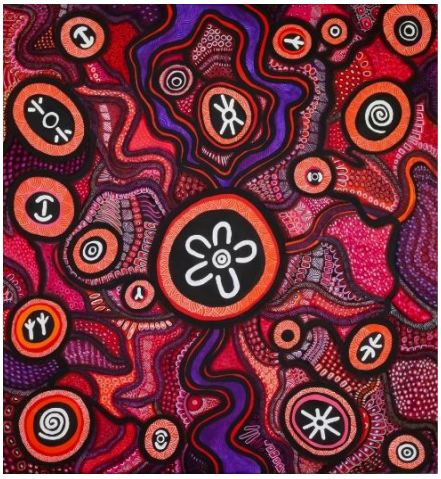
Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

'Dagura Buumarri'

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Brown Country. Representing Victoria.



'Gadalung Djarri'

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Colliers Urban Planning acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past and present.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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1.0 Introduction

1.1 Overview

This clause 4.6 variation request has been prepared by Colliers Urban Planning on behalf of The Trustee for TM No. 8 Development Unit Trust and is submitted to the Department of Housing, Planning and Infrastructure (the Department) in support of a State Significant Development Application (SSDA) for a mixed use residential development at 142-148, 160 Oxford Street, 13 Gipps Street and 6 Shadforth Street, Paddington (the site).

The proposed development seeks consent for the construction of an eight (8) storey residential flat building comprising infill affordable housing development and ground floor retails including:

- Demolition of structures on the site except for the dwelling on 13 Gipps Street.
- Removal of vegetation on the site except for 13 Gipps Street.
- Site works comprising excavation and ground works including bulk excavation and in ground services works;
- A four (4) storey basement, with vehicular access from Shadforth Street, comprising:
  - 82 car parking spaces;
  - 9 Motorcycle spaces;
  - 53 Bicycle spaces;
  - Garbage storage for both the residential and non-residential components of the proposed development;
  - Loading space;
  - Plant rooms; and
  - Apartment storage.
- Ground floor shops amounting to approximately 153m^2 of GFA;
- A total of 44 dwellings, comprised of:
  - 11 affordable housing dwellings to be managed by a community housing provider (CHP) for a period of at least 15 years.
  - 33 market build-to-sell dwellings; and
- Provision of approximately 725m^2 communal open space;
- Landscaping works and extension and augmentation of services and infrastructure as required.

Clause 4.6 of the *Woollahra Local Environmental Plan 2014* (WLEP 2014) enables the consent authority to grant consent for development even though the development contravenes the development standard within the WLEP 2014 or any other environmental planning instrument, which would include *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from the development.

It is noted that clause 4.15(3)(b) of the EP&A Act enables a Clause 4.6 Variation Request to be applied to a non-discretionary development standard. Non-discretionary development standards are standards that if complied with, prevent consent authorities from:

- taking the non-discretionary development standard into further consideration in determining the DA;
- refusing the DA on the grounds that the development does not comply with those standards; and
- imposing a condition of consent that has the same, or substantially the same, effect as the standard but is more onerous than the standard.

If a development does not comply with a non-discretionary development standard, s4.15(3)(b) of the EP&A Act allows the consent authority to apply a provision of an environmental planning instrument that allows flexibility in the application of a development standard (e.g. Clause 4.6) to the non-discretionary development standard.

Accordingly, this Clause 4.6 Variation Request relates to the non-discretionary development standard for height of buildings under section 16(3) of the Housing SEPP. Section 16(3) the Housing SEPP permits the maximum building height

for residential flat buildings to be an additional 30% of the maximum permissible building height where at least 15% of gross floor area (GFA) is proposed to be affordable housing managed by a registered Community Housing Provider (CHP) for a minimum of 15 years. The maximum building height on the portion of the site to which this Clause 4.6 Variation relates is the non-discretionary development standard of 22m under section 180(2)(b) of the Housing SEPP which applies to residential flat building developments in the low and mid rise (LMR) housing inner area, within which the site is located (see **Section 2.0** and the EIS). As such, the maximum permissible non-discretionary height development standard under section 16(3) of the Housing SEPP is **28.6m** (i.e. 22m + 30%).

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances. Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (clause 4.6(3)(b)).

This document demonstrates that compliance with the Housing SEPP non-discretionary development standard of a maximum building height of 28.6m is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the development standard. As such, this document satisfies the provisions of clause 35B(2) of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation).

This clause 4.6 variation request demonstrates that, notwithstanding variation to each of the above-mentioned height-related development standards:

- The proposal meets the objectives of the Housing SEPP, including the LMR and Affordable Housing chapters, by enabling the delivery of 11 affordable dwellings and allowing the site to achieve the density envisaged under the combined affordable housing bonus and LMR provisions.
- The site is highly suitable for the proposed height given its excellent access to public transport, services and centres, meaning the height variation supports the efficient use of existing infrastructure.
- Strict compliance with the height standard would result in reduced affordable housing provision and reduced provision of housing supply with vastly improved amenity than existing dwellings on the site, thereby thwarting the underlying objective of section 16(3) to facilitate provision of affordable housing.
- The development exceeds a variety of ADG amenity criteria notwithstanding the proposed variation, delivering generous landscaped area, deep soil zones, high-quality communal open space, and strong solar access and ventilation outcomes and therefore continues to provide high amenity outcomes notwithstanding the variation from the height controls.
- The height variation does not result in a building height that is incompatible with the existing desired future character of the surrounding area, noting the planning controls that now apply to the site, and the existing 8+ storey built forms that punctuate Greater Paddington, especially along the Oxford Street ridgeline. The proposal has also been sympathetically designed to respond to the surrounding heritage context through use of sandstone materiality and articulation of the built form.
- The height variation does not compromise the Proposal's alignment with the expected environmental capacity of the site established by the LMR and infill affordable planning controls that now apply to the site, as the proposal complies with the maximum 2.86:1 FSR for the site established by the LMR and infill affordable.
- The proposed development is consistent with Section 3 (Principals of the Policy) in the Housing SEPP and the objectives of Chapter 6 Low and Mid Rise Housing, notwithstanding the proposed variation.
- The development (inclusive of height variation) provides an appropriate transition in scale, particular to the R2 Low Density Residential zone to the north, through setbacks and built form/façade articulation.
- Local amenity is protected, with acceptable overshadowing outcomes, no loss of views, no unreasonable visual intrusion from the height variation. Privacy impacts from the height variation are mitigated through setbacks, solid balustrades, considered window placement and landscaping.
- The site is one of two potential realistic LMR housing inner area and infill affordable housing development sites in Paddington due to existing lot patterns and heritage constraints. Therefore, this proposed development meaningfully

contributes to the desired density targets and reducing the proposed height undermine the objectives of housing supply in this area and hence undermine the objectives of the LMR and infill affordable housing height controls.

There are sufficient environmental planning grounds to justify the height variation, including:

- Strict compliance with the height control would result in an inferior streetscape presentation, due the placement of mass and the site's topography in a fully compliant scheme. The proposed height variation facilitates a superior urban design outcome, avoiding the visually discordant "stepping" that would occur under strict compliance with the height control. Instead, the height variation facilitates a cohesive street wall that aligns with the established and desired future character of Oxford Street.
- The proposed height variation facilitates improved residential amenity in relation to rooftop amenity and landscaping compared to a compliant scheme.
- The LMR and infill affordable housing reforms envisage a built form of 6-8 storeys in these highly accessible locations. The proposed height variation still presents with a six (6) storey base and a total of eight (8) storeys when viewed from the public domain and Oxford Street and is readily capable of being absorbed into the surrounding context which includes buildings and heights of this scale in the locality.
- Strict compliance with the height control to respond to sloped topography from the ground level would reduce retail activation, amenity of communal spaces and efficiency of construction (which is an important consideration in terms of speed to market of housing facilitated under the NSW planning reforms).
- The proposed height variation ensures suitable floor to floor heights are provided to avoid intrusive bulkheads within apartments.
- The proposed height variation ensures consistent slab levels across each entire floorplate to maximise efficiency of construction with respect to timely delivery and minimising of construction resources.
- The proposed height variation has partially arisen as ground floor retail is provided without the benefit of the infill affordable housing bonus being added to the LMR inner area maximum height of 24m for shop top housing development. This is because non-residential development on the entire ground floor of the development is an inappropriate response to the site context which benefits from residential areas at the ground floor facing north to take advantage of the ground floor private open space and ground floor access to communal open space. Full compliance with the height would undermine the delivery of this ground plane activation outcome.
- The proposed height variation does not result in any unacceptable additional amenity impacts compared to a compliant scheme, including impacts in relation to overshadowing, views, privacy, heritage interface and visual impacts.
- The proposed height variation does not result in any additional visual impact or urban design impacts compared to a compliant scheme.
- The proposed height variation does not result in any additional heritage impacts compared to a compliant scheme.
- The proposed height variation will support a more coherent built form, enhance residential amenity, supporting housing supply, and delivering a high-quality long-term contribution to the streetscape.
- The proposed height variation results in a level rooftop, which promotes the most efficient layout of mechanical plant and solar panels, which contributes to maximising the ESD outcomes of the proposed development.
- The proposed development, inclusive of the variation, will promote the orderly and efficient use of land, good design and the social welfare of the community in accordance with the objects of the EP&A Act as assessed and demonstrated in this Clause 4.6 variation.
- The degree of the technical non-compliance is not, in isolation, a material consideration as to whether the variation request should be upheld. Notwithstanding, the degree of the proposed height variation is comparable, if not less than the wide range of commonplace numerical variation to development standards under clause 4.6.

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the *Woollahra Local Environmental Plan 2014*.

1.2 Legal Guidance

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe). While these cases referred to the former SEPP 1, the analysis remains relevant to the application of Clause 4.6(3)(a). Further guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this Clause 4.6 variation request:

- Identifies the site and proposed development (**Section 3.0**);
- Identifies the development standard to be varied (**Section 4.0**);
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 5.1**); and
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.2**).

2.0 Background to the NSW Housing Planning Reforms

2.1 Low and Mid Rise Housing Reforms

Chapter 6 of the Housing SEPP commenced on 28 February 2025, introducing a new Low and Mid-Rise (LMR) housing policy applicable to areas that are well located. The policy responds to the NSW Government's recognition that existing built-form planning controls in many residential zones have limited the delivery of mid-rise housing, despite strong locational suitability. Chapter 6 of the Housing SEPP therefore seeks to encourage LMR housing in well-serviced areas with strong access to goods, services and public transport, and supports the delivery of new housing in established areas capable of accommodating growth.

To facilitate this objective, the Housing SEPP establishes non-discretionary development standards that apply wherever residential flat buildings or shop-top housing are permitted within station precincts and identified town centres, excluding only low-density residential zones. These non-discretionary development standards are specifically intended to allow increased density within 400-800m of stations and identified/mapped town centres, enabling mid-rise development in these highly accessible precincts.

Under the LMR policy, a residential flat building development on the site is permitted for a height of 22m in height with an FSR of 2.2:1 as the site is considered an inner area, being located 281m (that is within 400m) of the mapped Darlinghurst and Paddington town centre (Oxford Street).

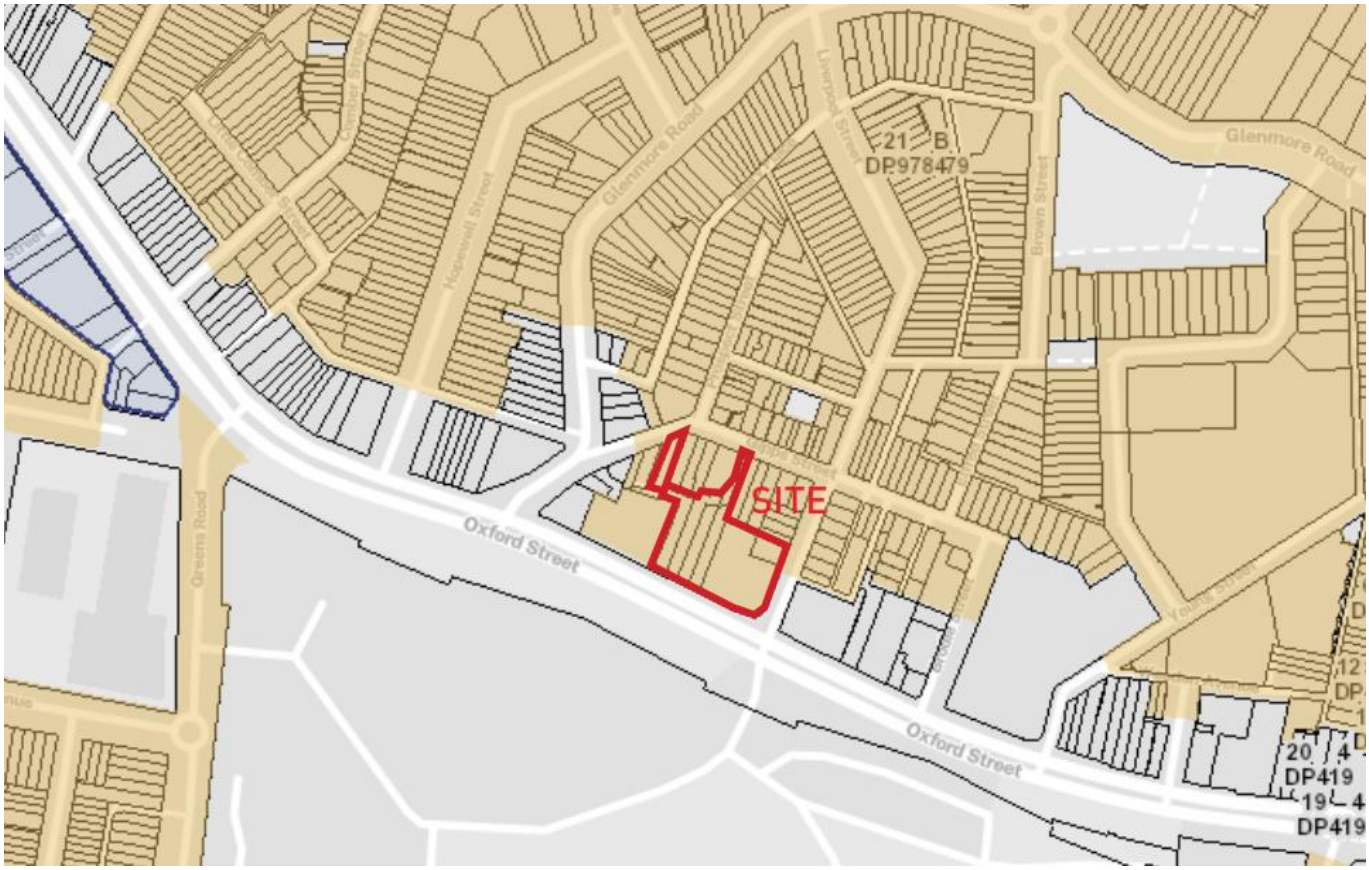


Figure 1 Low and Mid-Rise Housing Map for the Paddington and Darlinghurst Area (LMR applicability shaded) (site outlined)

Source: Housing SEPP, with site annotation by Colliers Urban Planning

If redeveloped in accordance with these LMR provisions, applicable sites can accommodate additional contemporary mid- to high rises of approximately six (6) storeys. It is noted that for developments that comply with non-discretionary standards like this, the consent authority must not refuse the application on the grounds that the application does not

comply with those standards. This limits the discretion of the consent authority which indicates that a building that meets those height standards will generally be acceptable.

