



PLANNING DEVELOPMENT PROPERTY

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Clause 4.6 Variation

RE: DEVELOPMENT APPLICATION FOR PROPOSED CONSTRUCTION OF EIGHT-STOREY MIXED USE DEVELOPMENT AT 35 HONEYSUCKLE DRIVE, NEWCASTLE NSW 2300

1 Introduction

The development to which this submission relates is for the construction of an eight (8) storey mixed-use development located at 35 Honeysuckle Drive, Newcastle NSW 2300.

Specifically, the State Significant Development (SSD) proposal seeks approval for:

- Two basement levels of carpark, providing 190 car spaces for the development;
- A freestanding ground floor retail premises with outdoor dining space;
- Eight additional ground floor retail premises providing active edges of the site;
- 92 apartments including a mix of one, two and three-bedroom typologies;

The development controls sought to be varied are contained in Clause 4.3 and Clause 4.4 of the Newcastle Local Environmental Plan 2012 (NLEP 2012) which relate to building height and floor space ratio respectively.

In summary, the proposal largely complies with the provisions of the NLEP 2012, except for these exceedances to building height and floor space ratio. An assessment of this variation is provided in the following pages in accordance the requirements of Clause 4.6 of NLEP 2012.

The proposed variation is considered reasonable on the basis that:

- The proposed height exceedance is situated in a location which will not result in any detrimental impact to any sensitive land uses and therefore the impact will be negligible;
- The proposed built form will reflect the emerging contemporary character of the locality and positively upgrade the existing streetscape. The projection of the building above the height limit will not result in an overbearing visual impact; and
- Strict compliance with the exact standards would not achieve a greater planning or urban design outcome.

2 Site Details

2.1 Site Location and Context

The site is known as "Lee 4" at 35 Honeysuckle Drive, situated within the Local Government Area (LGA) of Newcastle. The Site comprises a polygon configuration with an area of approximately 5,250m² within a larger tract of land currently under one title. The land is currently legally identified as part of Lot 1 in Deposited Plan 1236735.

The location of the site is illustrated in Figure 1.

Hunter Development Corporation (HDC) intends to subdivide the site from the greater land parcel (Lot 1). The creation of the site is to be formally identified by survey and legally created as its own parcel of land by Torrens Title subdivision.

Under the intended subdivision of Lot 1 DP 1236735 to create the site; the western boundary of the site is planned to align with the boundary of Steel Street; the northern boundary is planned to align with the foreshore promenade which is generally 8 metres from the harbour edge; the southern boundary will have a frontage to Honeysuckle Drive of approximately 130 metres; and the eastern boundary of the site adjoin private land.

Figure 1 – Locality Plan (Lot 1 DP 1236735)



3 Exception to Development Standards

The Department of Planning and Environment's publication "*Varying Development Standards: A Guide*" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and*
- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the NLEP 2012 is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

3.1 Clause 4.6

Clause 4.6 of the NLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development;

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

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

The proposal seeks to vary the building height and floor space ratio standards applicable to the site and does not introduce new controls across an area. The Clause 4.6 guidelines also express when this clause is not to be used, namely:

"...in Rural or Environmental zones to allow subdivision of land that will result in 2 or more lots less than the minimum area specified for such lots by a development standard, or the subdivision of land that will result in any lot less than 90% of the minimum area specified for such lots by a development standard in the following SI zones: Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living."

Neither the site nor the proposal is included within these criteria and therefore, the use of Clause 4.6 is appropriate to vary the height and floor space ratio standards in this instance.

3.2 Legal Context to Varying Development Standards

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following NSW Land and Environment Court (Court) judgements:

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
- Wehbe v Pittwater Council [2007] NSWLEC 827
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five No 1)
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (Four2Five No 2)

- Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (Four2Five No 3)
- Moskovich v Waverley Council [2016] NSWLEC 1015
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

In the decision of *Moskovich v Waverley Council* [2016] NSWLEC 1015 it was deemed consistent with the decision in Four2Five and the Court agreed that the public interest test (incl 4.6(4)(a)(ii)) is different to the "unreasonable or unnecessary in the circumstances of the case" test (incl 4.6(3)(a)). The Court said that "*the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in Wehbe at [70-76]*".

Randwick City Council v Micaul Holding Pty Ltd [2016] NSWLEC 7 documents a decision of the Chief Judge of the Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the Standard Instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed those matters. This lessens the force of the Court's earlier judgement in Four2Five that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger Residential Flat Buildings (RFBs) that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the Commissioner was satisfied that the variation was justified.

