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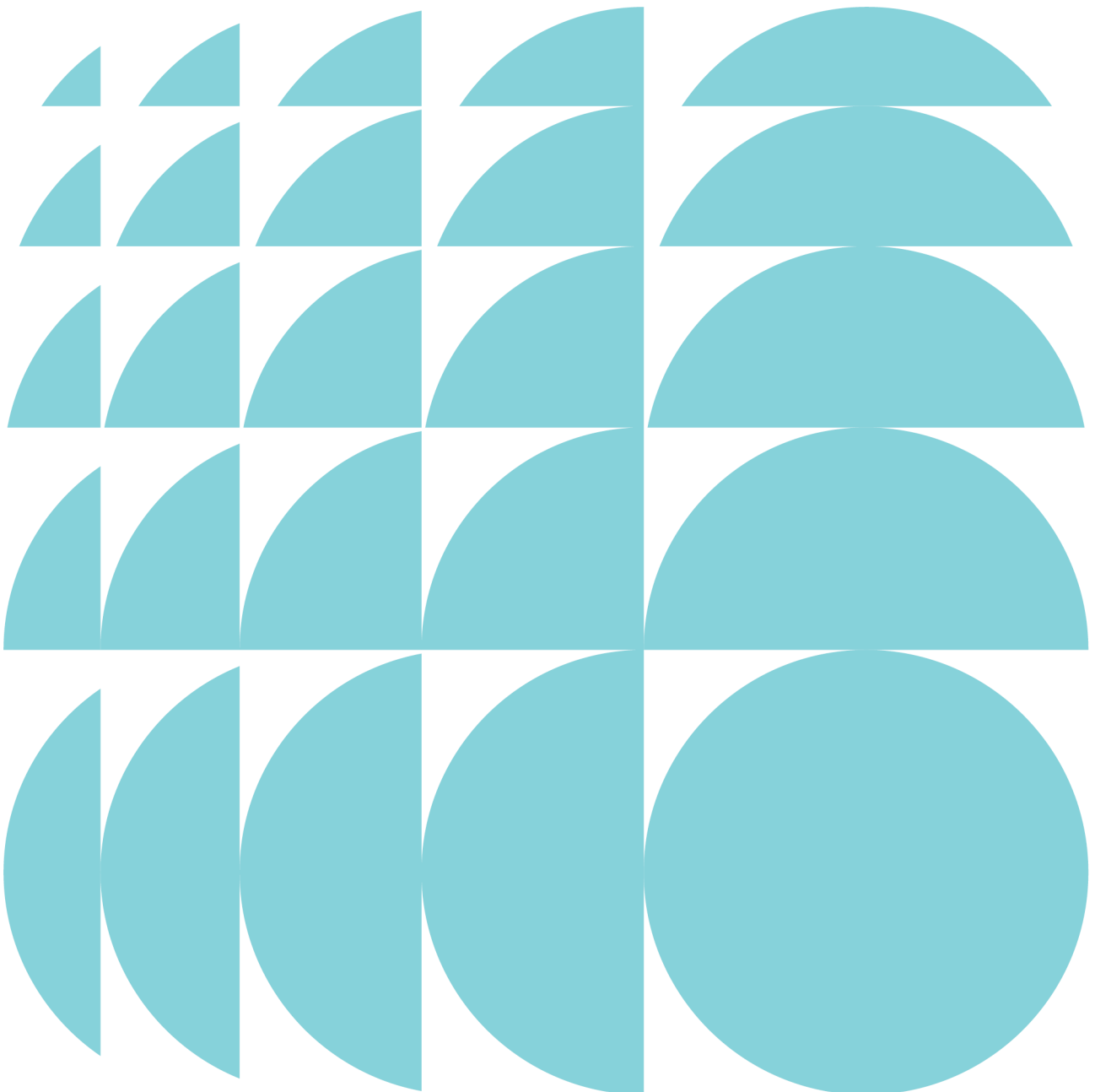
## Clause 4.6 Variation

794-796 New South Head Road, Rose Bay  
Kambala Sports, Wellbeing and Seniors Learning  
Precinct

Submitted to Department of Planning, Industry  
and Environment

On behalf of Kambala

2 September 2020 | 2190171



DRAFT

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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Kambala School. It is submitted to Department of Planning, Industry and Environment (DPIE) in support of a State Significant Development Application (SSDA) for Kambala School at 794-796 New South Head Road, Rose Bay.