For the subject site which is identified as being within an 'inner area' being within 400 metres of the Paddington and Darlinghurst Town Centre, the LMR non-discretionary standards set the appropriate expectation for bulk and scale from a State-wide strategic and statutory planning standpoint, which has a higher order than local planning controls such as those set out in the *Woollahra Local Environmental Plan 2014* (WLEP 2014). The proposal responds to this with a design that respects the surrounding built form character and responds to the amenity of neighbours, noting that existing buildings in the immediate area range between eight (8) and 12 storeys. Combined with the new LMR controls that have changed the baseline expected height of future development on the site to be 22m, the site is readily able to absorb the density and scale of the proposed development without adverse environmental impacts.

2.2 Infill Affordable Housing Incentive Reforms

In addition to the LMR reforms outlined above, Affordable Housing planning reforms in NSW aim to provide housing diversity and quality for those most in need of housing security. Affordable housing is available to very low to moderate income households which is priced at no more than 85% of the market rent so that these households are also able to meet other basic living costs. Housing affordability is generally measured if the cost of living is equal to or less than 30% of gross household income. Affordable housing as defined by *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) is required to be managed by a registered Community Housing Provider (CHP), that is responsible for assessing and granting applications for affordable housing to ensure transparency and equity in housing provision, and managing the affordable housing units, ensuring that they are well-maintained and in safe, habitable condition.

A key aspect of NSW's current housing crisis is a shortage of affordable housing. In response, the NSW Government introduced new provisions in the Housing SEPP which incentivise the provision of affordable housing within residential development. For the purposes of this proposal, the development will provide affordable housing under those provisions, specifically, Chapter 2 Part 2 of the SEPP, relating to infill affordable housing.

At least 15% of the proposed gross floor area (GFA) is proposed to be provided as affordable housing managed by a registered Community Housing Provider (CHP) for a period of at least 15 years. Therefore, under section 16(3) of the Housing SEPP, the proposed development is eligible for additional height and floor space that is 30% greater than the maximum height and floorspace stipulated by the LMR controls outlined in **Section 2.1**. The intent of this policy is to incentivise provision of affordable housing by maintaining the feasibility of redevelopment while ensuring that the additional height and floorspace results in built form and environmental amenity outcomes suitable for highly accessible locations. In this case, the infill affordable housing incentives allow for two additional storeys, which continues to result in a medium-rise development that is the desired future character established by the LMR controls.

3.0 Site and Proposed Development

3.1 Site Location and Context

The site is located at 142-148, 160 Oxford Street, 13 Gipps Street and 6 Shadforth Street, Paddington within the Woollahra Local Government Area (LGA). It is situated approximately 11km to the southeast of the Sydney CBD.

It is located on a strategic site, being along the Oxford Street ridgeline and on a prominent corner with a bus stop directly adjoining the site on Oxford Street which provides services to Bondi Junction, Rozelle and Marrickville Metro Station. Less than 600m away further east of Oxford Street, bus services are provided to the Sydney CBD. The site is therefore a highly accessible 'inner area' location.

The site's locational context is shown at **Figure 2.**

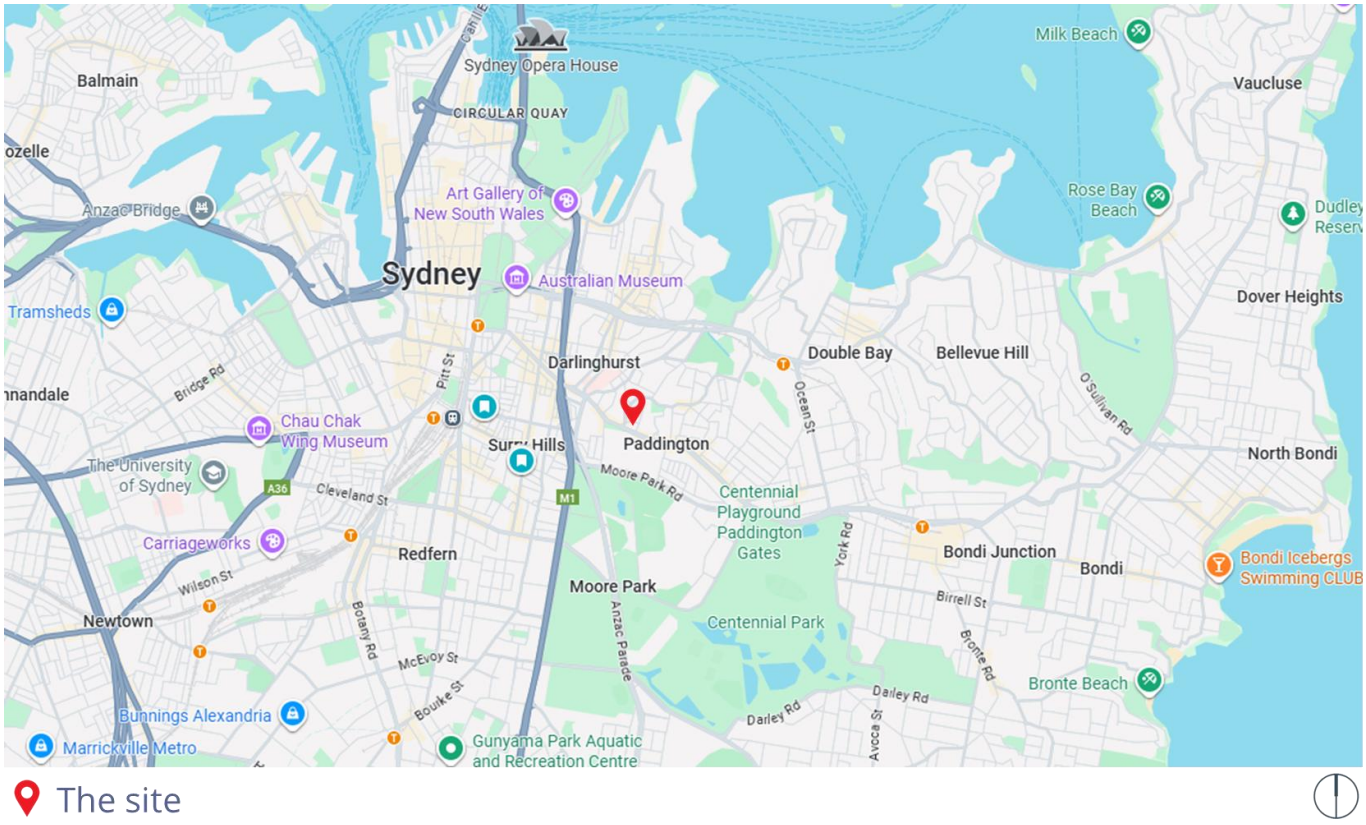


Figure 2 Locational Context

Source: Google Maps and Colliers Urban Planning

The site is advantaged by its walking distance proximity to high frequency bus services to Eastern Suburbs (50m level walking distance) and CBD with further Metro connections beyond. Shops, services and other high quality infrastructure occur along Oxford Street, including Paddington Reservoir Gardens, and Spring Street Playground. The site is approximately 300m east of the UNSW Art Campus, 50m north of the Victoria Barracks, 800m southeast of St Vincents Hospital and multiple schools including Crown Street Public School (1.2km) and Bourke Street Public School (1.5km).

The broader context includes a mix of uses of various heights, form and age. The aerial image of the site (refer to **Figure 3**) which demonstrates that development of 8-12 storeys is part of the existing character of the area, and that housing and affordable housing is suitable for the location as:

- Street corners along Oxford Street are often marked by taller buildings.
- The site is near health and educational institutional developments including St Vincents Hospital (8 storeys), UNSW Art and Design Campus, infrastructure and public transport, which together generate substantial demand for affordable housing.
- There are many 8+ storey developments which punctuate the skyline in the broader area.

An axonometric context aerial photograph is provided in **Figure 3** which demonstrates developments of a medium-rise scale interspersed along Oxford Street and throughout Paddington.

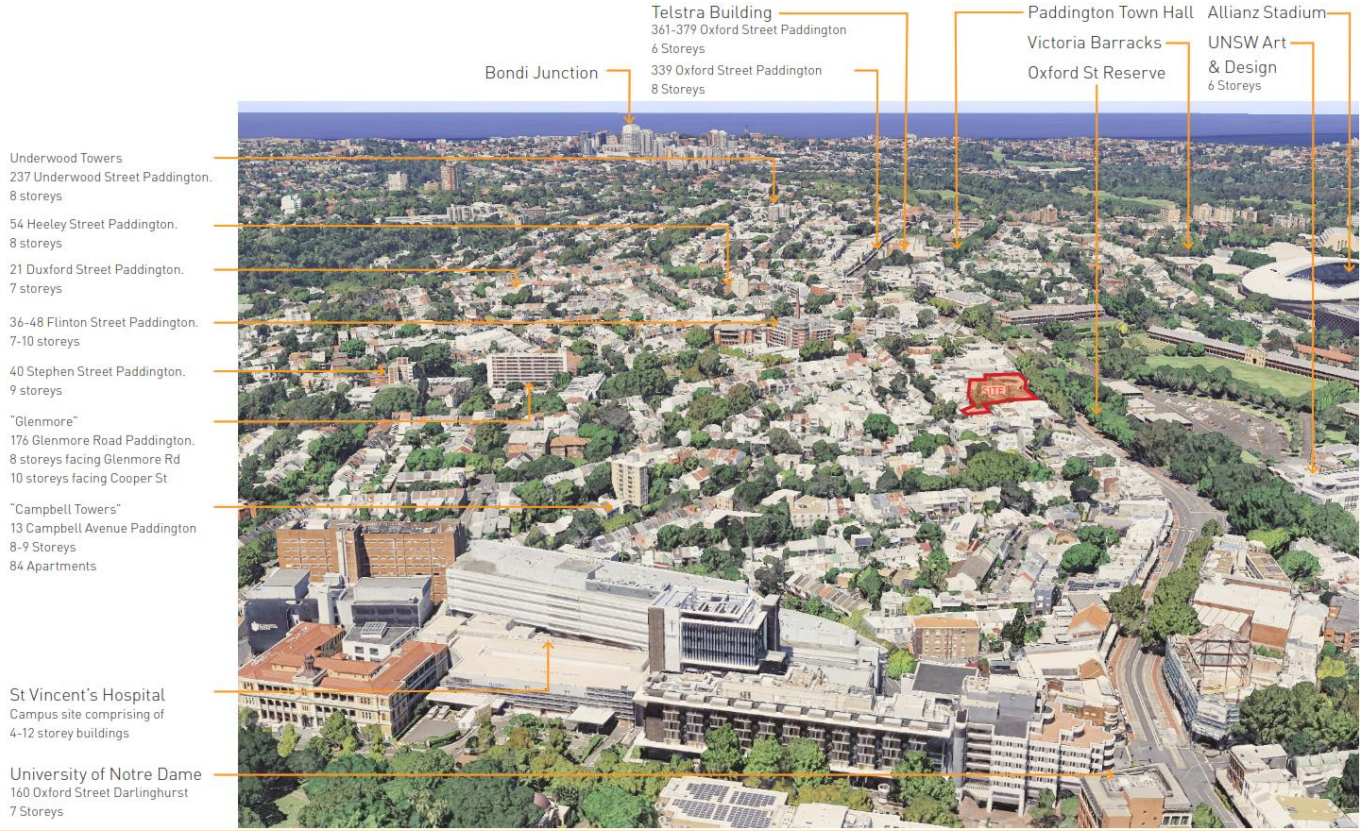


Figure 3 Context Aerial Photograph (site outlined and coloured)

Source: Smart Design Studio

3.1.1 Surrounding Development

The development surrounding the site is characterised by predominantly medium and high-density residential uses and includes the following:

- **North:** Parts of the sites are bound to the north by residential terrace developments varying in height from one (1) to two (2) storeys. The site adjoins the backyards of those terraces which have a depth of approximately six to eight metres. 146-148 Oxford Street and 13 Gipps Street are immediately adjoining Gipps Street. Further north of the site is a variety of low-density residential development including terrace housing and one storey miner cottages.
- **East:** Immediately east of the site is Shadforth Street. Adjacent to this is a diverse mix of heritage terrace style commercial development ranging in height from two (2) to four (4) storeys with ground floor retail fronting Oxford Street. Further east of the site is mixed use developments ranging in height from four (4) to eight (8) storeys.
- **South:** The site adjoins Oxford Street to the south. Further to the south is a heritage item of local significance being the Victoria Barracks Group at 75 Oxford Street, Paddington and surrounding Paddington Heritage Conservation Area. Notably, the Barracks are currently being utilised as an active army barracks that comprises of tall walls that essentially frame Oxford Street and large trees that cast substantial overshadowing to the Barracks. As well, Queens Gate is the nearest entry to the Barracks along Oxford Street. Further south of the site is the Moore Park Stadium.
- **West:** To the west of the site is a series of two (2) storey shop top terraces comprising boutique retail tenancies that contain heritage significant facades. Rows of terraces continue further west of the site in conjunction with low density residential dwellings including old miner cottages. However, it should be noted that the dwellings fronting Oxford Street are zoned MU1. Accordingly, shop top housing is permissible and future development of up to 9.5m and an FSR of 1:1 is permitted.

3.2 Key Features of Site and Surrounds

3.2.1 Site Description

The site is legally described in **Table 1**. The land is wholly owned by The Trustee for TM No. 8 Development Unit Trust . The site is irregular in shape and has an area of approximately 2,172.4m^2. The site comprises of four (4) street frontages, including a northern frontage to Gipps Street, northwestern frontage to Bethel Lane, eastern frontage to Shadforth Street and southern frontage to Oxford Street as shown in **Figure 4**.