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

- (1) *Is the planning control in question a development standard;*
- (2) *What is the underlying object or purpose of the standard;*
- (3) *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;*
- (4) *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- (5) *Is a development which complies with the development standard unreasonable or unnecessary; and*
- (6) *Is the objection well founded.*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision Preston CJ noted:

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

Wehbe V Pittwater [2007] NSW LEC 827 also established the 'five-part test' to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- (1) Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
- (3) Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
- (4) Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
- (5) Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

Of particular relevance in this instance is Part 1, that "*the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives*".

In the decision of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Chief Justice Preston has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not. Paragraph 88 of his decision Preston CJ noted:

"Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard."

This reference is of particular significance in this instance as the proposal, while contravening the development standard, does not have to justify a better environmental planning outcome than a development that complies with the development standard.

4 Development Standard to be Varied

This section pertains to the "*Application form to vary a development standard*" by the Department of Planning and Environment.

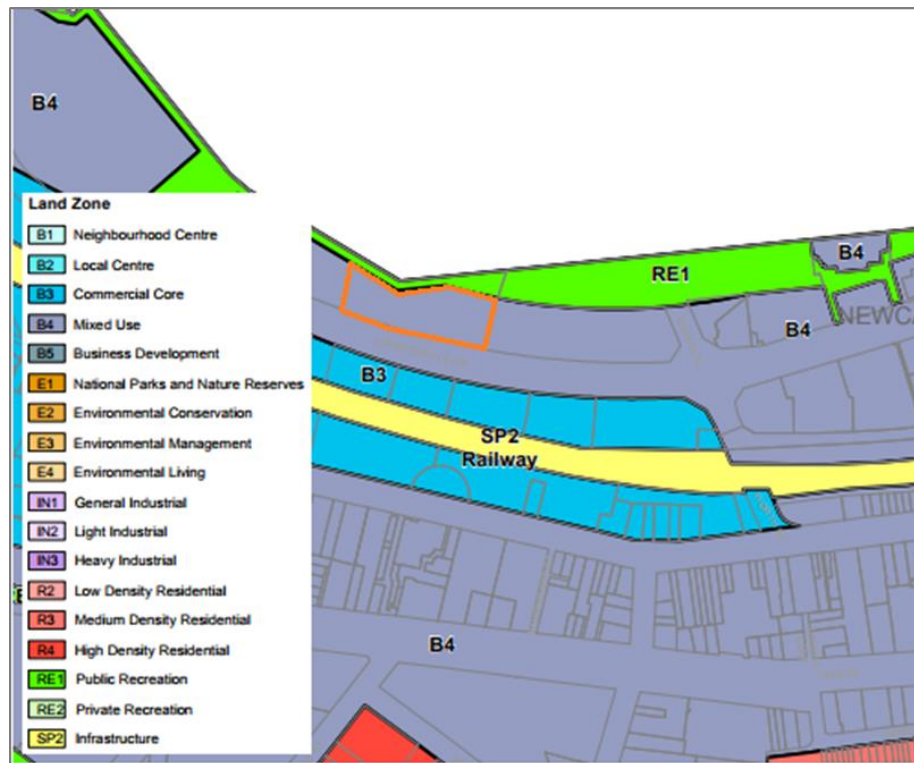
What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012.

What is the zoning of the land?

NLEP 2012 indicates that the site is within the B4 Mixed Use Zone, as illustrated in Figure 2.

Figure 2 – Land Zoning Map Extract (Map LZN_004G)



What are the objectives of the zone?

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations to maximise public transport patronage and encourage walking and cycling.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

What are the development standards being varied?

The building height development standard contained in Clause 4.3 and the Floor Space Ratio standard contained in Clause 4.4 of the NLEP 2012.

Are the standards to be varied a development standard?

Yes, the standards are each considered to be a development standard in accordance with the definition contained in Section 4(1) of the Environmental Planning and Assessment Act 1979; and not a prohibition.

What are the objectives of the development standard?

The objectives of Clause 4.3 – Height of Buildings are as follows:

(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,

(b) to allow reasonable daylight access to all developments and the public domain.