Clause 4.6 of the Woollahra LEP enables the consent authority to grant consent for development even though the development contravenes a development standard imposed. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That 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.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control.

Clause 42 of the Education SEPP permits that development consent may be granted for the purpose of a school that is State Significant Development despite the contravention of a development standard imposed by an Environmental Planning Instrument (EPI), in this case being the height of buildings standard imposed under the Woollahra LEP. Therefore, the height limit is considered unnecessary in its application to this site. Nevertheless, this Clause 4.6 variation request demonstrates that:

- The State Significant educational establishment is not required to achieve strict compliance with the height of buildings clause contained within the Woollahra LEP.
- The proposed development achieves the objectives of the height of buildings development standard because:
  - The height of the development is in line with the future desired character of the area;
  - The height provides an appropriate transition in scale to surrounding residential zones;
  - The height of the development does not result in an adverse impact on the amenity for any adjoining residences beyond what would be considered reasonable;
  - The development is consistent with the development potential of the site, which is not limited by the Hornsby LEP height limit but rather by the Education SEPP;
  - The development is sympathetic to the heritage items on site and will allow for the appropriate transition in height to these items; and
  - Views to the harbour from public places are not impacted.
- The proposed development is consistent with the objectives of the SP2 Infrastructure zone.
- The proposed development is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the site.

Therefore, the SSDA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Woollahra LEP

## 2.0 Background and Context to the Variation

### 2.1 Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. Specifically, the site is large educational campus along New South Head Road, Rose Bay, which sits on an almost standalone block of land, with significant topographical changes around it. The site's setting in relation to surrounding development is illustrated in **Figure 1**.

Kambala is an independent, Anglican day and boarding school for girls from Preparation (Kindergarten) to year 12. Kambala also has an early learning centre cares for approximately 100 girls and boys aged between 6 months and 4 years. The school was established in the late 1800s and moved to the current campus in 1913 and has evolved in an organic and ad-hoc manner across the span of a 120 years. This SSDA provides an opportunity to reconnect with the heritage features on the site and consolidate a number of uses into a state of the art educational and sports building to provide a positive outcome for the learning of the students as well as the aesthetic and heritage values of the site.



**Figure 1 Aerial of the site**

Source: Nearmap and Ethos Urban

### 2.2 Planning Context

#### State Significant Development Application

The redevelopment of a school on the site is proposed as a State Significant Development Application (SSDA) in accordance with Schedule 1 of the State Environmental Planning Policy (State and Regional Development) 2011. Therefore, the Minister or relevant delegate is the consent authority.

The assessment criteria for the educational establishment are provided within the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (Education SEPP). The Education SEPP was gazetted in 2017 in order to make a more streamline approach for child-care providers, schools, TAFEs and Universities to built new facilities and improve existing ones by streamlining the approval process in order to deliver



greater consistency across NSW. The SEPP balances the need to deliver additional educational infrastructure with a focus on good design. The SEPP is accompanied by design quality principles, which are listed under Schedule 4. It also permits the development of an educational establishment of up to 22 metres, and four storeys as Complying Development.

### Application of Development Standards for School Development

Clause 42 of the Education SEPP states that:

*“Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.”*

Therefore, the Education SEPP permits the contravention of any development standard, including the height of buildings standard imposed under the Woollahra LEP. It is considered that the intent of the clause seeks to meet the aims of the SEPP including improving regulatory certainty and efficiency through a consistent planning regime for educational establishments.

Despite this allowance provided by the Education SEPP, for abundant caution, this Clause 4.6 request has been prepared to demonstrate how the building envelope meets the aims and objectives of the development standard and land use zone.

## 3.0 Development Standard to be Varied

### 3.1 Development Standard to be varied

The development standard that is sought to be varied as part of this application is Clause 4.3 Height of Buildings from the Woollahra LEP. Clause 4.3 establishes the maximum building height permitted for all development. Under the Woollahra LEP, the site is afforded a maximum height of 9.5 metres across the site as shown in the excerpt of the height of buildings map shown in **Figure 2** below.