Table 1 Legal Description of Site Lots

Map Reference	Address	Lot/DP	Area (m^2)	Zone
1	13 Gipps Street, Paddington	Lot 5 DP26385	149.8	R2 Low Density Residential
2	142 Oxford Street, Paddington	Lot 4 DP26385	247.8	R3 Medium Density Residential
3	144 Oxford Street, Paddington	Lot 3 DP26385	232.5	R3 Medium Density Residential
4	146 Oxford Street, Paddington	Lot 2 DP26385	248.6	R3 Medium Density Residential
5	148 Oxford Street, Paddington	Lot 1 DP26385	266.5	R3 Medium Density Residential
6	160 Oxford Street, Paddington	SP13018	889.1	R3 Medium Density Residential
7	6 Shadforth Street, Paddington	Lot 1 DP70235	138.1	R3 Medium Density Residential
Total			2,172.4m^2	

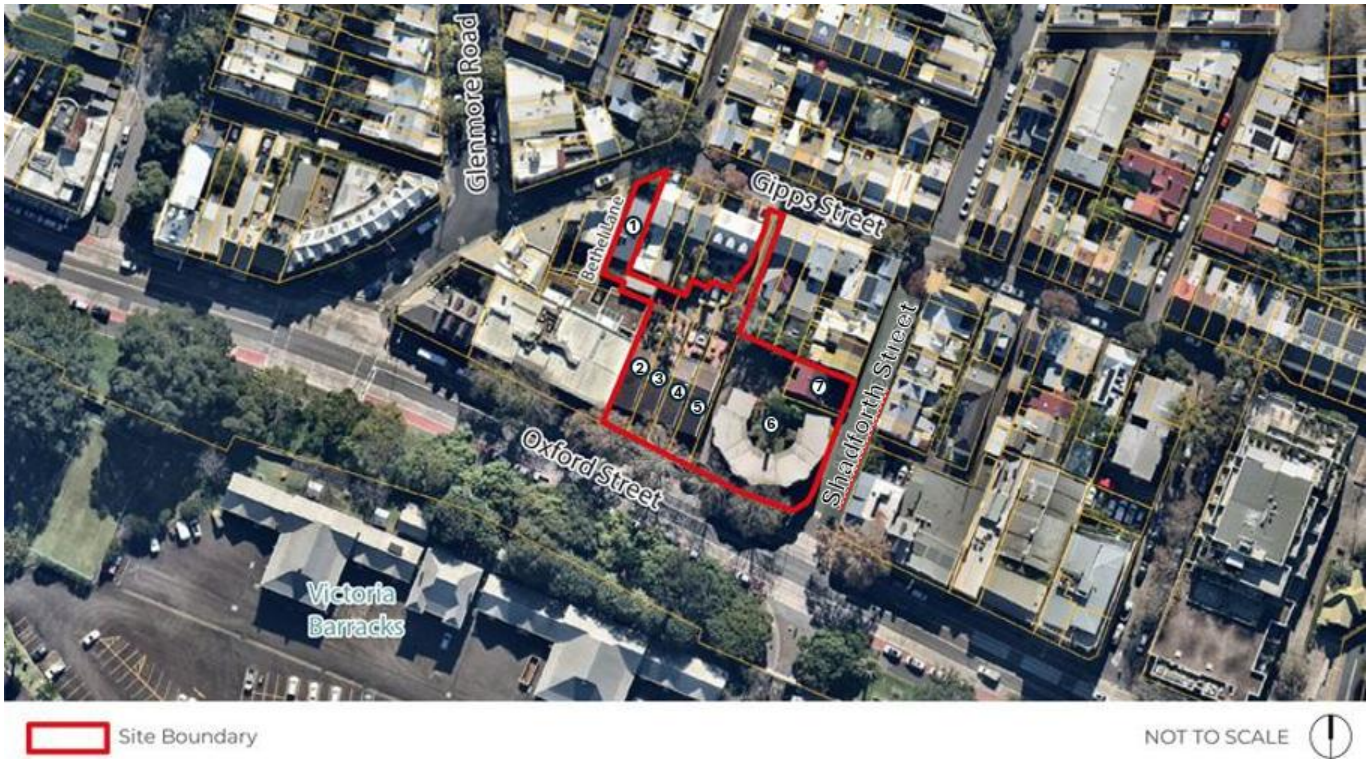


Figure 4 Site Aerial Map

Source: Nearmap and Colliers Urban Planning

Topography

The sites' topography is gently undulating with its highest point at the northeastern part of the site (RL 55.47). It slopes downward in a westward direction towards the site's western boundary, by approximately 5m, with the lowest point being on the western edge of the site along (RL 50.42). Along Oxford Street, the highest point is at the south-eastern corner of the site (RL 54.32), sloping downwards in a westward direction by approximately 3m to the southwestern corner of the site along Oxford Street (RL 50.95). A surveyed elevation of the Oxford Street frontage is shown at **Figure 5**, while an axonometric diagram showing the existing ground level throughout the site based on surveyed points within site is shown at **Figure 6**.

Consequently. the application of the height controls to the site results in a sloping maximum height plane.

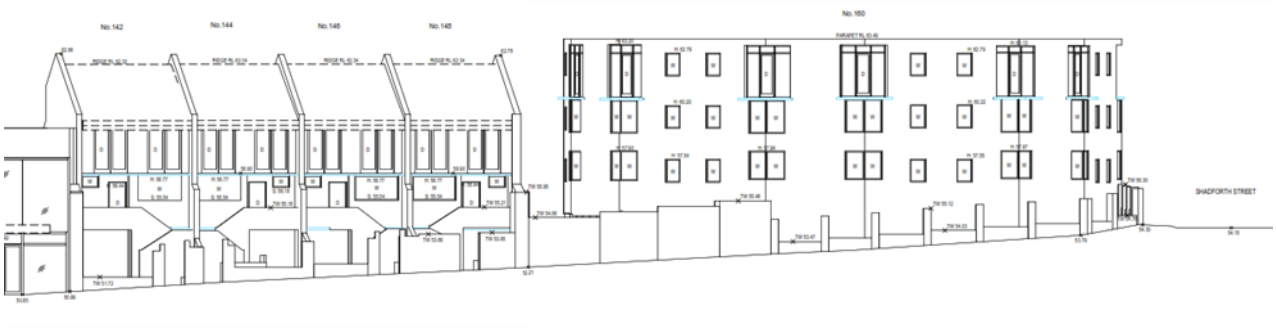


Figure 5 Surveyed elevation of the Oxford Street frontage of the site

Source: LTS

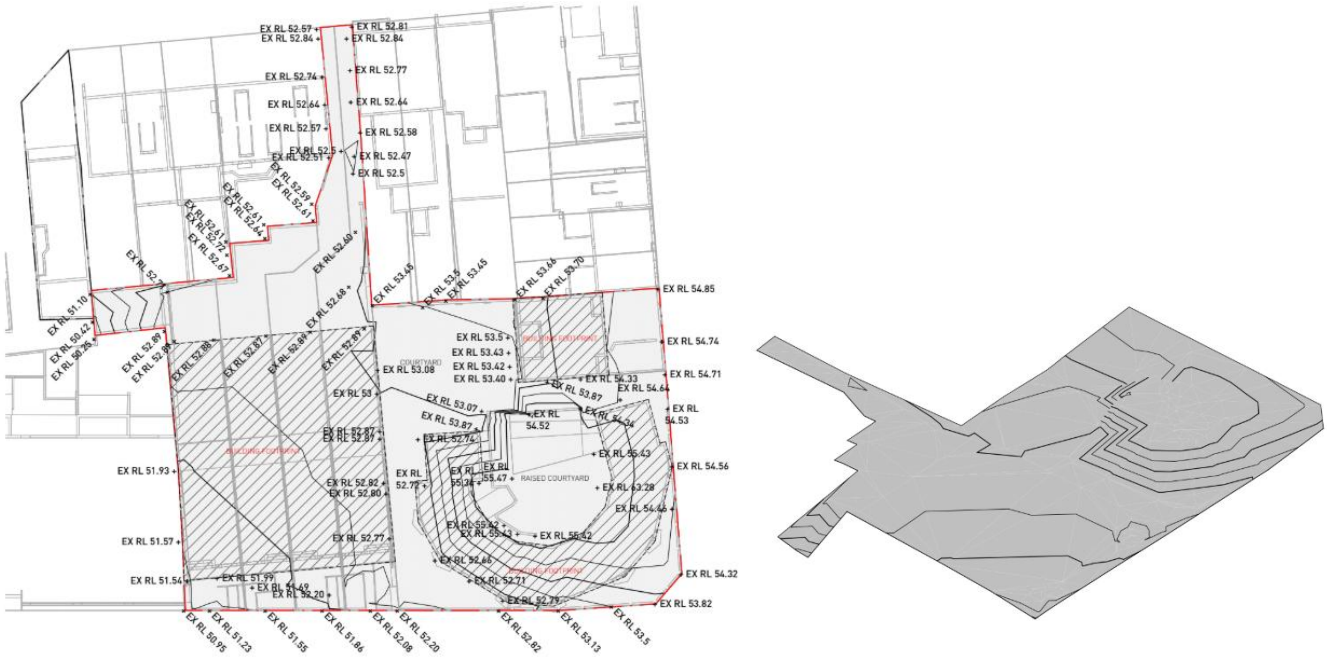


Figure 6 Surveyed levels within the site and axonometric diagram showing the topography within the site

Source: Smart Design Studio

3.2.2 Existing Development

Existing development on the site currently comprises of a detached two (2) storey rendered residential dwelling at 13 Gipps Street, a three (3) storey brick and rendered residential flat building at 160 Oxford Street with 27 studio dwellings, a row of two (2) storey terrace houses between 142-148 Oxford Street and a two (2) storey brick cottage at 6 Shadforth Street. Notably, there are two vehicular accessways to Gipps Street.

Photographs of the existing development on the site is illustrated in **Figure 7** below.

160 Oxford Street

142-148 Oxford Street

6 Shadforth Street

Gipps Street (Vehicular Access)

13 Gipps Street

Figure 7 Existing Development on Site

Source: Smart Design Studio

4.0 Development Standard to be Varied

4.1 Section 16(3) of the Housing SEPP

This clause 4.6 variation request seeks to justify contravention of the 28.6m height development standard created by:

1. The 22m non-discretionary standard in section 180(2)(b) of the Housing SEPP; and
2. The additional 30% permitted by section 16(3) of the Housing SEPP.

Section 16(3) of the Housing SEPP permits the maximum building height for residential flat buildings to be an additional 30% of the maximum permissible building height when 15% of the additional floor space ratio (FSR) is used for the purposes of affordable housing for a minimum of 15 years. The proposed development has an affordable housing component of at least 15% of floor space and is therefore eligible for a 30% increase in FSR under subsection 16(1) of the Housing SEPP.

The maximum building height has been established by subsection 16(3) of the Housing SEPP which states:

> *'maximum building height... is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1)'.*

For the proposed development on the site, the maximum building height is determined by the maximum building height under section 180(2)(b) of the Housing SEPP which applies a non-discretionary development standard of 22m to a residential flat building development in the LMR housing inner area, within which the site is located (see **Section 2.1**), plus an additional 30% of building height, which equates to 28.6m. The proposal therefore seeks to vary the 28.6m development standard.

A summary of the environmental planning instrument (EPI), development standard and proposed variation is in **Table 2.**

Table 2 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental Planning Instrument (EPI) sought to be varied	*State Environmental Planning Policy (Housing) 2021*
The site's land use zone (that is the portion of the site to which the clause 4.6 variation applies which excludes the R2 zoned part of the site)	R3 – Medium Density Residential
Development standard sought to be varied	28.6m height development standard created by: • The 22m non-discretionary standard in section 180(2)(b) of the Housing SEPP; and • The additional 30% permitted by section 16(3) of the Housing SEPP.
Definition of building height	*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.*
Numeric value of the development standard in the EPI	28.6m (refer to extract provided in **Figure 8**).
Difference between the existing and proposed numeric values. Variation percentage between the proposal and the EPI	**LMR Height Limit** / **30% Housing SEPP Bonus** / **Maximum building height under s16(3) Housing SEPP** / **Proposed maximum building height** / **Exceedance (m)** / **Variation (%)** 22m / 6.6m / 28.6m / 29.9m-31.4m / 2.8m / 4%-9%
Visual representation of the proposed variation	Refer to **Figure 10** and **Figure 12**.

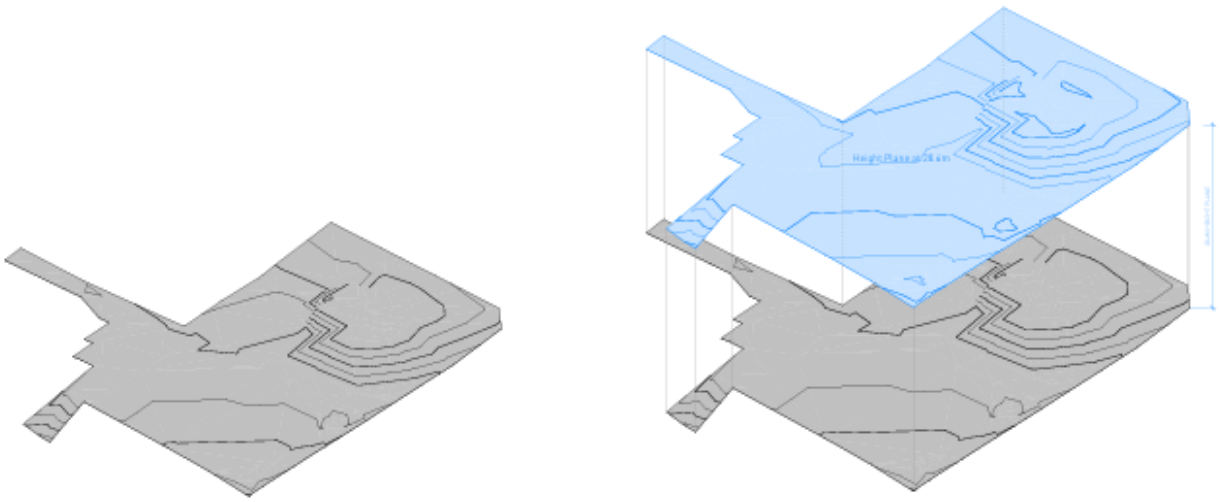


Figure 8 Axonometric diagram showing the sloping maximum height plan based on the surveyed existing ground level

Source: Smart Design Studio

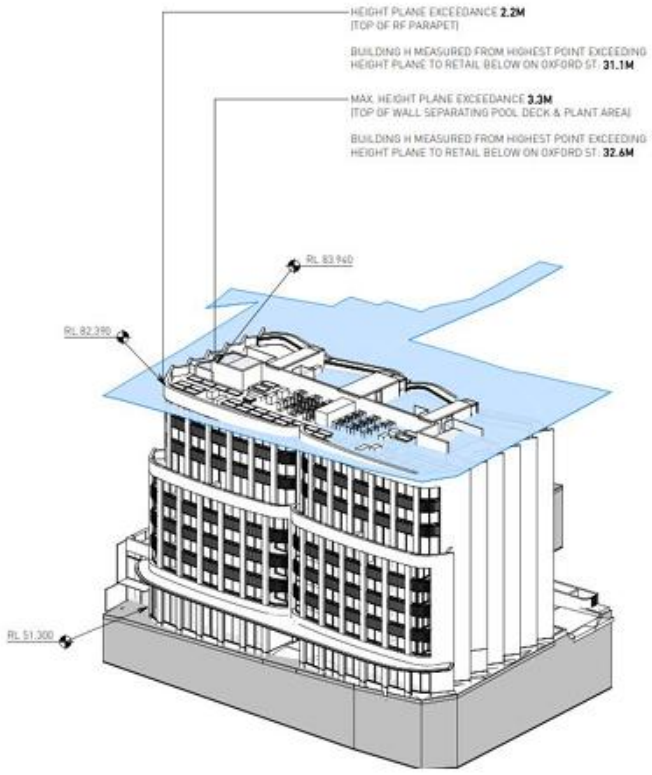


Figure 9 Submitted 3D Axonometric (view from southeast)

Source: Smart Design Studio

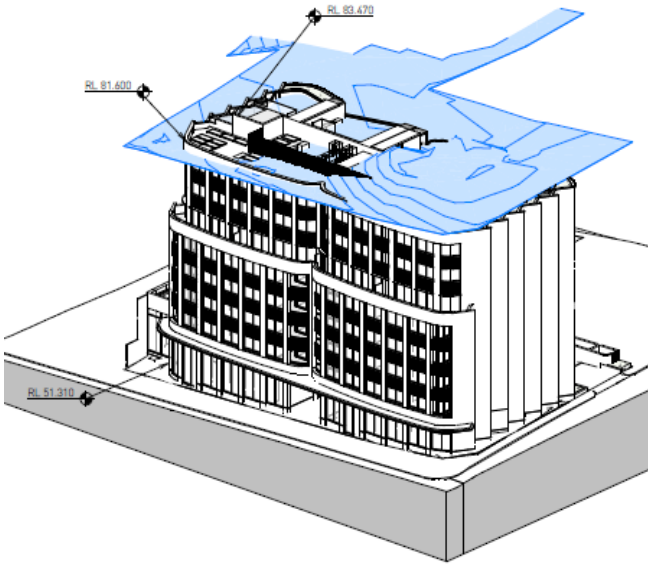


Figure 10 Amended 3D Axonometric (view from southeast)