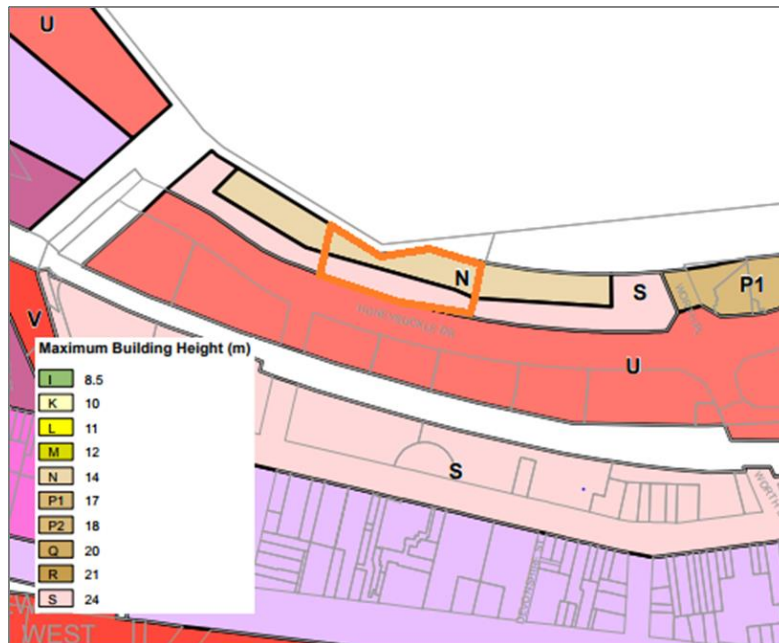
The objectives of Clause 4.4 – Floor Space Ratio are as follows:

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

What is the numeric value of the development standard in the environmental planning instrument?

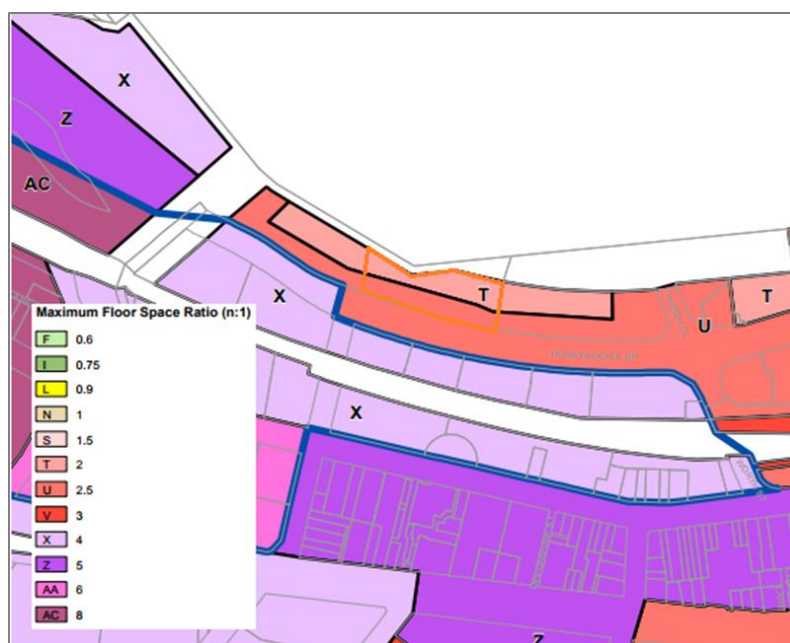
The maximum height under the NLEP 2012 is 14 metres for part of the site and 24 metres for the remainder of the site, as shown in Figure 3.

Figure 3 - Height of Building Map Extract (Map 004G)



The maximum floor space ratio under the NLEP 2012 is 2:1 for part of the site and 2.5:1 for the remainder of the site, as shown in Figure 4.

Figure 4 – Floor Space Ratio Map Extract (Map 004G)



What is the proposed numeric value of the development standard in your development application?

The numerical value of the proposed development and percentage variation are detailed in the following table.

Clause	Control	Proposal	Variation
Clause 4.3 – Building Height	14m (area N)	Max. 27.90m (in area N)	
	24m (area S)	Max. 27.90m (in area S)	
Clause 7.5 – 10% Bonus to Allowable Building Height	15.4m (area N)		81% for a small portion of the site within area N.
	26.4m (area S)		5% in area S.
Clause 4.4 – Floor space ratio	4,139m ² or 2:1 (area T)	2,554m ² or 1.22:1 (in area T)	Compliant.
	8,115m ² or 2.5:1 (area U)	9,122m ² or 2.81:1 (in area U)	12% in Area U
	<i>Average of entire site (5,250m²)</i>		
	<i>11,812m² or 2.25:1</i>	<i>11,676 m² or 2.22:1</i>	<i>Compliant</i>

Note:

Newcastle LEP 2012 defines building height as the following:

building height (or ***height of building***) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

The numerical values in the table above in relation to building height are the vertical distance from ground level (existing) to the highest point of the building, as opposed to the reduced level (RL) of the building.

