

24 January 2023

2210545

Ms Amy Watson
Team Leader, Key Sites Assessments
NSW Department of Planning and Environment
4 Parramatta Square,
Parramatta NSW 2150

Dear Amy,

Powerhouse Ultimo Renewal - SSD-32927319 Additional Information

We refer to your request for additional information in respect of the Concept State Significant Development Application for the Powerhouse Ultimo Renewal (SSD-32927319) dated 22 December 2022.

As outlined in the Clause 4.6 Variation Request prepared by Ethos Urban dated 24 May 2022 was prepared for an abundance of caution in respect of the existence of basement levels within the existing Powerhouse Ultimo.

The Sydney Local Environmental Plan 2012 (the Sydney LEP) defines a basement as “the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing)”. This makes clear that any basement is inherently located below ground level. In order to determine the existing ground level of a site, the approach taken within developed environments such as the City of Sydney is as outlined by the NSW Land and Environment Court in *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (Stamford). The proposed maximum building envelopes set out in the Concept State Significant Development Application have been prepared in accordance with this accepted approach in order to comply with the maximum building height prescribed by the Sydney LEP.

We refer the Department to Appendix C- Revised Envelope Plans submitted with the Response to Submissions which sets out the ground levels (existing) identified for the Powerhouse Ultimo site for the purposes of considering the height of the proposed amended envelope relative to the height development standard.

Notwithstanding the above, a Clause 4.6 Variation Request was prepared should the consent authority form the view that a different approach be taken to the measurement of building height, specifically having regard to the decision of the NSW Land and Environment Court in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 (Merman). The *Merman* case dealt with a site that was steeply sloped due to the natural topography of that site, that was only partially developed, and had been partially excavated for the purposes of the then existing building such that the ground levels prior to that excavation had been lowered within the footprint of that building. The important distinction to the Powerhouse Ultimo Renewal project is that the existing ‘basements’ or excavated levels the subject of the *Merman* decision were recessed building elements within the slope rather than true ‘basements’ (ie sub-ground level basements) within the definition set out in the Standard Instrument LEP. The determination of the ground level in the *Merman* case by reference to the ‘extant excavated level’ was a result of the facts and circumstances of that project based on the characteristics of that sloping site. The decision does not include a finding that a sub-ground basement level should be used for the purposes of determining a height of a building and no such level was considered in that case. The characteristics of the site and project considered in *Merman* are clearly distinguishable from the characteristics of the site and project that is the subject of the Concept State Significant Development Application for the Powerhouse Ultimo Renewal project, where the existing site is fully developed and existing basement levels are clearly a divergence from the existing ground level, being consistent with other developed sites within a CBD context where the *Stamford* case provides clear guidance. That is, in the context of the Sydney LEP definition of a basement, *it does not follow that existing ground level becomes the level of the basement floor or the soil beneath the basement following the construction of a basement. A basement is, by definition, below ground level and so the level of the*

basement floor cannot be taken to be the existing ground level' (adopting the approach in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070).

The plans lodged as Appendix C- Architectural Plans with the EIS illustrated the existing basements below the Powerhouse Ultimo site referred to above as 'true' basements, with all sides encased below the ground level (existing). By way of example, Attachment A includes representations of basements within the western portion of the site in 3D for ease of reference.

If the Applicant were to retain or resubmit a Clause 4.6 Variation Request to address an alternative basis of the various basement levels as ground levels (existing) resulting in a contravention of the height standard requiring justification, this would require equating a basement with ground level (existing) which in the Applicant's view would be contrary to those definitions in the SLEP.

Having regard to the above, it is clear that the correct approach to determining existing ground level in the circumstances of the Powerhouse Ultimo site and this project is as set out in the enclosed Appendix C - Revised Envelope Plans and as consistently applied throughout the City of Sydney. Accordingly, the proposed maximum building envelopes comply with the building height development standard set out in the Sydney LEP, and a Clause 4.6 Variation Request is not required.