Source: Smart Design Studio

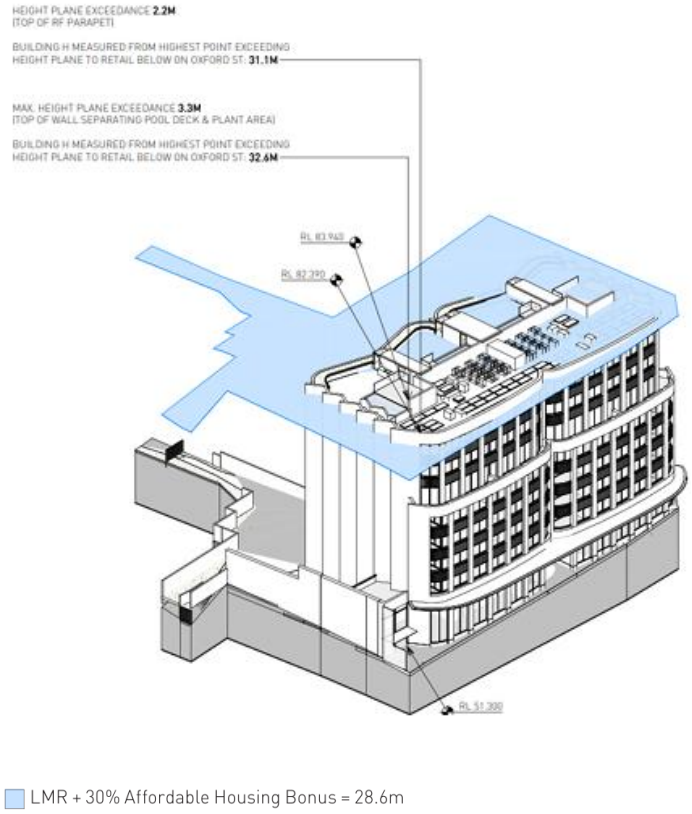


Figure 11 Submitted 3D Axonometric (view from southwest)

Source: Smart Design Studio

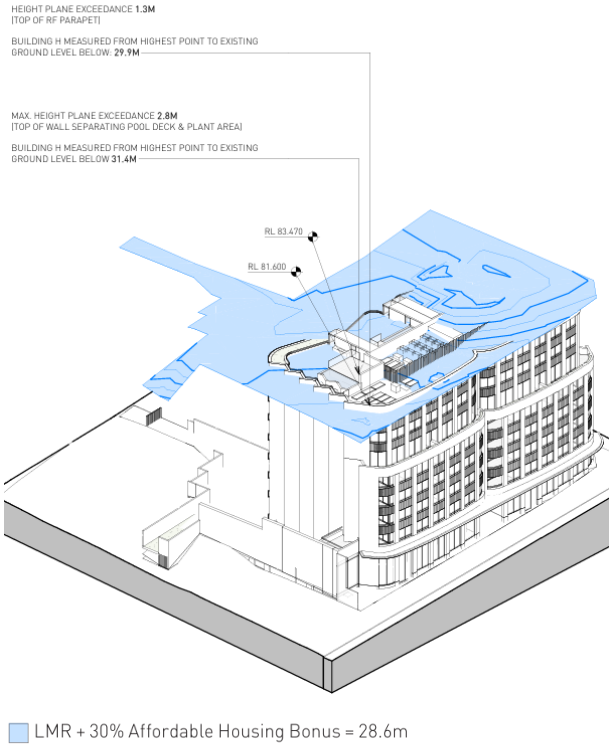


Figure 12 Amended 3D Axonometric (view from southwest)

Source: Smart Design Studio

The proposed variation is limited to the parapet of Level 7, rooftop plant, rooftop amenity structures and stairway overruns. The rooftop plant, rooftop amenity structures and stairway overruns are well setback from the building parapet such that they cannot be readily seen from Oxford Street, as shown below **Figure 13**.

Figure 13 Photomontage of Proposed Development from corner of Oxford and Shadforth Street

Source: Smart Design Studio

Notably, the height variation is predominantly a result of the uneven topography of the site with an approximate fall of 3-5m (see **Section 3.2.1**). Accordingly, the eastern portion of the proposed development is fully compliant with the 28.6 maximum building height under section 16(3) of the Housing SEPP, with the height variation applying to the western portion of the development as the site slopes west.

5.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the WLEP 2014 provides that:

4.6 Exceptions to development standards

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five); and
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).

The relevant matters contained in clause 4.6 of the WLEP 2014, with respect to the maximum building height development standard, are each addressed below, including with regard to these decisions.

5.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses similar language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the WLEP 2014 is essentially the same as the language used in clause 6 of SEPP 1, the principles contained in Wehbe are of assistance to this clause 4.6 variation request.

The five methods outlined in Wehbe include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 (**Fourth Method**).
- 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

This Clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and

accordingly justifies the variation to the height of buildings development standard pursuant to the **First Method**, addressed in **Section 5.1.1**.

The **Third Method** is also of relevance in that underlying object or purpose of the height of buildings development standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable. With the respect to the Third Method, Robson J characterised the relevant test as to whether requiring compliance would thwart or undermine at least one of the objectives of the height control development standard: *Linfield Developments Pty Ltd v Cumberland Counci*l [2019] NSWLEC 131 at [24]. The Third Method is addressed in **Section 5.1.2**.

5.1.1 First Method: The objectives of the standard are achieved notwithstanding non-compliance with the standard

Introduction

The development standard sought to be varied in this instance is the maximum permissible building height of 28.6m, comprising:

- The 22m non-discretionary standard in section 180(2)(b) of the Housing SEPP; and
- The additional 30% building height permitted under section 16(3) of the Housing SEPP.

Neither section 180(2)(b) nor section 16(3) of the Housing SEPP contains an express statement of objectives relating specifically to the applicable building height standard. Accordingly, the objectives of the 28.6m height standard must be derived from the broader statutory framework and policy intent of the relevant planning instruments.

The objective of section 16(3) of the Housing SEPP is informed by the broader objectives of Part 2, Division 1 of the Housing SEPP, which is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

Further, as the maximum building height is derived through the application of a 30% bonus to the 22m non-discretionary development standard under section 180(2)(b) of the Housing SEPP, the aim of Chapter 6 of the Housing SEPP relating to LMR housing is also relevant. In particular, section 162 identifies the overarching aim of encouraging the development of low and mid-rise housing in areas that are well located with regard to goods, services and public transport.

In addition, given that the development standard proposed to be varied is established under the Housing SEPP, the principles set out in section 3 of the Housing SEPP are also considered relevant to identifying the underlying objectives of the standard. These principles include supporting housing supply, affordability, diversity and well-designed residential development in appropriate locations. Finally, in the absence of any explicitly stated objectives specific to the height of buildings non-discretionary development standard and the 30% additional height under the Housing SEPP, the objectives of the height of buildings development standard under clause 4.3 of the WLEP 2014 are also considered for completeness. These objectives assist in demonstrating that the underlying planning outcomes sought by the applicable height controls are achieved notwithstanding the proposed variation to the development standard.

Accordingly, the relevant objectives are considered to arise from the following provisions and instruments:

- The objectives of Chapter 2, Part 1, Division 1 of the Housing SEPP relating to in-fill affordable housing;
- The objectives of Chapter 6 of the Housing SEPP relating to LMR;
- The principles of the Housing SEPP set out in section 3 of the Housing SEPP; and
- The objectives of the height of buildings development standard in clause 4.3 of WLEP 2014.

a) The objective of Chapter 2, Part 1, Division 1 of the Housing SEPP relating to infill affordable housing which underpins section 16(3) is achieved notwithstanding non-compliance with the standard

The objective of Part 2, Division 1 In-fill affordable housing of the Housing SEPP is as follows:

Section 15A

'The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.'

The proposal responds to an identified need for affordable housing, noting that the Woollahra Affordable Housing Policy (October 2021) acknowledges that there is insufficient affordable housing in Woollahra. The development provides a

meaningful component of affordable housing for those on low to moderate incomes for a minimum of 15 years in a location close to existing and proposed services, retail and public transport. The following aspects of the proposal demonstrate that the proposed development achieves this objective despite a variation to the standard:

- Total affordable housing apartments: 11 apartments.
- The affordable housing will be provided in a range of sizes as follows:
  - 6 x 1 bedroom apartments.
  - 4 x 1 bedroom apartments.
  - 1 x 3 bedroom apartment.

Compliance with the maximum building height would result in a building with one less storey on the western portion of the site (to meet the topography constraints of the site), which would reduce the provision of housing, and proportionally reduce the provision of affordable housing. The variation to the building height development standard therefore enables the proposal to deliver the upper-most storey in full and hence provide the required proportion of new in-fill affordable housing to meet the expected needs and profile of low and moderate income households. As such, the proposal, inclusive of the proposed variation to the building height development standard, meets the objective of the in-fill affordable housing provisions of the Housing SEPP, and would result in a better planning outcome planning outcome than if full compliance was achieved.

b) The aim of Chapter 6 of the Housing SEPP relating to the LMR housing non-discretionary development standard of 22m (to which the 30% affordable housing height incentive is applied) is achieved notwithstanding non-compliance with the non-discretionary development standard

Section 162

'The aim of this chapter is to encourage the development of low-and mid-rise housing in areas that are well located with regard to goods, services and public transport.'

The subject site is well-located in relation to public transport, services and key activity centres. It occupies a prominent position along the Oxford Street ridgeline and sits on a strategic corner adjoining an existing bus stop on Oxford Street, which provides frequent services to Bondi Junction, Rozelle and Marrickville Metro Station. Additional bus routes are located less than 600 metres further east along Oxford Street provide direct access to the Sydney CBD, ensuring excellent connectivity for future residents. This highly accessible setting aligns with the intent of Section 162, which seeks to focus low-and mid-rise housing in well-serviced, well-connected locations. The proposed height variation is readily able to be absorbed and accommodated within this urban built form morphology and represents an improved housing supply outcome when compared to a fully compliant scheme.

c) The principles of the Housing SEPP set out in section 3 are achieved notwithstanding non-compliance with the standard

Objective (a): enabling the development of diverse housing types, including purpose-built rental housing,

The proposed mixed-use development provides for a varied unit mix, including 6 x 1-bedroom apartments, 15 x 2-bedroom apartments and 23 x 3-bedroom apartments. Accordingly, although the development does not propose purpose-built rental housing, it provides for 44 high amenity dwellings consistent with the objectives of the Apartment Design Guide (ADG) within the Woollahra LGA and provides a significant improvement to the existing dwellings on the site in terms of internal amenity, quality of design, and consistency with the ADG.

The proposed variation to the affordable housing bonus and LMR non-discretionary development standard allows a reasonable quantum of additional dwellings to be provided without any unacceptable environmental impacts resulting from the variation to maximum building height.

Objective (b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,

The proposed development includes at least 15% of floorspace that will be affordable housing managed by a registered CHP for a minimum of 15 years, that will ensure the eleven (11) affordable dwellings will be leased to the more vulnerable members of the community, including very low to moderate income households. A reduction in height/storeys would result in a proportionate reduction in affordable housing units. The environmental impacts on that additional height (when compared to a compliant scheme) are further assessed in **Section 5.2**.

Objective (c) ensuring new housing development provides residents with a reasonable level of amenity,

The objectives and criteria of the ADG are the standard benchmark for a reasonable level of amenity for residential flat building developments. The proposed development is consistent with all the objectives of the ADG (refer to the EIS). The proposed height variation does not undermine the proposal's ability to meet these amenity objectives.

Moreover, certain amenity outcomes exceed the criteria in the ADG, including:

- Provision of 19.8% of site area as deep soil area whereas the ADG nominates 7%, enabling meaningful tree planting which will subsequently improve residential outlook, shade and microclimate for its residents.
- Provision of 33.4% of site area provided for communal open space whereas the ADG nominates 25%, offering a high-quality and usable open space that also achieves a minimum of 50% direct sunlight during mid-winter.
- Tree canopy 24% in comparison to the required 20%.
- 73% of apartments achieving cross-ventilation, whereas the ADG nominates 60%.
- 82% of all apartments receiving at least two hours of direct solar access between 9am and 3pm during mid-winter, including 73% of affordable apartments, whereas the ADG nominates 70%.

Objective (d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,

The proposed development is located on a site that benefits from existing infrastructure and services, including all essential utilities. Moreover, bus services are readily accessible from bus stops within walking distance of the site, providing services to Bondi Junction, Rozelle and Marrickville Metro Station and the Sydney CBD. The site is also within walking distance to the Darlinghurst and Paddington Town Centre, which has ample essential services and is well-located, evidenced in its inclusion as one the LMR areas, noting that the objective of LMR housing is to encourage the development of low-and mid-rise housing in areas that are well located with regard to goods, services and public transport. The LMR and infill affordable housing reforms envisage a built form of 6-8 storeys in these highly accessible locations. The proposed height variation still presents an eight (8) storey building (with the removal of the Lower Ground Floor dwelling) from the public domain and Oxford Street and is readily capable of being absorbed into the surrounding context which includes buildings and heights of this scale in the locality.

Objective (e) minimising adverse climate and environmental impacts of new housing development

An ESD Report, NABERS embodied emissions form, BASIX and NatHERS certificates are provided as part of the EIS for the proposed development, demonstrating the proposal's commitment to minimising climate-related impacts. The proposed height variation results in a level rooftop, which promotes the most efficient layout of mechanical plant and solar panels, which contributes to maximising the ESD outcomes of the proposed development.

Objective (f) reinforcing the importance of designing housing in a way that reflects and enhances its locality

The site is located within a varied context, as the character of Paddington includes a mix of development types, including smaller apartment blocks as well as low-rise Victorian-era terraces and houses. Importantly, a number of taller buildings both old and new exceed this low-rise scale (refer to **Figure 3** and **Figure 14**). These include the landmark Paddington Town Hall (c1891) whose 32m clock tower remains a dominant tall structure and demonstrates that buildings along the Oxford Street ridgeline are capable of holding taller buildings. Examples of more contemporary taller buildings pockmarking the greater Paddington area ranging from 8-12 storeys including: St Vincents Hospital (12 storeys), 339 Oxford Street Paddington (8 storeys); 36-42 Flinton Street Paddington (10 storeys); 176 Glenmore Road Paddington (10 storeys); 40 Stephen Street Paddington (9 storeys); and 13 Campbell Avenue Paddington (9 storeys). In this regard, the proposed development responds to the varied the character of Paddington, Oxford Street and its surrounding area, by contributing to the collection of varied height buildings through a well-designed scheme.

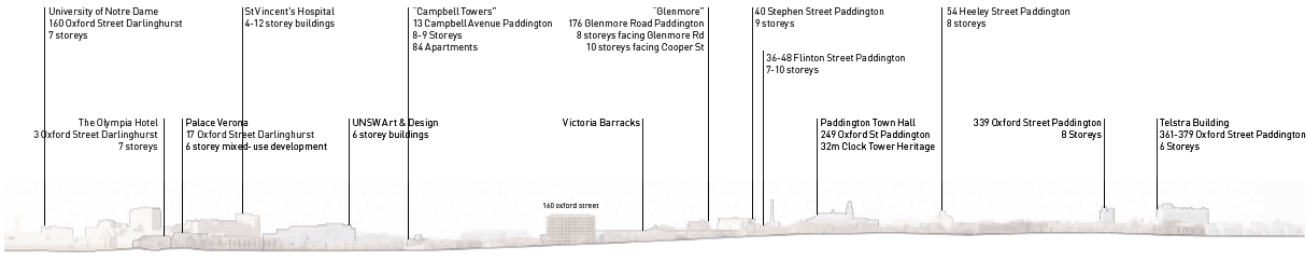


Figure 14 Elevation of building heights within the locality

Source: Smart Design Studio

Moreover, the Paddington Heritage Conservation Area (HCA) locality statement in the Woollahra Development Control Plan 2015 (WDCP 2015), states that:

> *Paddington retains many significant types of buildings that represent all phases of the suburb's historical development. These building types range from modest, small-scale, single storey timber and masonry cottages, to remnant examples of former gentry mansions, boom style middle-class terrace houses, apartment blocks and contemporary infill development, all of which are set in a varied network of streets, lanes and pedestrian accessways which reflect the phases of subdivision and development.*

The proposed development and proposed height variation represents contemporary infill development and an apartment block that is well-designed and thus reflects the locality. In addition, it responds to the historic materiality of the surrounding context by proposing the main building facades to be clad in sandstone.