5 Justification for the Contravention

This section addresses Section (3), (4) and (5) of Clause 4.6 and seeks to justify the contravention from development standards of Clauses 4.3 and 4.4.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and***
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.***

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:**
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and**
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and**
- (b) the concurrence of the Secretary has been obtained.**

(5) In deciding whether to grant concurrence, the Secretary must consider:

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

5.1 Compliance is unreasonable or unnecessary

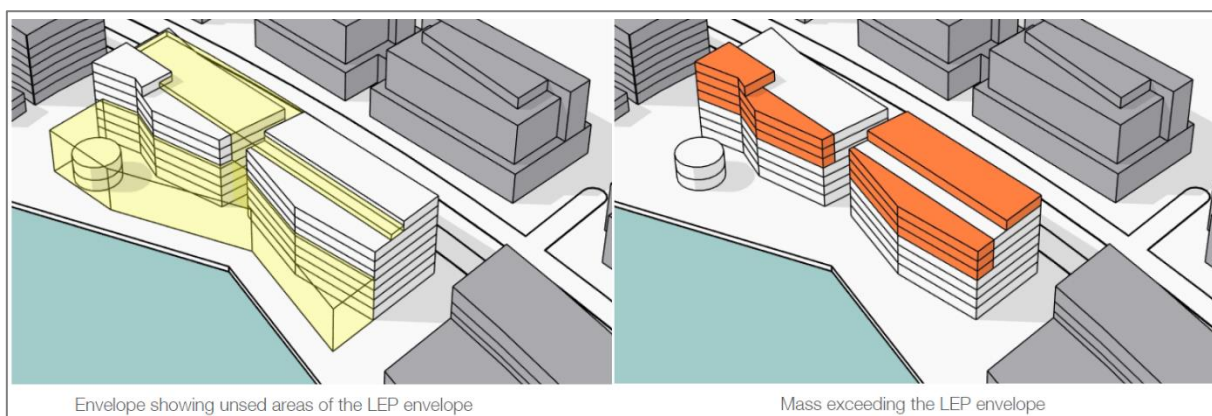
As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the standard.

As per the SEPP65 Design Statement in Appendix B of the Environmental Impact Statement, the proposed development has undergone a significant review process to guide the design to its current design. This entailed a Competitive Tender process as well as a Design Panel Review process. The Design Review Panel consists of members from Council's Urban Design Consultative Group (UDCG), NSW Government Architect, and Hunter Development Corporation.

It was established early during the review process that the development would exceed the building height and floor space ratio controls in portions of the site. The tender process explored the options against other tenders provided. The Government Architect and Council's UDCG supported the proposed design as the best outcome for the site in context of the surrounding locally and adjoining developments.

Initial consideration was given to the envelope from the inception of the design and it was supported by the Design Review panel that the manipulation of the height and FSR controls were the most supported direction for the development to follow. Figure 5 illustrates the initial concept in relation to the LEP envelope controls and the proposed redistribution of the floor area.

Figure 5 – Initial extent of building height exceedance



The height was guided by the heights of the surrounding buildings. Figure 6 below demonstrates the consistency in height that the proposed design incorporates with the surrounding streetscape.

Figure 6 – Building height in context to streetscape and neighbouring buildings.



Height

The proposed development achieves the objectives of Clause 4.3:

- (a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*

The proposed development has been designed by SJB Architects and consists of a high quality, architecturally designed building that makes a positive contribution to the street frontage of Honeysuckle Drive and importantly to the foreshore and harbour of Newcastle to the north.

The proposal reflects the desired transition of building heights from the Commercial Core further south toward the harbour foreshore to the north. The bulk of the proposed development is situated in the southern portion of the site, stepping down toward the north and proposing a human scale single-storey retail building in the northernmost part of the site. Whilst not strictly adhering to the building height standards within the site the design response is suitable for the site and enables the achievement of high quality development and pedestrian access through-site links and open space areas at ground level.

The proposed built form will reflect the emerging contemporary character of the Honeysuckle Precinct, being predominantly elongated rectangular multi-story buildings fronting to the north and the Hunter River (as depicted in Figure 6). The projection of the building above the height limit will not result in an overbearing visual impact and will be compatible with the approved adjoining development to the east. Further to this, the exceedance in height is towards the south of the site, stepped back from the waterfront; and will likely have minimal impact on surrounding development and public domain.

Details of the façade treatment and articulation are provided in the Architectural plans provided at Appendix A of the Environmental Impact Statement (EIS). In this instance, strict application of the development standards for maximum height and FSR is unreasonable, unnecessary, and would not achieve a greater planning or urban design outcome. Figure 5 shows the extent of the exceedance of the building height. Figure 8 illustrates the section of the building with the height control line shown. Figure 9 illustrates the proposed development in the context of the site.