Figure 2

Mapped maximum building height for the site.

Source: Woollahra LEP 2014

The SSDA seeks a maximum building envelope of 12.5 metres, or three (3) metres higher than the LEP height limit. However, due to the significant variation in height and topography across the site, this additional height will not be considerably noticeable, as shown at **Figure 3**.



**Figure 3** The proposed building viewed from New South Head Road at the front gates of the school.

Source: AJ+C

## 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Woollahra LEP 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 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.*

Further, clause 4.6(4)(a) of the Woollahra LEP provides that:

- (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.*

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; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the Woollahra LEP, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

### 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

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 the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Woollahra LEP is 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**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method and the Fifth Method.

#### **4.1.1 First Method: The objectives of the standard are achieved notwithstanding non-compliance with the standard**

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

This objective seeks to ensure that the height of buildings is in line with the surrounding and future desired character of the area, by producing development that is well scaled to the expected development of the surrounding neighbourhood. The development of Kambala School on the site has occurred since the early 1900s. The character of the site has been long linked to the school, and the heritage items existing on the site are important due to their role in relation to the school. Therefore, the existing use of the site as a school is well known, and therefore part of the expected future use of the site and wider desired future character.

The surrounding area is largely residential, with Kincoppal School to the north of the site. As this proposal does not seek to change the ongoing use of the site as a school, and instead intends to provide ongoing facilities for the operation of the school, this proposal is in line with the future character of the area.

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

The site is zoned SP2 Infrastructure and is surrounded by land zoned R2 and R3 residential or SP2 Infrastructure. As this development pertains to the north-eastern portion of the site, it is adjacent to New South Head Road, which is also zoned SP2 Infrastructure, and then R2 Low Density Residential and R3 Medium Density Residential land. In addition to this, the site and surrounding area are dominated by highly variable topography, with the site sloping towards the harbour to the west and southwest.

Therefore, the height of the proposed building, whilst three metres higher than the LEP mapped height, sits considerably below New South Head Road to the north-east, and even further below the residential buildings on the other side of New South Head Road, due to the continued rising slope to the north and north-east. Therefore, the height proposed reflects the rising topography to the north-east and provides suitable transition between the SP2 zone and the R3 zone.

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

The proposed building does not result in any additional overshadowing to buildings or open spaces outside the Kambala site. The precinct's overshadowing falls completely to the south of the building and is completely captured within the school boundary. Therefore, there is no loss of solar access to existing buildings or open spaces outside the school.

##### **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**

As discussed in Objective (b), the site is affected by considerable sloping to towards the harbour. Therefore, the sports precinct sits entirely below New South Head Road and any adjoining residential buildings to the north-east. Therefore, there are no disruptions to views for any surrounding residents or from any significant viewpoints in the public domain.

In addition to this, the building sits on the highest point on the site and overlooks the remainder of the campus to the south and south-west. Therefore, there is no possibility of overlooking into any private residences and therefore, no

loss of privacy results. Finally, as discussed above, there is no additional overshadowing into any private or public property surrounding the site, and therefore, overshadowing is not a relevant issue.

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

As discussed in Objective (d), there are no areas of the public domain which currently have views to the harbour and surrounds that are restricted or impacted as a result of this application. This is discussed in the View Analysis provided at **Appendix H** of the SEE.

**4.1.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method)**

Under the Woollahra LEP 2014, the site is zoned SP2 Infrastructure and has a height limit of 9.5 metres. However, in 2017, *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (EDSEPP) was introduced. Clause 42 of the EDSEPP stipulates:

*“Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.”*

Therefore, under this clause of the EDSEPP, the height limit applied by the Woollahra LEP is not relevant to the development as it is State Significant Development for the purpose of a school, and as a result, compliance is unnecessary.

**4.1.3 Conclusion on clause 4.6(3)(a)**

- The proposal meets the objectives of clause 4.3 of Woollahra LEP 2014, despite varying the height standard by three metres.
- Clause 4.3 of the Woollahra LEP is not necessarily relevant to the development as clause 42 of the EDSEPP overrules it, and therefore, the three-metre height variation is acceptable.