The proposal and proposed height variation will enhance the locality, especially when viewed from Oxford Street, by providing an aesthetically balanced and visually broken-up presentation to Oxford Street through sandstone walls that soften the building, and a curved design with ribbed spandrels and balconies that provide high-quality design features and visual interest.

The tallest elements of the proposal that exceed the 28.6m height plane are well-setback form the building parapet, being centrally located rooftop plant, rooftop amenity structures and stairway overruns and rooftop/parapet of the top level. Therefore, the visual presentation of the development to the streetscape is not detrimentally affected by the proposed height variation.

Objective (g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,

This principle is not relevant to the proposed development as it does not propose short-term rental accommodation.

Objective (h) mitigating the loss of existing affordable rental housing.

This objective is given effect by Chapter 2, Part 3 of the Housing SEPP, which seeks to retain low-rental dwellings within low-rental residential buildings. Under section 146, this part of the Housing SEPP does not apply to a building that is strata-titled. The existing building on 160 Oxford Street is strata-titled, while all other dwellings on the site are owner-occupied. As such, the proposed development does not result in the loss of any existing affordable rental housing as defined by Chapter 2, Part 3 of the Housing SEPP.

d) The objectives of the WLEP 2014 clause 4.3 height of buildings development standard are achieved notwithstanding non-compliance with the standard

The objectives of the height of buildings development standard contained in Clause 4.3 of the WLEP 2014 are:

> *(a) to establish building heights that are consistent with the desired future character of the neighbourhood,*
>
> *(b) to establish a transition in scale between zones to protect local amenity,*
>
> *(c) to minimise the loss of solar access to existing buildings and open space,*
>
> *(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*

(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

Objective (a): to establish building heights that are consistent with the desired future character of the neighbourhood,

The desired future character of any site is necessarily related to the site's relevant principal development standards, principally established by the State gazetted statutory planning controls that apply to the neighbourhood. As the site is located within 400m walking distance of the Darlinghurst and Paddington Town Centre, medium-rise housing is now the anticipated scale and density of development on the R3 Medium Density Residential zoned part of the site, which forms the majority of the site, and other R3-zoned sites in Paddington. These new statutory planning controls thus set the desired future character of the site and Paddington locality and reflect a broader changing desired future character across Greater Sydney for increased medium-rise housing. It is also noted that concurrent use of both the LMR and Affordable Housing height and floor space incentives is appropriate and encouraged by the Housing SEPP.

The desired future character of the neighbourhood is also affected by the land use zoning within the neighbourhood. The neighbourhood has a varied character because it is made up of three different land use zones, namely the MU1 Mixed Use zone along the majority of the northern side of Oxford Street, the R3 Medium Density Residential zone fronting Oxford Street on this block, and the R2 Low Density Residential zone immediately behind the MU1 and R3 zones. Therefore, the desired future character of the neighbourhood includes a range of development scales and uses due to the confluence of land use zones within the neighbourhood. The proposed development is consistent with the key objectives, including the providing for the housing needs of the community and through a variety of housing types within a medium density environment. Importantly, the objectives of the R3 Medium Density Residential zone envisages a variety of housing types, of which residential flat buildings are a permissible housing type. Moreover, the proposed development also includes shops on the ground floor to provide facilities and services to meet the day to day needs of residents. The proposed development is also consistent with the objective to conserve and enhance tree canopy cover, as the trees along Oxford Street will be retained, and tree canopy cover will be increased to 24% of site area.

In addition, and reflective of the range of land use zones in the neighbourhood, the greater Paddington area already contains a mix of buildings including 8-12 storey developments which punctuate the skyline (as shown in **Figure 3**).

The proposal demonstrates a very close alignment with these development standards and for this reason demonstrates a high degree of consistency with the desired future character. It presents as an eight (8) storey development towards the public domain and Oxford Street, which is consistent with the desired future character under the mid rise housing reforms and affordable housing height and floorspace incentives, and is also consistent with the existing varied character of the area. Moreover, the upper-level setback of the top three storeys ensures that the street wall height is less than the 6 storeys envisaged by the base LMR controls. Therefore, the height variation continues to result in a building height that is consistent with the desired future character of the neighbourhood.

Figure 15 shows a surveyed photomontage which includes an indicative future built form on the neighbouring R3 Medium Density Residential-zoned site immediately to the west that is eligible to use the low and mid rise controls of 22m. It shows the scale of development envisaged by the principle development standards which establish the desired future character, and demonstrates the consistency of the proposed development with the overall desired future character.

Figure 15 Photomontage showing proposed development with indicative future built form at 126-140 Oxford Street under LMR controls viewed from Oxford Street (southern footpath at Glenmore Road intersection)

Source: Colliers Urban Planning & Virtual Ideas

Objective (b): to establish a transition in scale between zones to protect local amenity,

The proposed height variation relates only to the R3 Medium Density Residential part of the site, which is subject to the LMR housing controls allowing for an uplift in height, upon which the NSW Government encourages the 30% height bonus to be applied. The proposal is consistent with the desired future character of the area as envisaged by the statutory planning controls and the NSW Housing Reforms (demonstrated above).

Both sides of Oxford Street are characterised by mixed-used zones, development and buildings such as Paddington Town Hall (c1891) (with a 32m high clock tower) that demonstrate that Oxford Street can hold tall buildings, being a major road along a ridgeline. As such, transitions in scale along Oxford Street are not critical, given that Oxford Street is punctuated in regular intervals by many tall buildings of various heights (see **Figure 3**).

Therefore, the key transition in scale between zones is the transition from the R3 Medium Density Residential zone on the site to the R2 Low Density Residential zone to the north of the site. As the height variation relates primarily to elements setback above the parapet, and that a compliant development would still present an eight storey form on at least the eastern half of the site, the proposed height variation does not change the prevailing scale of the building when viewed from the R2 zone to the north, when compared to a fully compliant building. Rather, the scale of the development and height variation is mitigated through other design moves, such as:

- Generally providing a 9m setback from the northern boundary to ensure that all ADG building separation criteria are achieved (see **Figure 16**). It is noted that a setback limited to 6m would be require for the ground floor to Level 3. However, a consistent setback of generally 9m is proposed from the ground level, which provides a superior building separation and urban transition outcome. It also avoids ziggurat building forms which are not encouraged by the ADG.
- Dividing the northern façade into four distinct vertical forms, with sculpted curved balcony forms to reduce the visual bulk and scale of the building (see **Figure 17**), which is determined more by architectural articulation than solely height.

- Provision of planters on the northern facade such that line of sight to the backyards and windows of properties on Gipps Street to the north are obstructed, thus ensuring visual privacy through design measures rather than providing an additional 3m setback recommended for high density developments adjoining a low -density zone.
- The rooftop terraces have solid balustrades and are setback from the building parapet by planters to prevent overlooking onto neighbouring properties to the north.

Moreover, as the site is located south of the R2 Low Density Residential zoned land, the proposed development does not result in any overshadowing to the low density residential properties to the north, irrespective of the height variation.

Importantly, establishing appropriate urban character for building separation and transition in scale is derived from an analysis of the local area, rather than metrics in the ADG that are for visual privacy purposes. Accordingly, on a broader urban scale, it is important to note that the transition in scale between zone boundaries at the northern boundary of the site, while pronounced, is consistent with similar transitions evident elsewhere along Oxford Street. A clear and recurring pattern occurs along Oxford Street, where corner sites accommodate buildings of greater scale in very close proximity to adjacent low-scale terrace houses - for example immediately next door to many of the corner pubs, schools, churches, and the Paddington Post Office. In these instances, the nearby terrace houses directly abut the larger-scale building or sit in very close proximity to it, and these taller buildings are a visual immediate backdrop behind those terrace houses. This is a feature of the relationship between Oxford Street - the high street - and the remainder of lower-scale Paddington. The proposal is consistent with this observable pattern along Oxford Street where larger buildings are situated close to small ones.

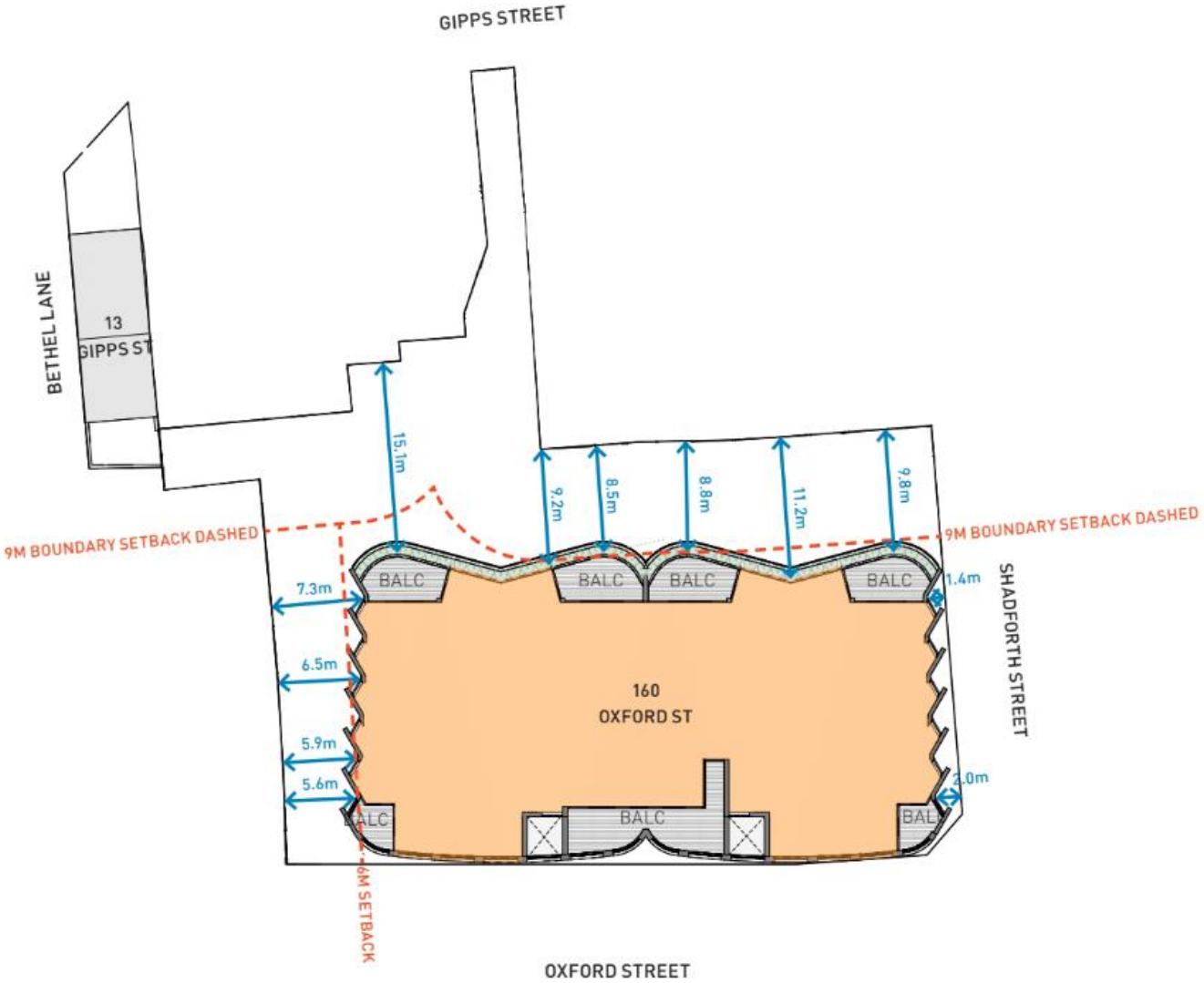


Figure 16 Proposed building separation distances (to mediate height transitions) in accordance with the ADG

Source: Smart Design Studio

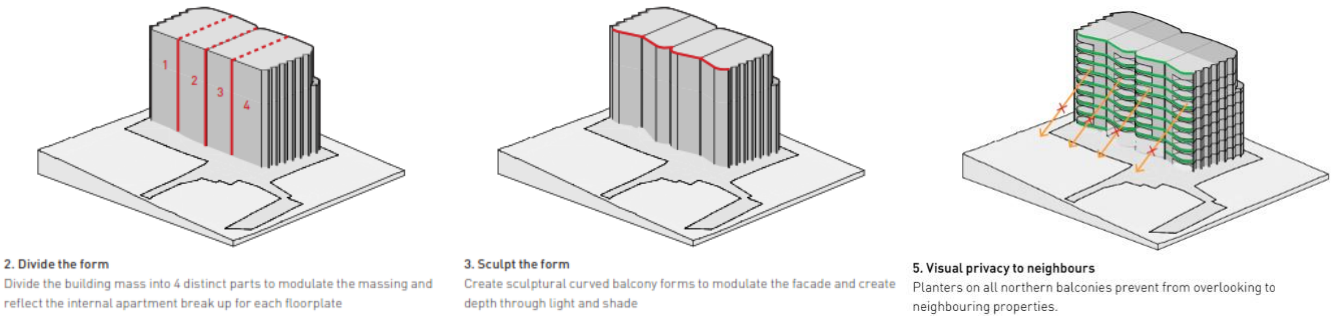


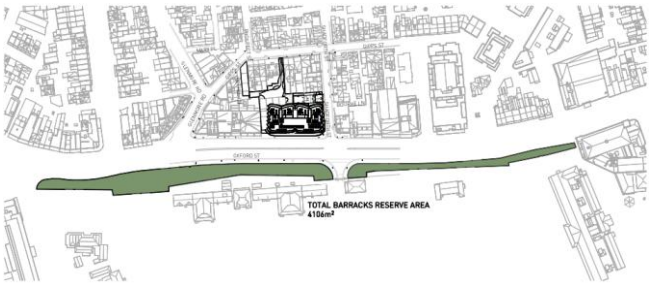
Figure 17 Design moves to mitigate visual bulk and scale when viewed from the low density residential properties to the north and to mitigate visual privacy impacts

Source: Smart Design Studio

Objective (c): to minimise the loss of solar access to existing buildings and open space,

There are no residential properties that are impacted by overshadowing by the proposed development, irrespective of the height variation.

In relation to open space, the site is located north of Oxford Reserve, which is on the southern side of Oxford Street and within the City of Sydney local government area. Therefore, the acceptability of the proposal's overshadowing of the Oxford Reserve open space may be guided by reference to Control 3.1.4(3) of the Sydney Development Control Plan 2012, which specifies no more than 50% of public open space areas to receive sunlight for at least 4 hours between 9am-3pm on the winter solstice. Noting that the total area of Oxford Reserve adjacent to the site is 4,106m^2, **Figure 18** shows that between 9am and 3pm, at least **3,386m^2 (82%)** of Oxford Reserve receives sunlight each hour (that is the worst case). Moreover, the amount of overshadowing generated by the parts of the building over 28.6m is limited to a maximum of 15m^2 which is **0.37%** of the entire Oxford Reserve Area, and thus an insignificant amount. Therefore, notwithstanding the height variation, the proposed development minimises the loss of solar access to existing buildings and open space as per this objective.