Figure 7 – Extent of building height exceedance

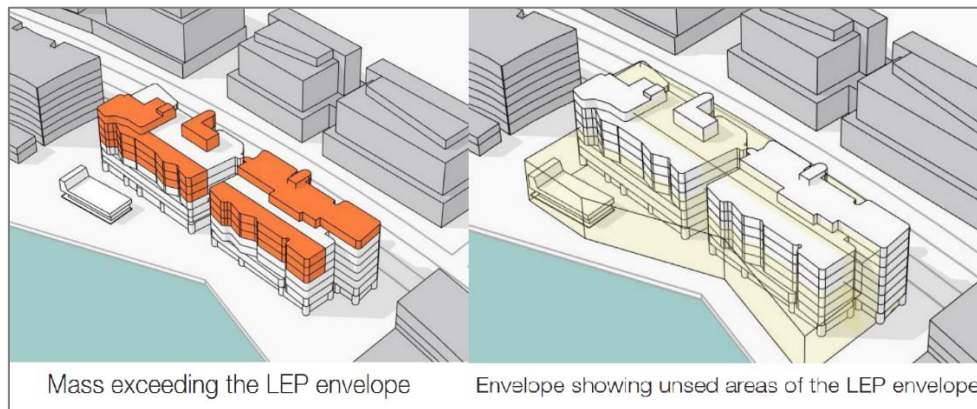


Figure 8 – Section of building showing proposed height exceedance in relation to natural ground level

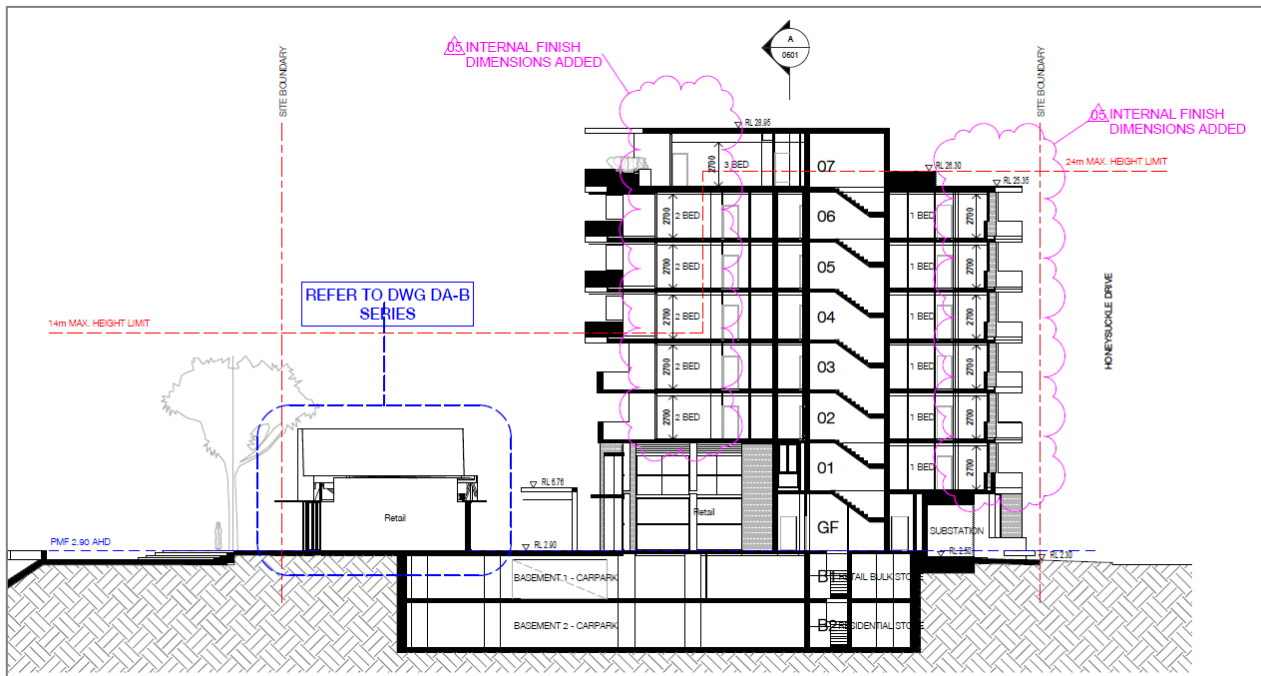


Figure 9 – Photomontage of the Proposal in its Context



(b) to allow reasonable daylight access to all developments and the public domain.

Reasonable daylight access is provided to all surrounding developments. Reasonable daylight access is considered to be the amount of daylight that is accessible to any existing or possible future development based on the height controls prescribed for the site. The proposed height variation will not result in any detrimental impact to any sensitive land uses, as illustrated in the shadow diagram analysis shown in Figures 10, 11 and 12 below. The development will not unreasonably overshadow either of the private lands to the east or west; and does not cause unreasonable shadowing of the public domain in comparison to a fully compliant proposal on the site.