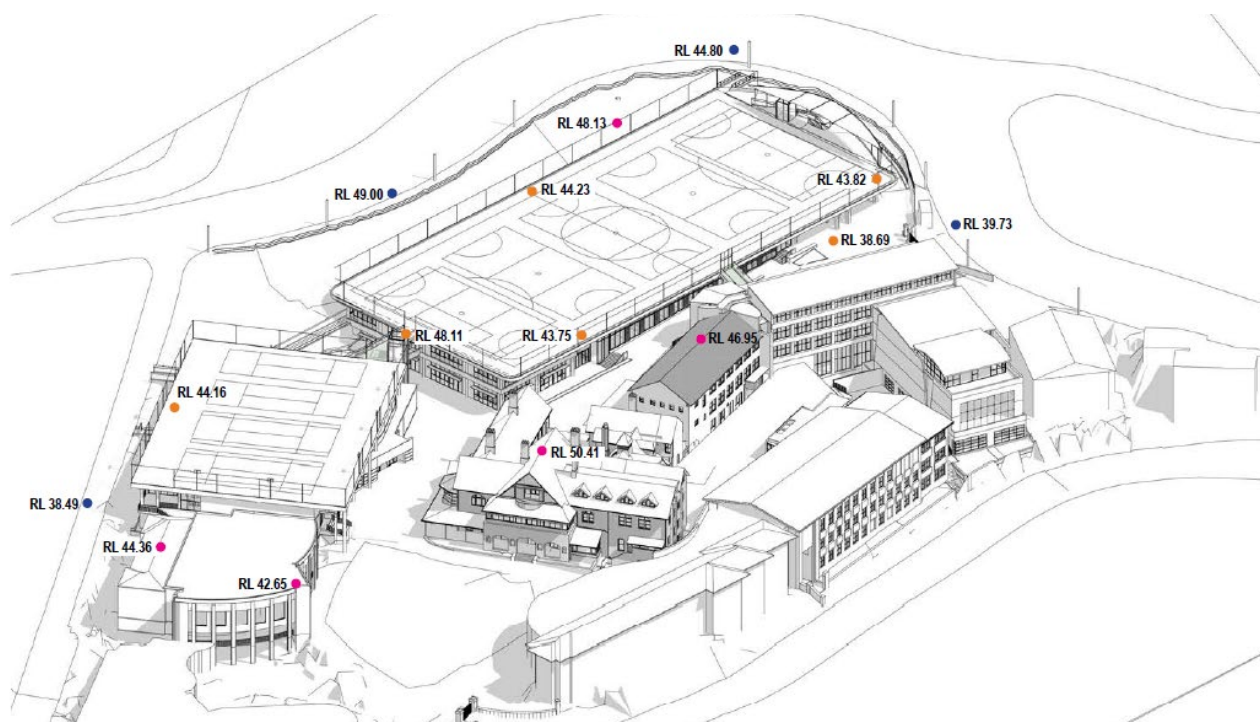
**4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard**

**4.2.1 Ground 1: Topography**

The Kambala School site and surrounds is subject to significant topographical changes, with New South Head Road sitting at RL 49, or nine metres above the existing playing field, and the lowest point of the school site approximately 20 metres lower than New South Head Road. Therefore, the site experiences a significant downwards slope to the south-west towards the harbour, with development to the north and north-east significantly higher than the site.

It is proposed that the roof of the building would be at a height of RL 44.23, with the transparent sports net fencing at a maximum height of RL 48.13. Therefore, even at the top height of the translucent fence, the development is still 850mm lower than the equivalent location on New South Head Road. At lower points on New South Head Road, the roof of the building and playing fields on the roof are at still below this level. A summary of the RL heights is shown at **Figure 4**. This is due to the variation in topography across the site, which ameliorates many potential impacts resulting from this building.

Therefore, the proposed height of the building, whilst it varies the Woollahra LEP mapped height for the site, responds to the topographical changes on the site, and utilises this to provide a successful design and amenity outcome without creating any considerable environmental impacts.



**Figure 4** Heights resulting from the proposed building.

Source: AJ+C

#### 4.2.2 Ground 2: View Impact and Visual Privacy

As discussed in relation to topography, the site and surrounds is highly variable, and the building will not block any existing views, either from a public space or from private property, particularly to the north and northeast. A View Analysis has been prepared to accompany the EIS (**Appendix H**), which concludes that from the public domain, views to scenic items, such as the harbour will be largely unaffected, and there are other, unrelated development applications on the school site that are approved but unbuilt, and would have a greater impact on views from the public domain.