Oxford Reserve area: 4,106m²

SHADOW LEGEND

EXISTING SHADOWS

ADDITIONAL SHADOWS BY THE PROPOSED MASSING (FOR THE LMR HEIGHT - MAX HEIGHT 22M)

ADDITIONAL SHADOWS BY THE PROPOSED MASSING (FOR THE LMR + 30% AFFORDABLE HOUSING BONUS HEIGHT - MAX HEIGHT 28.6M)

ADDITIONAL SHADOWS BY THE PROPOSED MASSING (EXCEEDING 28.6M LMR + 30% AFFORDABLE HOUSING BONUS HEIGHT

Figure 18 Proposed overshadowing to Oxford Reserve (showing difference in shadowing when compared to a compliant scheme)

Source: Smart Design Studio

Objective (d): to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

Views

No iconic views have been identified from surrounding residential buildings, and therefore the proposed height variation does not disrupt any valuable views from surrounding residential buildings to iconic views.

Loss of privacy

The trafficable elements of the building above the 28.6m height plane that affect privacy are limited to the trafficable rooftop terraces on the western portion of the rooftop. As shown in **Figure 19**, the trafficable areas of these terraces are setback behind planters to prevent overlooking onto neighbouring properties to the north.

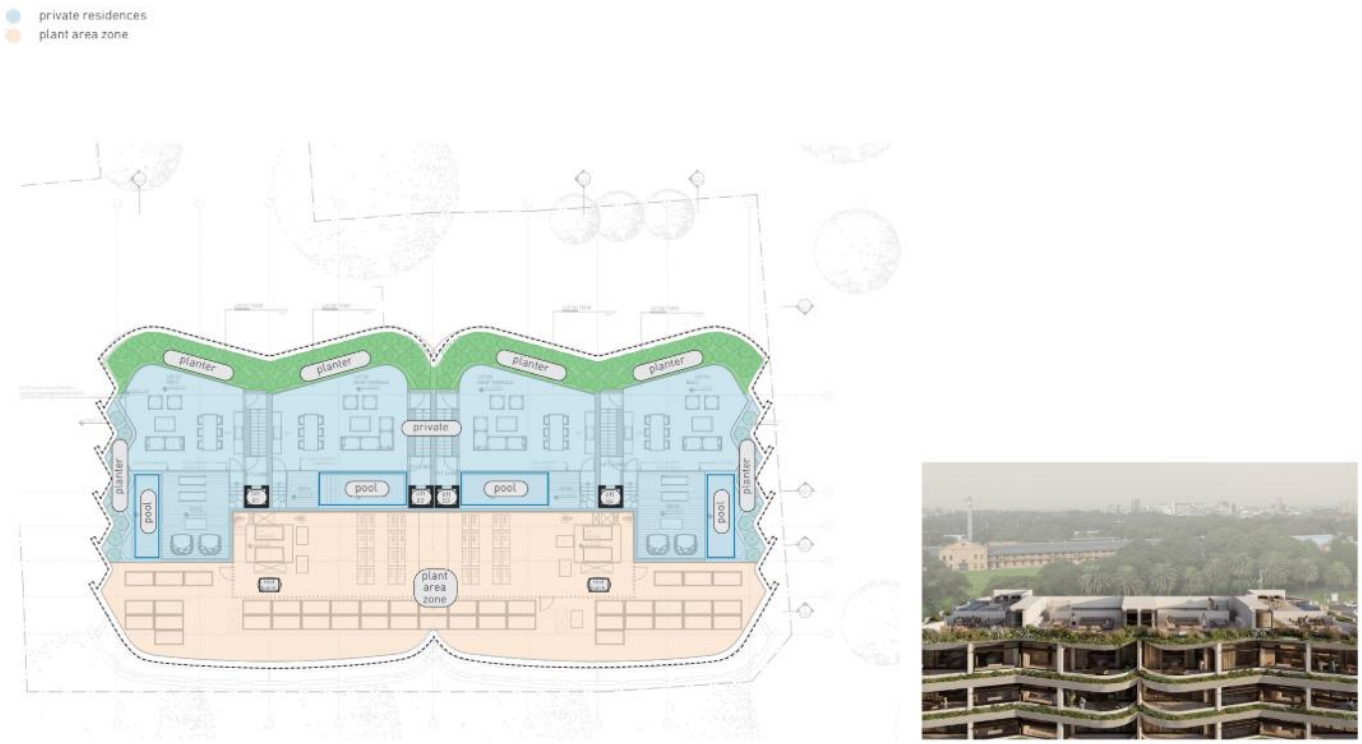


Figure 19 Diagram showing trafficable roof terraces setback from the building parapet to mitigate overlooking from proposed height variation

Source: Smart Design Studio

For the remainder of the northern façade that is below the height limit, visual privacy to the north is promoted through the following design measures (see **Figures 20 and 21**):

- Provision of planters on the northern facade such that line of sight to the backyards and windows of properties on Gipps Street to the north are obstructed, thus ensuring visual privacy through design measures rather than providing an additional 3m setback recommended for high density developments adjoining a low -density zone (see **Figure 21**).
- Upper-level living rooms are situated behind balconies to further restrict the potential for overlooking onto the properties to the north, noting solid balustrades are proposed.
- Visual privacy between the lower-level residents' living rooms and balconies and the neighbouring properties is achieved through a combination of existing mature trees on adjoining sites and supplementary landscaping & trees within the site. The substantial green buffer reduces direct lines of sight. Together the existing landscape context and the new vegetation ensure a softened interface, improving privacy for both residents and neighbours without relying on built screening elements or boundary walls. Notwithstanding, numerical consistency with the recommended ADG building separation for the lower levels is achieved.

Figure 20 Diagram showing design measures for the lower levels to further promote visual privacy to the north

Source: Smart Design Studio

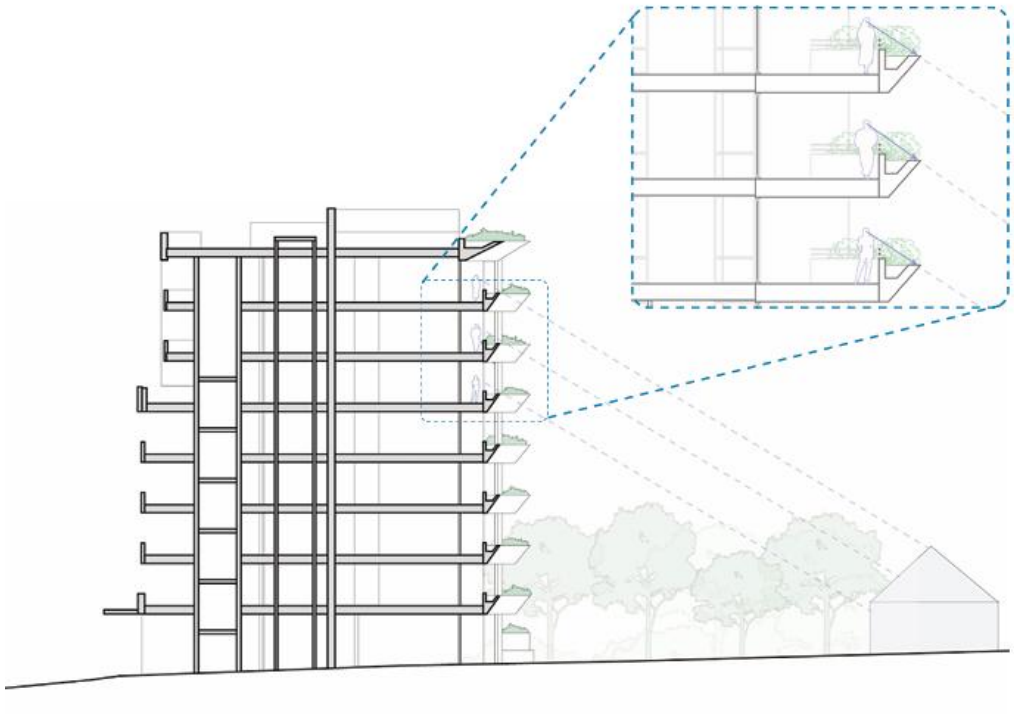


Figure 21 Line of sight diagram showing the benefit of planters to promote visual privacy to the north

Source: Smart Design Studio

Visual privacy to the lower scale buildings to the east and west is ensured through the proposed angled gills on the eastern and western facades which direct views away from adjacent residential buildings (see **Figure 16**).

It is also noted that the proposal generally aligns with the numerical guidance under ADG Objective 3F-1 of the ADG, while providing generous building setbacks to 23-27 Gipps Street. Although numerical consistency is broadly achieved, the proposed design measures listed above, including strategic window placement, gills, ground floor landscaping and the deliberate positioning of planters along the balconies ensures that the qualitative objectives of the ADG visual privacy outcomes are fully met and that the proposed height variation therefore results in no adverse privacy impacts.

Figure 22 Diagram showing design measures for the eastern and western elevations

Source: Smart Design Studio

Overshadowing

Overshadowing impacts have been addressed in detail under Objective (b). In summary, the minor height exceedances do not generate any overshadowing to residential dwellings. Additional overshadowing is limited to a commercial/retail developments along Oxford Street. Any incremental overshadowing from the height variation occurs only on the roof of 170-174 Oxford Street and 178 Oxford Street and would arise even under a compliant height envelope.

The Victoria Barracks, particularly Buildings, 94, 95 and 96 are not considered to be sensitive to overshadowing impacts from the site because:

- A row of existing mature trees within Oxford Reserve already throw shadows on the façade and roof of those buildings (see **Figure 23**).
- Where the existing mature trees do not throw shadows, shadows from the development would be cast on the perimeter wall which is over 3m in height.
- Buildings 94, 95 and 96 have no visibility from the public realm in Oxford Street, have no outlook beyond the Barracks precinct, and do not have any residential function.
- Buildings 94, 95 and 96 turn their backs to the nearby Perimeter Wall, the narrow space between the two features accommodating toilet facilities. The wall itself throws shadows onto the intervening space and onto portions of the subject buildings.

Overshadowing to Buildings 94-96 resulting from the height variation, that are not already overshadowed by the existing trees, is limited to one small portion of the roof of those buildings between 9-10am, circled in red at **Figure 23** which is very minor and does not affect any windows.

The majority of new overshadowing remains confined to Oxford Street and the public domain, notwithstanding the height variation, and thus meets this objective.

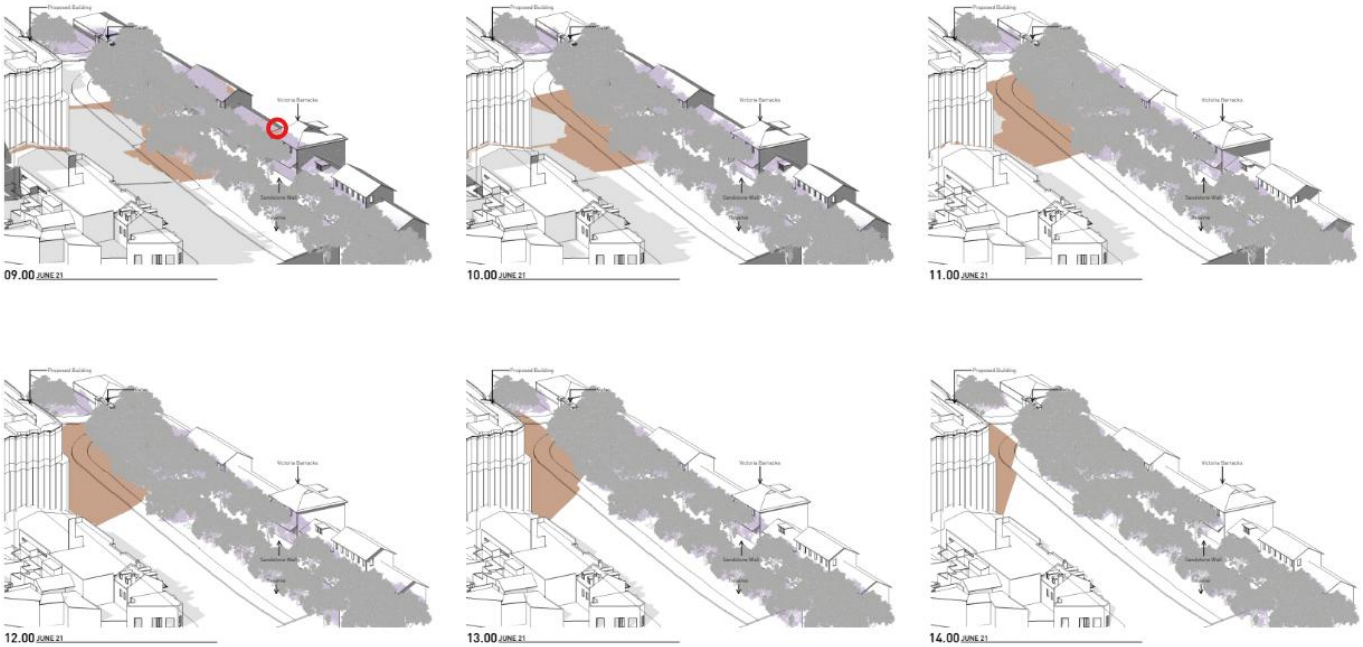


Figure 23 Overshadowing diagrams showing impact to Victoria Barracks

Source: Smart Design Studio

Visual Intrusion

The proposed development, irrespective of the height variation, will be largely obscured from view from most locations within the Paddington HCA, due to the web of streets north of Oxford Street and dense existing development terrace-style development with minimal separation between buildings and development to or near the front boundary line of most sites. This allows for only a narrow skyline in most places. As such, the proposed development will have limited visibility from north of Oxford Street. Surveyed photomontages of the development viewed from streets within the HCA to the north are shown in **Figures 24-25**.

Figure 24 Surveyed photograph of the proposed development looking south from Mary Place

Figure 25 Surveyed photograph of the proposed development looking south from Liverpool Street (corner of Walker Lane)

Source: Colliers Urban Planning

Along Oxford Street, there will be minimal visual intrusion as the proposed development sits within the scale of and behind the large trees that line the northern side of Oxford Street (see **Figures 26-27**).

Figure 26 Surveyed photograph of the existing site looking east along Oxford Street

Figure 27 Surveyed photograph of the proposed development looking east along Oxford Street

Source: Colliers Urban Planning

Overall, the building and proposed height variation has been deliberately modelled to reduce perceived bulk and minimise visual intrusion. This includes façade articulation, considered building separation from surrounding development, and a clear upper-level setback strategy. The elements that exceed the Housing SEPP height limits, namely predominantly rooftop plant, rooftop amenity structures and stairway overruns are centrally located, substantially recessed from all external façades, and effectively obscured from public view, including the Oxford Street frontage. Importantly, the height variation arises from a sloped topography on the site, which causes portions of an otherwise compliant eight (8) storey roof level to sit above the height limit despite achieving an appropriate overall building scale. The proposal (irrespective of the height variation) continues to read as an eight (8) storey building, with a six (6) storey based, which is envisaged by the site's planning controls.

5.1.2 Third Method: The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

Furthermore, compliance with the building height non-discretionary development standard is considered unreasonable and unnecessary because strict compliance would thwart or undermine the objectives of the height control development standard.