Figure 10 – Shadow diagram comparing LEP height control versus proposed heights – 9AM.

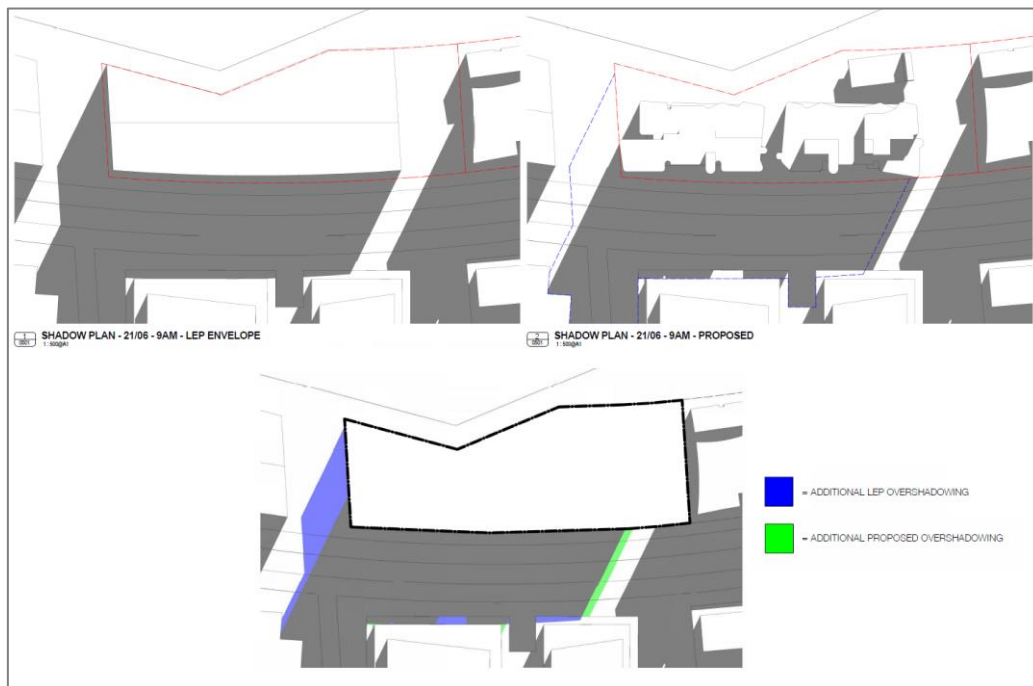


Figure 11 – Shadow diagram comparing LEP height control versus proposed heights – 12PM.