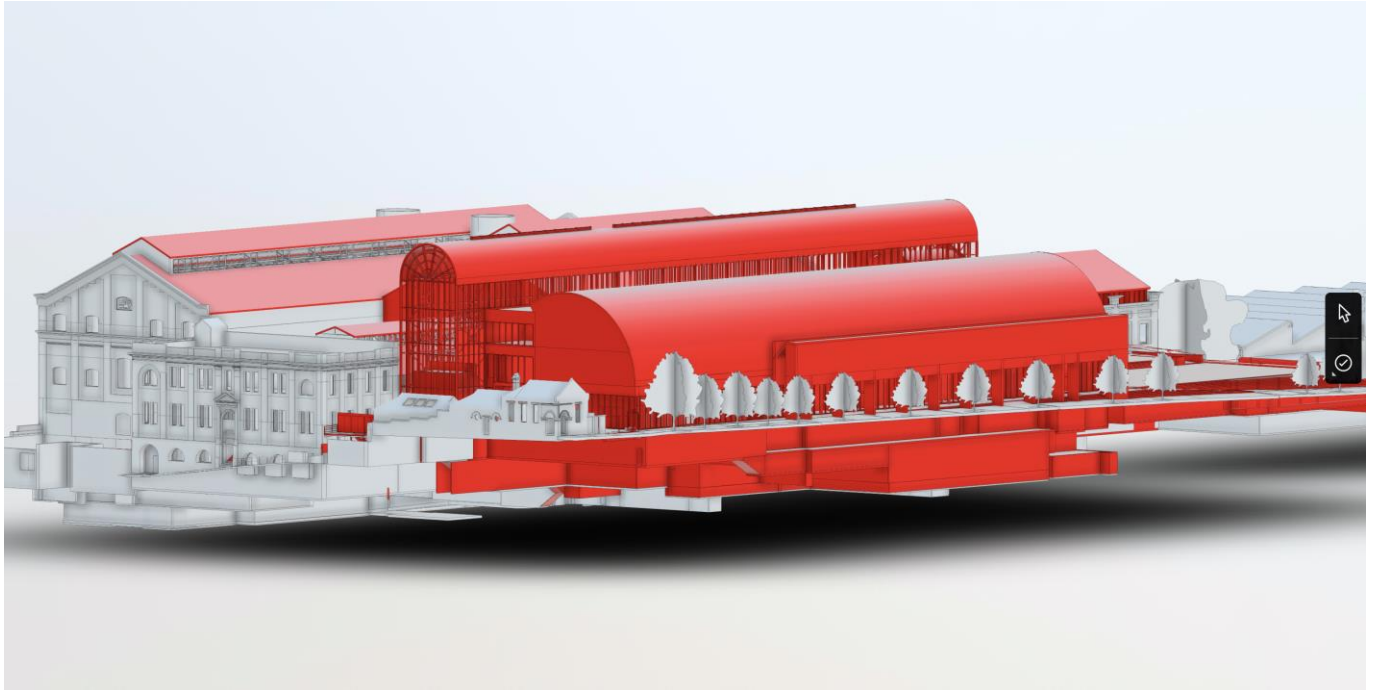
Should you have any further queries in relation to this matter, please do not hesitate to contact the undersigned or Mr Tom Kennedy of Infrastructure NSW.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M Oliver', written in a cursive style.

Michael Oliver
Director, Planning
02 9956 6962
moliver@ethosurban.com

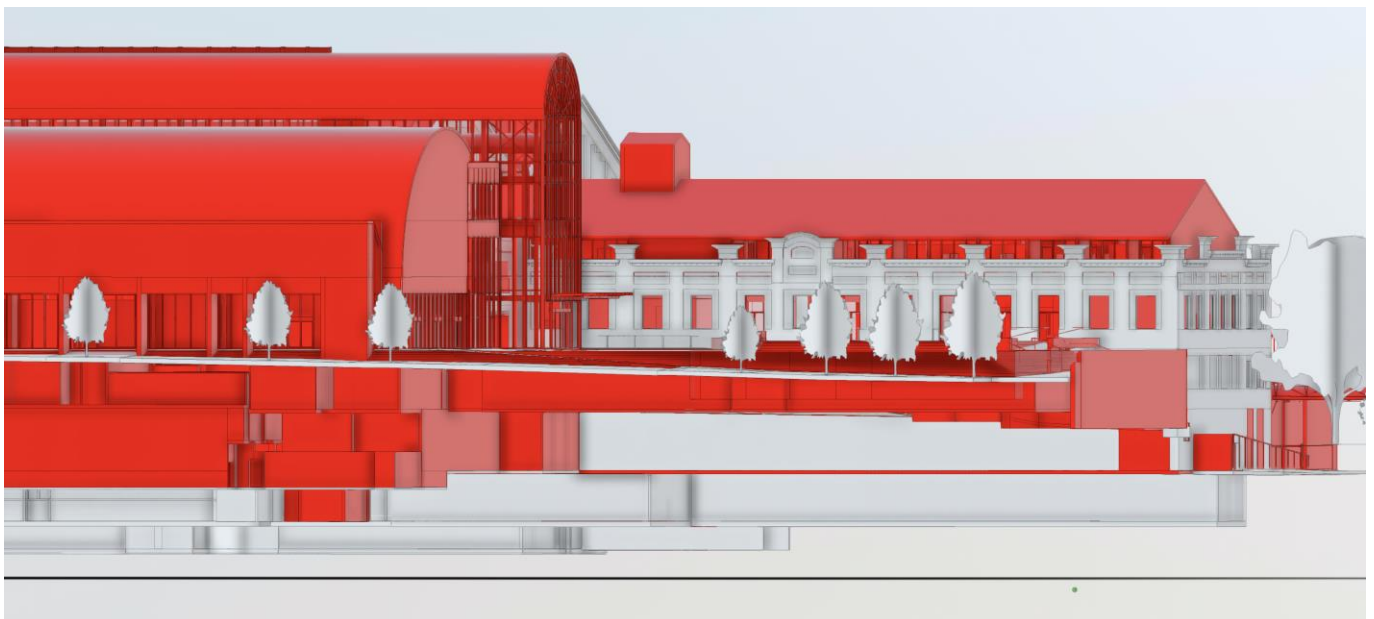
Attachment A: 3D Model of Existing Basements



View 1: From Pier Street



View 2: From Harris Street



View 3: From Corner of Harris and Macarthur Streets