As discussed in **Section 5.1.1**, the underlying objective of the height development standard is partly informed by section 15A of the Housing SEPP which states that the *'The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.'*

Strict compliance with the 28.6m height plane could result in the loss of at least half a storey of residential apartments, being at least 4-5 apartments. As the proposal results in a net increase of eleven (11) dwellings, strict compliance would thwart the underlying objective to increase affordable housing supply as well as housing supply that meets the higher standards of amenity required by the ADG. The proposed infill affordable dwellings provide substantially more amenity than the current studio dwellings on the site which are generally inconsistent with the ADG (refer to the RTS Report), as they will meet the ADG objectives and criteria and incorporate superior and current ESD initiatives.

In addition, the proposed development complies with the maximum FSR including application of the 30% FSR bonus for infill affordable housing. Therefore, strict compliance with the height control would result in an underutilisation of the maximum FSR potential of the site, and thus undermine the objective of the standard to facilitate and maximise provision of both housing and affordable housing (to meet the needs of very low, low and moderate income households).

Lastly, despite the majority of Paddington being mapped within the LMR area, the majority of Paddington is either zoned R2 Low Density Residential that limits residential flat building developments to a height of 9.5m and FSR of 0.8:1, or zoned R3 Medium Density Residential but limits residential flat building developments to a height of 17.5m and FSR of 1.5:1, neither of which can provide as much housing as this site. Moreover, even though there are other areas in the R3 Medium Density Residential LMR housing inner area, they are unlikely to be redeveloped as they either contain many strata titled flat buildings or have been recently redeveloped. Therefore, only this site, and the adjacent site to the west at 126-140

Oxford Street are realistically potential LMR + infill affordable housing development sites which can play the role of increasing housing supply in Paddington.

Therefore, this proposed development meaningfully contributes to the desired density targets and reducing the proposed height would undermine the objectives of housing supply in this area and hence undermine the objectives of the LMR and infill affordable housing height controls.

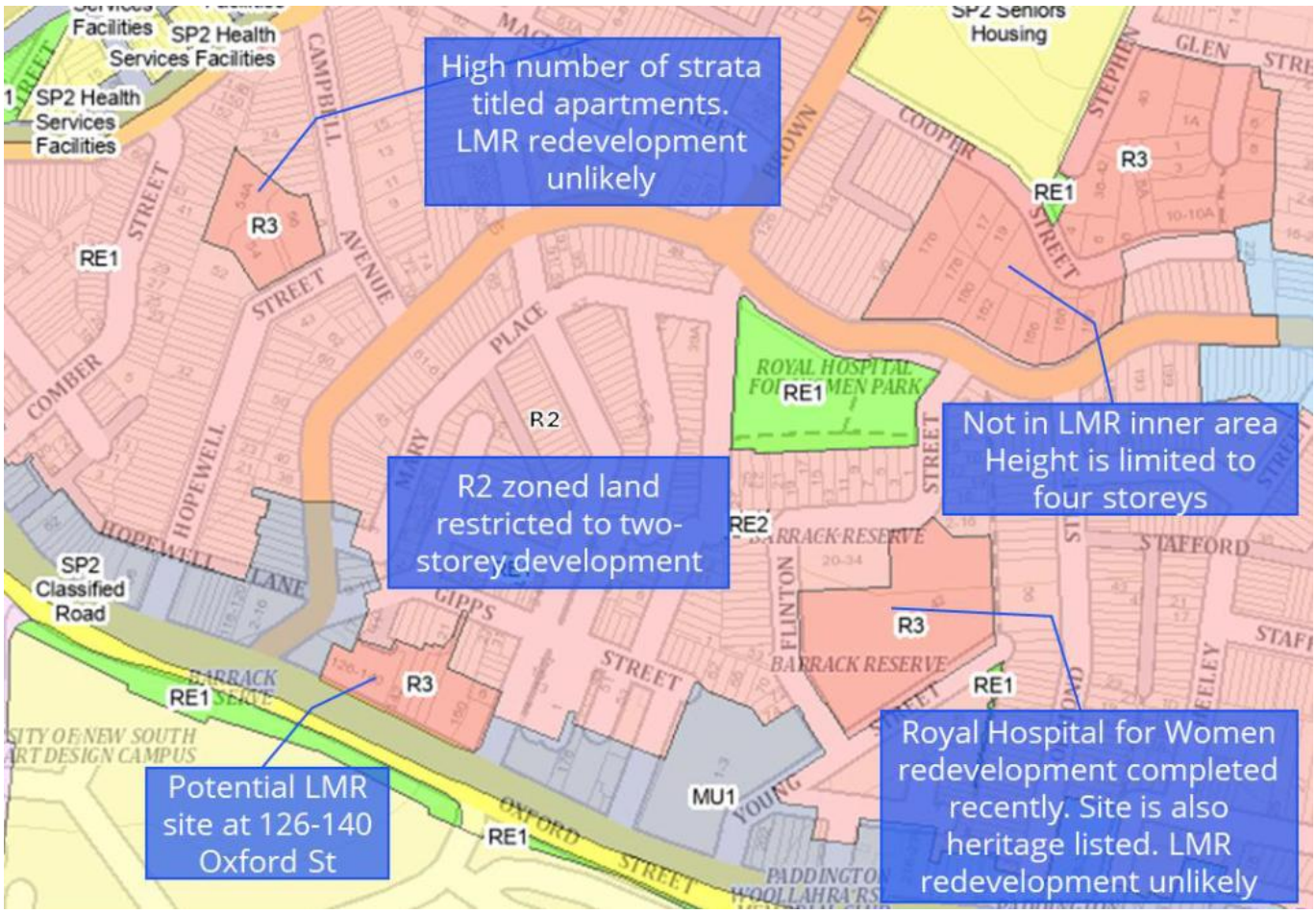


Figure 28 Diagram showing design measures for the eastern and western elevations

Source: Smart Design Studio

5.1.3 Conclusion on clause 4.6(3)(a)

In summary, compliance with the building height development standard is considered unreasonable and unnecessary, given the proposal achieves the objectives of the infill affordable housing and LMR chapters of the Housing SEPP, the overall principles of the Housing SEPP, and the objectives of the height of buildings development standard under clause 4.3(1) of the WLEP 2014. In particular:

- The proposal meets the objectives of the Housing SEPP, including the LMR and Affordable Housing chapters, by enabling the delivery of 11 affordable dwellings and allowing the site to achieve the density envisaged under the combined affordable housing bonus and LMR provisions (6-8 storeys).
- The height variation is appropriate given the site's excellent access to public transport, services and centres, meaning the height variation supports the efficient use of existing infrastructure.
- Strict compliance with the height standard would result in reduced affordable housing provision with vastly improved amenity than existing dwellings on the site, thereby thwarting the underlying objective of section 16(3) to facilitate provision of affordable housing.
- The development exceeds a variety of ADG amenity criteria notwithstanding the proposed height variation, delivering generous landscaped area, tree canopy, deep soil zones, high-quality communal open space, and strong solar access and ventilation outcomes.
- The variation does not result in a building height that is incompatible with the existing or desired future character of the surrounding area, noting the planning controls that now apply to the site, and the existing 8+ storey built forms

that punctuate Greater Paddington, especially along the Oxford Street ridgeline. The proposal has also been sympathetically designed to respond to the surrounding heritage context through use of sandstone materiality and articulation of the built form. In addition, on a broader urban scale, the transition in scale to the north of the proposal is consistent with similar transitions evident elsewhere along Oxford Street as there is a clear and recurring pattern along Oxford Street, where corner sites accommodate buildings of greater scale in very close proximity to adjacent low-scale terrace houses.

- The height variation does not compromise the Proposal's alignment with the expected environmental capacity of the site established by the LMR and infill affordable planning controls that now apply to the site. The proposal presents as a six (6) storey base with setback upper levels, providing an eight (8) storey building. Notwithstanding, the proposed height variation, the proposal presents as a carefully crafted built form element that presents as consistent with the gazetted statutory planning controls for the site (being 6-8 storeys) which establish the desired future character.
- The proposed development is consistent with Section 3 (Principals of the Policy) in the Housing SEPP and the objectives of Chapter 6 Low and Mid Rise Housing, notwithstanding the proposed variation.
- The development, notwithstanding the proposed height variation, provides an appropriate transition in scale, particular to the R2 Low Density Residential zone to the north, through setbacks and built form/façade articulation and use of well-designed privacy measures.
- Local amenity is protected even though the proposal has a height variation, with acceptable overshadowing outcomes, no loss of views, no unreasonable visual intrusion, and privacy impacts mitigated through setbacks, solid balustrades, considered window placement and landscaping, which is not worse when compared to a height compliant scheme.

5.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the WLEP 2014 requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. There are sufficient environmental planning grounds to justify the contravention of the non-discretionary height of building development standard in this specific instance, as described in the relevant headings below.

5.2.1 Ground 1: Strict compliance to respond to sloped topography would result in an inferior streetscape presentation

The exceedance of the building height development standard predominantly arises directly from the sloping natural ground levels across the site, rather than from any attempt to increase overall bulk or scale. As outlined throughout this Clause 4.6 Variation Request, the sloping topography from east to west is the primary driver of the minor protrusions above the maximum 28.6m height plane. The site falls approximately 3-5m metres from the south-eastern corner to the north-western corner. The extent of the fall can be illustrated in the southern elevation shown below in **Figure 29**.

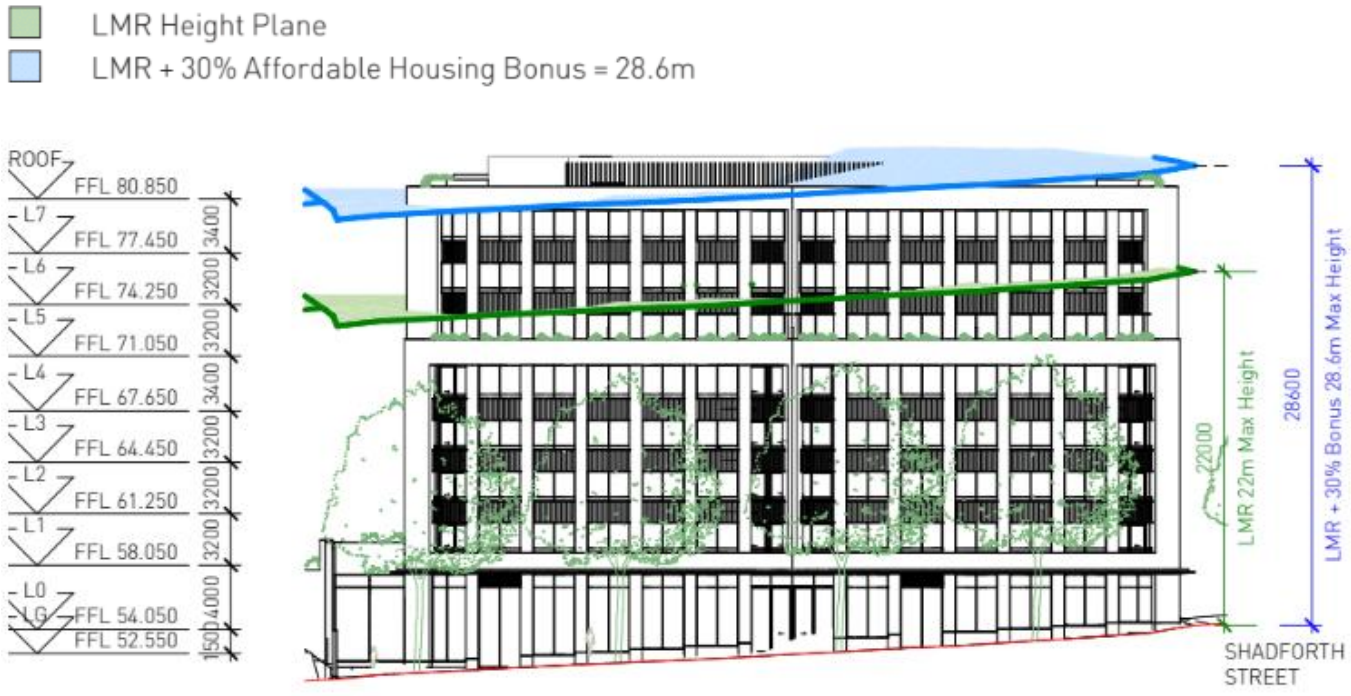


Figure 29 Proposed Southern Elevation showing LMR height plane (22m, green) and LMR height plane (combined with affordable housing bonus) (28.6m blue)

Source: Smart Design Studio

This sloping topography means that the proposed building parapet to Oxford Street sits within the 28.6m height plane at the eastern end of the site, while exceeding the height plane by a maximum of 1.3m at the western end. In effect, the same building envelope placed on a level site would comply with the height control. The height of the parapet has already been reduced to its minimum extent (noting its height has been reduced since the publicly exhibited design) while still ensuring that the parapet screens rooftop plant when viewed from Oxford Street adjacent to the site. Further to this, as illustrated above, the majority of the other elements that exceed the height plane (up to 2.8m exceedance of height plane) are limited to rooftop plant.

Maintaining a consistent street wall height is fundamental to reinforcing the rhythm, legibility and architectural cohesion of the streetscape. If strict compliance were to be enforced, the built form would result in a stepped parapet and loss of the consistent horizontal datums on the façade. This would produce a disjointed and visually discordant built form outcome. This is reinforced by the ADG that discourages buildings with a 'ziggurat' appearance.

In contrast, the proposed height of the parapet to Oxford Street, facilitates a better outcome being an improved and consistent visual and streetscape outcome.

5.2.2 Ground 2: Strict compliance through reduced floor to floor heights would reduce residential amenity

Floor to floor heights have already been reduced to the minimum required to provide adequate amenity for residents and accommodate the required building service within the design. Specifically, the floor to floor heights from Level 1 and above have been reduced from 3.25m to 3.2m since public exhibition to minimise the height exceedance. While further reduced floor to floor heights could still facilitate the minimum 2.7m floor to ceiling heights required by the ADG, that would result in many intrusive bulkheads throughout the habitable spaces of the apartments to accommodate the necessary building services, substantially reducing amenity for residents. This is reflected in Objective 4C-2 of the ADG which discourages intrusive bulkheads:

> *ceiling heights are maximised in habitable rooms by ensuring that bulkheads do not intrude. The stacking of service rooms from floor to floor and coordination of bulkhead location above non-habitable areas, such as robes or storage, can assist*

Therefore, it is a better planning outcome to propose a minor height exceedance which allows adequate floor to floor heights that do not compromise residential amenity, rather than strict compliance which would result in reduced internal apartment amenity.

5.2.3 Ground 3: Strict compliance through reduced floor to floor heights would result in inefficient construction and use of resources, and delays to housing provision

If floor to floor heights were to be further reduced on the western side of the building to allow a fully height compliant scheme, not only would it result in poor residential amenity outcomes, but the floorplates on each side of the building would be inconsistent. This would require additional structural engineering solutions and reduce the efficiency of the overall design. Construction timeframes would be slower as double the amount of slabs would need to be poured, increasing construction costs, ESD impacts of additional construction materials and reducing affordability of the dwellings. Therefore, it is a better planning outcome to provide consistent floor to floor heights across the entire floorplate of each level, even though it results in a minor height exceedance.

5.2.4 Ground 4: The proposed height variation facilitates improved residential amenity compared to a compliant scheme

Rooftop amenity

The elements that exceed the height plane to the greatest extent relate to the trafficable roof terraces on the western side of the building. This includes terrace seating areas, private rooftop pools, walls that separate the terraces from mechanical plant areas, and enclosed staircases that provide access to the terraces. This area forms an integral component of the overall amenity offering and would not be achievable to the same extent if the building were forced to compress its floorplate to strictly align with the numerical height standard. Moreover, the majority of these elements are positioned in the centre of the rooftop, such that they cannot be seen from Oxford Street, and are mostly concealed by the parapet and setback by the proposed large expanse of planters when viewed from the north. The resulting design outcome is a better planning outcome, as it prioritises high-quality residential experience without generating any unreasonable or perceivable additional visual bulk when viewed from the surrounding street network.