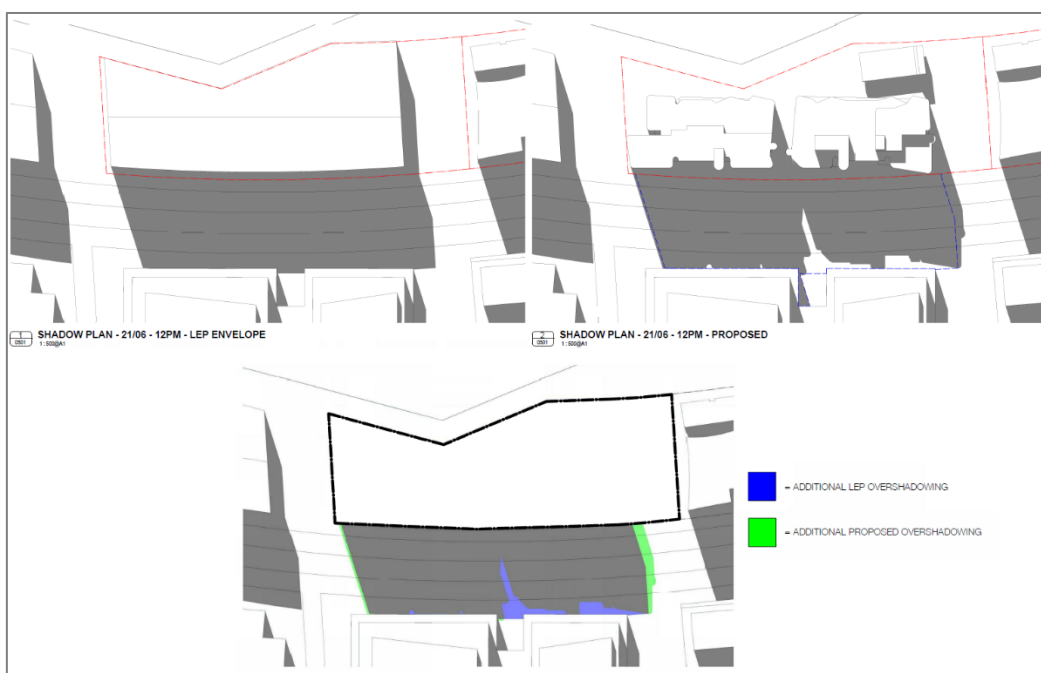
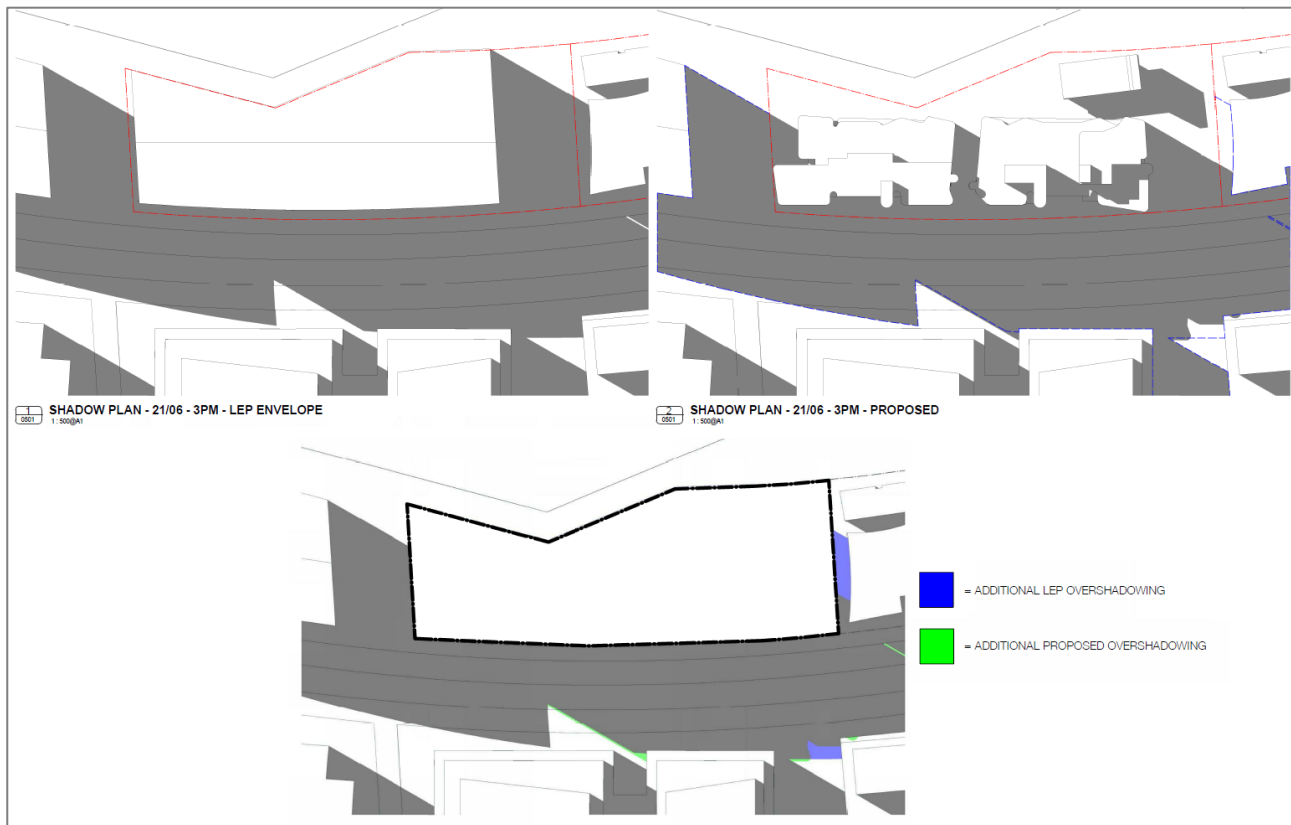


Figure 12 – Shadow diagram comparing LEP height control versus proposed heights – 3PM.



The proposed development arguably provides better access to solar than what strict compliance with the LEP controls could provide. The proposed development achieves the objective of the clause and therefore strict compliance with the 14 metre and 24 metre height standards within the site would be unreasonable, unnecessary, and would not achieve a greater planning or urban design outcome.

Accordingly, the proposal is considered to be consistent with Clause 4.3.

Floor Space Ratio

The proposed development achieves the objective of Clause 4.4:

(a) to provide an appropriate density of development consistent with the established centres hierarchy,

The proposal is compliant with the average applicable FSR within the site. As discussed above, the bulk of the development is concentrated to the southern portion of the site which is desired by the built form controls.

(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

As discussed above, the bulk of the development is concentrated to the southern portion of the site which is desired by the built form controls.