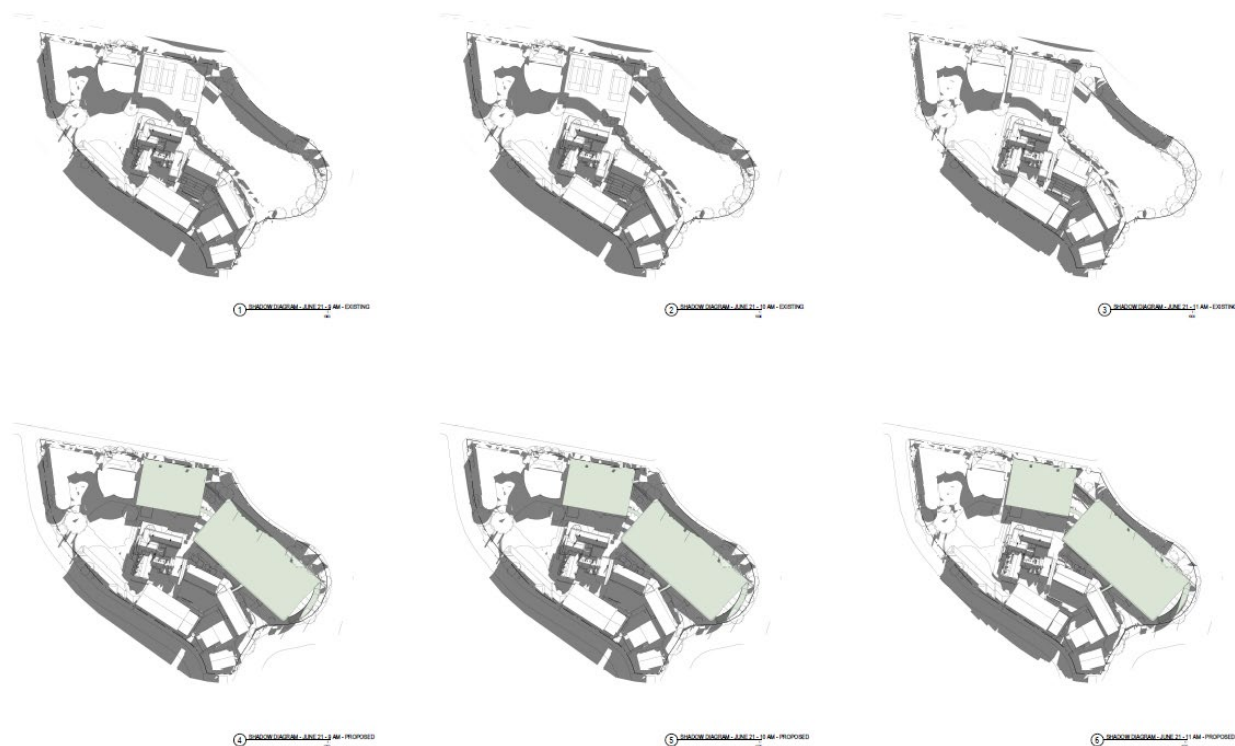
A Visual Impact Assessment has been prepared by Urbis to assess the impact on views from private properties as a result of this proposal (**Appendix I** of the EIS). This report finds that the visual impact from private property to be of an acceptable level and of low impact. Again, this report finds that this design is a better outcome than previous development applications approved for the site.

Therefore, whilst the height limit provision of the Woollahra LEP applicable to the site is contravened as a result of this application, the additional height does not have any significant impact on views and the accessing of key views to the harbour from both public and private domains.