Landscaped area

Strict compliance with the maximum height could be remedied by extending the building envelope towards the north, especially where setbacks exceeding 9m are proposed in the north-western corner of the site. However, if additional building mass was redistributed to that part of the site to maintain maximisation of residential floorspace, that would come at the cost of landscaped area, deep soil, tree canopy and superior visual privacy outcomes. Therefore, the height variation facilitates a better planning outcome that is a more coherent arrangement of communal open space at the ground level that maximises deep soil areas and tree canopy for landscaping rather than built form, which is concentrated above the basement.

5.2.5 Ground 5: Strict compliance to respond to sloped topography from the ground level would reduce retail activation, amenity of communal spaces and efficiency of construction

Retail activation

Strict compliance at the parapet height could be achieved on the western end of the building if the floor to ceiling heights on the ground floor were reduced. However, this would preclude the opportunity for shops to be provided on the ground floor, as non-residential uses at the ground floor require higher floor to ceiling heights than residential developments. This is acknowledged in the LMR controls that provide an additional 2m of building height (allow height up 24m) for shop top housing developments in the LMR housing inner area. The proposed development is unable to access the 24m building height as the site does not lend itself to deep retail tenancies to avoid residential development on the ground floor and thus does not technically meet the definition of shop top housing, even though it relates to Oxford Street in a same way that a shop top housing development would.

Lowering the ground floor, floor to ceiling height for a fully height compliant development and preventing shop developments, would result in a substantial missed opportunity for retail activation along Oxford Street. This is the only block of R3 zoned land along the entire northern side of Oxford St from Darlinghurst to Paddington and is the only missing link along the retail strip on the northern side of Oxford Street. Provision of ground floor retail is reinforced as a strategic planning objective in the following the strategic planning documents:

- The Woollahra Local Strategic Planning Statement contains an objective to boost local productivity and support Oxford Street in being a key local and visitor destination. Ground floor activation supports the business and employment role of the Oxford Street precinct.

- Theme 4 of the Oxford St and Paddington Place Plan seeks to promoting Paddington as a retail and dining destination, which would be facilitated through proposing ground floor retail offerings on the site.

Therefore, providing ground floor activation is a major public benefit, improvement to the amenity and character of Oxford Street and aligns with the strategic planning goals for Oxford Street. A reduction in building height to strictly comply with the height control would result in the activation outcomes on the ground floor being reduced and/or foregone, especially given that the environmental impacts of the height variation have been managed and are acceptable (refer **Section 5.2**).

Amenity of communal spaces

Moreover, the higher floor to ceiling heights provided at the lower and ground floors plays an important role in creating double height spaces for the ground floor communal spaces, including the pool area (see **Figure 30**). This promotes the openness of the pool area and also maximises solar access to the pool and pool deck, providing critical amenity to that space.

Figure 30 Photomontages of the double height pool area on the ground floor of the northern elevation

Source: Smart Design Studio

5.2.6 Ground 6: The proposed height variation does not result in any unacceptable additional amenity impacts compared to a compliant scheme

Visual privacy

The elements of the building above the 28.6m height plane *that affect* privacy are limited to the trafficable rooftop terraces. As shown in **Figure 18**, the terraces have solid balustrades and are setback from the building parapet by planters to prevent overlooking onto neighbouring properties to the north. Also refer to **Section 5.1.1** above which addresses visual privacy in greater detail.

Overshadowing

The proposed height variation does not result in any overshadowing to residential properties. As shown in **Figure 18** and **Figure 23**, the additional shadow generated by the proposed height variation is insubstantial, limited to slithers along Oxford Street, Oxford Reserve, and small amounts to the wall and façade of the Victoria Barracks. The additional overshadowing is but a small percentage of the additional overshadowing and does not affect any sensitive receivers. Also refer to **Section 5.1.1** above which addresses overshadowing in greater detail.

5.2.7 Ground 7: The proposed height variation does not result in any additional visual impact or urban design impacts compared to a compliant scheme

The site is located within a varied context with the predominate character of Paddington is low-rise Victorian-era terraces, houses, and smaller apartment blocks, the area also has a mix of development types. However, a number of taller buildings both old and new, which exceed this low-rise scale. These include the landmark Paddington Town Hall (c1891)

whose 32m clock tower remains a dominant tall structure, and demonstrates that buildings along the Oxford Street ridgeline are capable of holding taller buildings. Examples of more contemporary taller buildings pockmarking the greater Paddington area ranging from 8-12 storeys include: 361- 379 Oxford Street Paddington; 339 Oxford Street Paddington; 36-42 Flinton Street Paddington; 176 Glenmore Road Paddington; 40 Stephen Street Paddington; and 13 Campbell Avenue Paddington. Both the proposed scheme and a compliant scheme would be 8 storeys. In this regard, the proposed development with the height variation therefore achieves the same outcome of fitting in with the prevailing building heights in the broader surrounding area, and especially along the main road of Oxford Street along the ridgeline. The proposed development is also located in a section of the Paddington HCA that has low heritage sensitivity along Oxford Street. This again relates to the role of Oxford Street as an arterial road along a ridgeline that is characterised by taller buildings that occur on regular intervals along the street. The relationship of the proposed development to the HCA is consistent with a recurring pattern along Oxford Street, where corner sites accommodate buildings of greater scale in very close proximity to adjacent low-scale terrace houses immediately in the vicinity, including many of the corner pubs, schools, churches, and the Paddington Post Office. In these instances, the nearby terrace houses directly border on the larger-scale buildings or sit in very close proximity. This is a feature of the relationship between Oxford Street being the high street, and the remainder of lower-scale Paddington;

This is in contrast to the centre of the Paddington HCA which would be much more sensitive to taller built forms. As such, a minor 1.3m variation to the parapet height on Oxford Street (and maximum 2.8m height variation to rooftop elements) is not an unacceptable impact on the HCA, especially as it facilitates a consistent street wall height. Moreover, the part of the parapet subject to the height variation remains consistent with the upper-level setback from Level 5 and above. Overall, the proposed height variation will not change the positive impact on the architectural character of Oxford Street compared to a compliant scheme.

5.2.8 Ground 8: ESD benefits

The proposed height variation results in a level rooftop, which promotes the most efficient layout of mechanical plant and solar panels, which contributes to maximising the ESD outcomes of the proposed development.

5.2.9 Ground 9: No adverse heritage impacts from height variation

The Statement of Heritage Impact prepared by GBA Heritage has concluded that the proposed development (inclusive of height variation) will have an acceptable impact on views to and from, and the setting of the Paddington HCA. Specifically, the large mature trees on Oxford Street obscure views to the first 5 storeys of the development and thus substantially reduce the visual bulk and scale of the development when perceived from Oxford Street. Therefore, the visible elements above the 28.6m height plane along Oxford Street, being the building parapet and rooftop elements, will not add any additional adverse heritage impact.

With regard to views from within the HCA to the north, GBA Heritage notes that the proposed development will have a moderate and acceptable impact on the setting of the HCA as the web of streets north of Oxford Street and dense development will obscure views of the development from most locations. However, multiple levels of the development can be seen from some intersections, such as the intersection of Gipps Street and Shadforth Street. The parts of the building subject to the height variation are minor, compared to the rest of the building, and will remain as background views where visible. In other locations within the web of streets and dense environment of the HCA, the parts of the building subject to the height variation will continue to be obscured.

Overshadowing to Buildings 94-96 resulting from the height variation, that are not already overshadowed by the existing trees, is limited to one small portion of the roof of those buildings between 9-10am, circled in red at **Figure 23** which is very minor and does not affect any windows. In addition, Building 94-96 are not considered to be sensitive to overshadowing impacts from the site because they are overshadowed by existing trees, have no visibility from the public realm in Oxford Street, have no outlook beyond the Barracks precinct, do not have any residential function and turn their backs to the nearby Perimeter Wall.

Overall, the minor height variation will not result in any additional adverse heritage impact. GBA Heritage have also concluded that the proposal, which is inclusive of the elements subject to the height variation, will have an acceptable impact on views to and from the Victoria Barracks.

5.2.10 Ground 10: Consistency with Objectives of the EP&A Act

In Initial Action, the Court stated that the phrase "environmental planning grounds" is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, as set out in **Table 3** we consider the proposed development is broadly consistent with each object, notwithstanding the proposed variation of the height of buildings non-discretionary development standard.

Table 3 Assessment of consistency of the proposed development with the Objects of the EP&A Act

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The proposed height variation will promote the social welfare of future residents by providing for the housing needs of the community in a medium-density development consistent with the 6-8 storeys envisaged under the LMR and infill affordable housing planning reforms. Strict compliance with the height of buildings standard in this instance would reduce the number of dwellings able to be delivered on the site, which is not in the social and economic interests of the community and would result in a development well below the yield and density envisaged under the combined affordable housing and LMR provisions (FSR 2.86:1).
(b) to promote the supply, delivery and maintenance of housing, including affordable housing,	As explained in this report, strict compliance with the building height standard would directly result in reduction of affordable housing provision.
(c) to promote productivity through the development and management of the State and its resources,	The proposed height variation does not undermine the orderly and economic use of the land. Instead, it allows the redevelopment of the site for a height and scale consistent with the current and future character of the locality and at a yield/density commensurate with the LMR and infill affordable housing planning reforms. Full compliance with the height control in this instance would reduce the provision of housing on the site which would be antithetical to the orderly and economic use of land to maximise housing provision. It is noted that this site is essentially the only R3-zoned site able to utilise the LMR provisions to contribute to NSW's housing crisis, as the other two R3 sites in the locality are either recently redeveloped, or contain a proliferation of strata-titled buildings which would be unlikely to receive sufficient owner agreement to redevelop.
(d) to protect the environment, including the conservation of threatened species of native animals and plants and ecological communities and their habitats,	The building height variation proposed has no specific impact on threatened and other species of native animals and plants, ecological communities and their habitats.
(e) to promote resilience to climate change and natural disasters through adaptation, mitigation, preparedness and prevention,	The building height variation proposed has no specific impact resilience to climate change and natural disasters through adaptation, mitigation, preparedness and prevention.
(f) to promote the sustainable management of built and cultural heritage, including Aboriginal cultural heritage,	The height variation in itself does not result in any adverse heritage impacts. Refer to **Section 5.2.7** above.
(g) to promote good design, amenity and the proper construction and maintenance of built environments, including the protection of the health and safety of the occupants of buildings,	The proposed height variation has drawn contextual cues from existing surrounding residential flat buildings as well as the height of building in the locality to deliver a development outcome that intrinsically fits into the neighbourhood context.
(h) to provide opportunities for participation in environmental planning and assessment,	The building height variation does not have an explicit link to this objective and will be assessed in accordance with the Department of Housing and Infrastructure's participation requirements.
(i) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social	The building height variation will have no negative impact on environmental and social considerations and will support the economic health of the Woollahra locality and will improve social considerations through the supply of a housing yield/density

Object	Comment
considerations in decision-making about environmental planning and assessment,	consistent with the LMR and infill affordable housing provisions and an improved high amenity (ADG) compliant form (when considered against the existing sub-standard residential accommodation on the site).
(j) to promote a proportionate and risk-based approach to environmental planning and assessment,	The building height variation does not have an explicit link to this objective.
(k) to promote the orderly and economic use and development of land.	The proposed height variation does not undermine the orderly and economic use of the land. Instead, it allows the redevelopment of the site for a height and scale consistent with the current and future character of the locality and at a yield/density commensurate with the LMR and infill affordable housing planning reforms. Full compliance with the height control in this instance would reduce the provision of housing on the site which would be antithetical to the orderly and economic use of land to maximise housing provision. It is noted that this site is essentially the only R3-zoned site able to utilise the LMR provisions to contribute to NSW's housing crisis, as the other two R3 sites in the locality are either recently redeveloped, or contain a proliferation of strata-titled buildings which would be unlikely to receive sufficient owner agreement to redevelop.

6.0 Conclusion

This Clause 4.6 Variation Request demonstrates that the proposed variation to the 28.6m maximum building height development standard is appropriately justified under clause 4.6 of the WLEP 2014. The request establishes that compliance with the development standard is both unreasonable and unnecessary in the circumstances of the case pursuant to clause 4.6(3)(a), and that there are sufficient environmental planning grounds to justify the contravention pursuant to clause 4.6(3)(b).

The proposal satisfies the First and Third Wehbe methods. The underlying objectives of the applicable height controls are achieved notwithstanding the non-compliance, including the objectives of the in-fill affordable housing provisions, the Low and Mid-Rise Housing provisions, the principles of the Housing SEPP, and the objectives of clause 4.3 of the WLEP 2014. In particular, the proposal facilitates the delivery of affordable housing and increased housing supply in a strategically located area identified by the NSW Government as suitable for increased residential density and scale.

Strict compliance with the height standard would undermine the intended operation of the Housing SEPP incentive framework by reducing the development yield, including the number of affordable housing dwellings capable of being delivered on the site, despite the proposal otherwise complying with the applicable FSR controls. A strictly compliant outcome would therefore frustrate the underlying objective of facilitating additional housing and affordable housing supply in well-located urban areas.

Importantly, the environmental planning grounds relied upon are particular to the circumstances of the site and the nature of the contravention itself, consistent with the principles established in *Initial Action* and *Four2Five*. The variation arises predominantly as a consequence of the site's sloping topography, rather than from an attempt to introduce excessive bulk or scale. The same building form on a level site would substantially comply with the applicable height plane.

The proposed variation facilitates a superior urban design and architectural outcome when compared to a strictly compliant scheme. In particular, the variation enables:

- A consistent parapet and street wall presentation to Oxford Street, avoiding an undesirable stepped or "ziggurat" built form outcome;
- Efficient and consistent floor-to-floor heights that support high-quality residential amenity and avoid intrusive bulkheads within apartments;
- Improved construction efficiency and reduced material consumption through consistent floorplates and structural systems;
- Enhanced rooftop amenity and communal open space outcomes;
- Retention of generous landscaped area, deep soil zones and tree canopy;
- Active ground floor retail uses and improved activation along Oxford Street; and
- Improved ESD outcomes through a level rooftop arrangement that maximises the efficiency of rooftop plant and solar infrastructure.

The proposed variation does not result in any unacceptable environmental impacts. The exceedance gives rise to no unreasonable impacts in relation to overshadowing, visual privacy, visual intrusion, heritage, view loss or streetscape character. The additional overshadowing attributable to the variation is negligible and limited to non-sensitive areas. The portions of the building above the height plane are predominantly centrally located rooftop elements, including plant, stair overruns and rooftop structures, which are substantially screened from public view and do not contribute materially to perceived bulk or scale.

The proposal remains consistent with the existing and evolving character of the locality, including the broader built form pattern along the Oxford Street ridgeline where taller built forms occur at regular intervals. The development also responds appropriately to the heritage context through considered setbacks, articulation, landscaping and materiality. The submitted heritage assessment confirms that the proposed variation will not result in any unacceptable heritage impacts.

Further, the proposal is consistent with the objects of the *Environmental Planning and Assessment Act 1979*, particularly those relating to housing supply, affordable housing, orderly and economic development of land, good design, sustainability and social welfare outcomes.

Overall, the proposed variation is minor in planning terms, produces a superior planning outcome to a strictly compliant scheme, and achieves the objectives of the relevant planning controls notwithstanding the non-compliance. The variation is therefore well founded and should be supported pursuant to clause 4.6 of the WLEP 2014.

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