As the southern portion of the site has a 24 metre height standard, the additional building height north of that has a negligible impact on properties to the south. The proposal when viewed from the harbour is compatible with other development along the foreshore promenade, including the recently approved development immediately east of the site at 21 Honeysuckle Drive.

The proposal reflects the desired transition of building heights from the B3 Commercial Core in the south toward the waterfront in the north. The bulk of the proposed development is situated in the southern portion

of the site, stepping down toward the north and proposing a human scale single-storey retail building in the northernmost part of the site. Whilst not strictly adhering to the building height standards within the site the design response is suitable for the site and enables the achievement of high quality development and pedestrian through-site links and open space areas at ground level.

As stated above the proposed built form is considered suitable for the site and does not result in any unreasonable adverse environmental impacts. The proposal is therefore considered consistent with Clause 4.4.

5.2 Sufficient environmental planning grounds to justify contravention

This submission demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3 and 4.4, there would be no additional benefit to the streetscape or public domain in the local area. The potential for loss of views toward the harbour as a result of the additional height of the proposal has been compensated and is considered reasonably justified by the incorporation of through-site links within the development.

Whilst exceeding the building height standard for the site, the proposal still contributes positively to the locality incorporating through-site links which enable view sharing, pedestrian connectivity and built form relief. The design is consistent to development in the immediate vicinity, in particular the adjoining site at 21 Honeysuckle Drive in context with height, scale, bulk and proportions. The exceedance will be visibly difficult to detect; and as demonstrated in the Architect's shadow diagram analysis (refer to Appendix A). These drawings illustrate that the proposed development does not cause an unreasonable amount of shadowing, particularly when compared with the shadowing that would be caused by a strictly compliant development.

It is important to note, that an intensive design excellence process has ensued to arrive at the form and massing for the site; which has been tested and optimised to create a superior outcome for the public domain and for its appropriateness in context. The LEP envelope was tested and manipulated to arrive at the proposed massing.

The granting of development consent will enable a high quality, architecturally designed mixed use commercial and residential building to be constructed with an active ground floor presence for the benefit of the community and high amenity apartment living opportunity. The objectives of Clause 4.3 and Clause 4.4 have been met by the proposed development. In light of this, there is considered to be sufficient environmental planning grounds to justify varying these two development standards in this instance.

5.3 Public interest

As demonstrated in this assessment, the proposed development will be in the public interest as it is consistent with the objectives of the height standard and floor space ratio standard and the objectives of the B4 Mixed Use Zone.

The intent of the Mixed-Use Zone is to provide a wide range of retail, business, office, entertainment, community, and other suitable and compatible land uses within a mixed-use development. The proposal is a mixed-use development which incorporates retail and residential components. These uses are compatible with the objectives of the zone and will complement surrounding uses and strengthen the Newcastle City Centre, particularly in the vicinity of the active Honeysuckle Foreshore.

The proposed development will provide a number of significant public benefits. The proposal contributes a mix of land uses to the locality, creating employment opportunities during construction and operational stages, whilst also providing opportunities for sustainable living. Further, the Section 94A development contributions are likely to exceed \$1,000,000, which will have a significant benefit to the community. The proposal will deliver a range of dwelling sizes, thereby providing a variety of housing choices for future residents. The proposed development represents a high quality urban design, which seeks to continue to redevelop and enhance the Honeysuckle Precinct of Newcastle City Centre. The height and floor space ratio exceedances do not outweigh the merits of the proposal and its contribution to the social fabric and built form of Honeysuckle.

5.4 Secretary's concurrence

It is understood that the Secretary's concurrence under clause 4.6(4) of NLEP 2012 has been delegated to the Department of Planning and Environment.

6 Conclusion

This Clause 4.6 Variation to Development Standard submission has been prepared in response to numerical non-compliance with the development standards for the site specified in Clause 4.3 – Height of Buildings and Clause 4.4 – Floor Space Ratio in NLEP 2012. The extent of non-compliance is considered acceptable in the context of the site given the type and scale of development proposed.

As demonstrated within this submission and the revised Architectural plans, the overall massing, scale, bulk and height of the proposed development is consistent with the desired future character envisioned by Council for the precinct.

It is considered that the variations allow for the orderly and economic use of the land in an appropriate manner, whilst allowing for a better outcome based on planning merits and public benefit. Further, the proposal will not result in any unreasonable impact on amenity or any significant adverse environmental impacts as a result of the variations, which have been arrived at after a design excellence process that involved testing and amending the design to achieve a most appropriate massing of development for the site.

The Department of Planning and Environment can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standards.

It is therefore requested that the Department of Planning and Environment grant development consent for the proposed development.

Yours sincerely,



Samuel Newman
Town Planner
KDC Pty Ltd