#### 4.2.3 Ground 3: Overshadowing

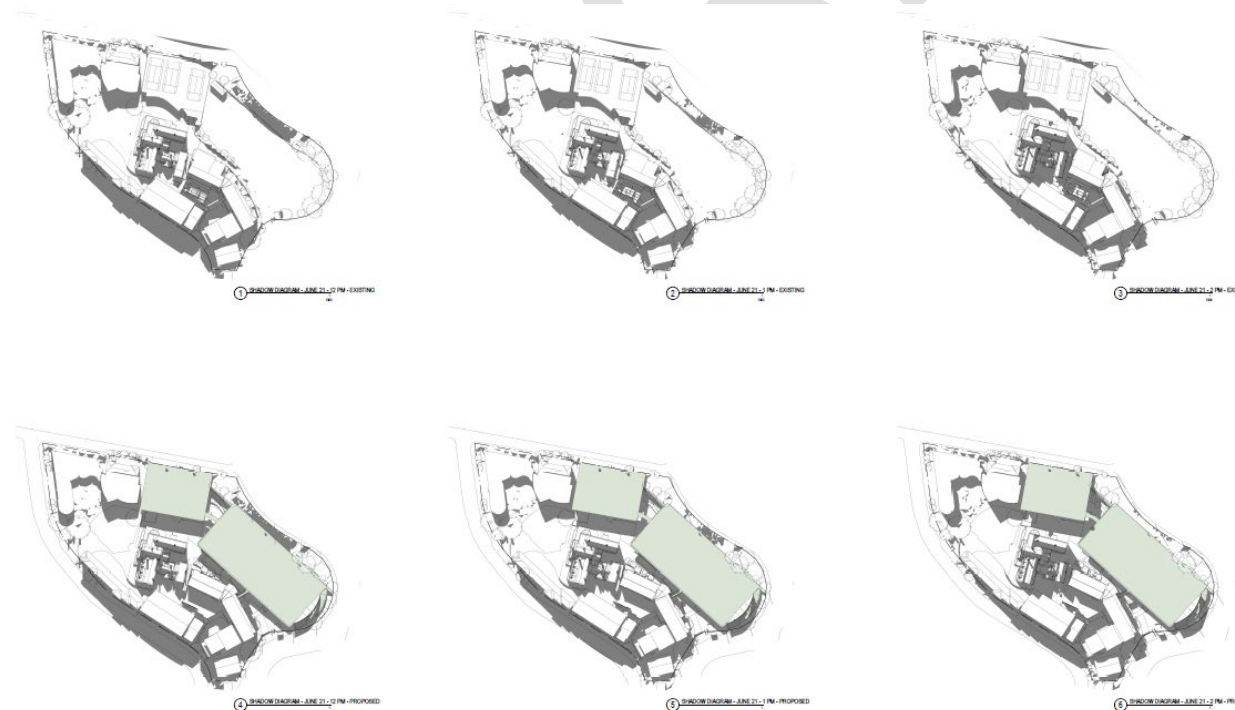
As discussed in **Section 4.1.1**, the additional height proposed does not result in any additional overshadowing outside of the site. Due to the size, shape and orientation of the site, the majority of the existing shadows fall within the site or adjoining road reserves of Tivoli Avenue and New South Head Road. The proposed works do not impact this fact.

The majority of shadows resulting from the proposed Sport and Senior Learning Precinct fall within the site, with a small portion of shadow falling onto New South Head Road at 3:00pm. No adjoining residential properties or public open space will experience additional overshadowing as a result of this proposal. The existing overshadowing versus the proposed is shown in **Figure 5** to **Figure 7**.



**Figure 5** Overshadowing as a result of the proposed works from 9:00am-11:00am

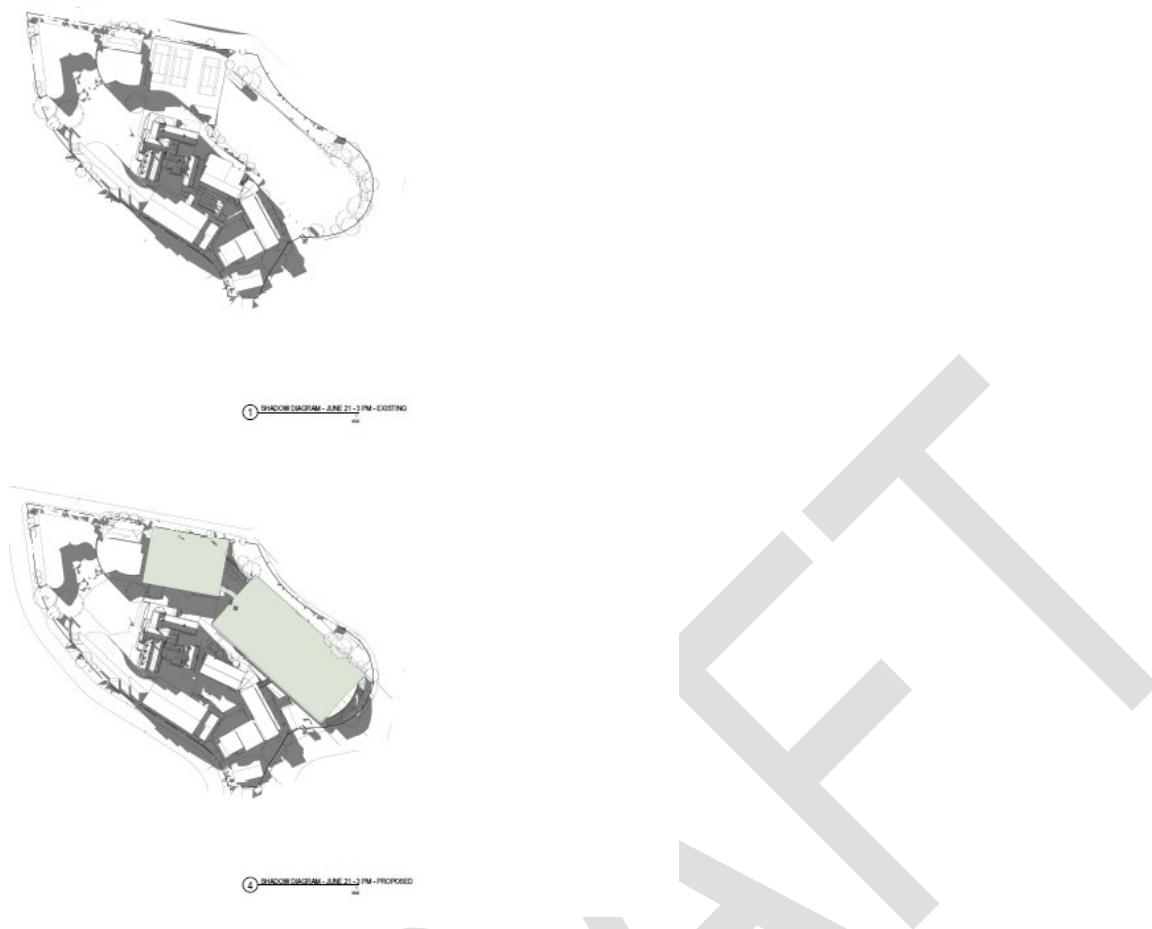
Source: AJ+C



**Figure 6** Overshadowing as a result of the proposed works from 12:00pm – 2:00pm

Source: AJC





**Figure 7** Overshadowing as a result of the proposed works at 3:00pm.

Source: AJC

#### **4.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard**

##### **4.3.1 Consistency with objectives of the development standard**

The proposed development is consistent with the objectives of the clause 4.3 height of buildings development standard, for the reasons discussed in section 3.1.2 of this report.

##### **4.3.2 Consistency with objectives of the zone**

The proposed development is consistent with the objectives of the SP2 Infrastructure Zone, as demonstrated below.

##### **Objective (a): To provide for infrastructure and related uses.**

The proposal seeks to deliver a sports, wellbeing and seniors learning precinct for Kambala School. As the proposal directly relates to the provision of school infrastructure, by way of the delivery of sports, student wellbeing and additional learning spaces, this objective of the zone is met.

##### **Objective (b): To prevent development that is not compatible with or that may detract from the provision of infrastructure**

As the proposal is directly in line with the provision of infrastructure on the site, the uses of the development are directly compatible with the school uses and will not detract from the provision of any future infrastructure.

### 4.3.3 Overall public interest

In *Initial Action v Woollahra Municipal Council* [27], it is established that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. Accordingly, it is demonstrated throughout this Clause 4.6 that the proposal is in the public interest as it is entirely consistent with the objectives of the development standard and the objectives of the zone.

In addition to this, the Concept Masterplan is considered to be in the public interest as the proposed development:

- Will contribute to provision of high-quality education facilities in the Eastern District at Kambala School;
- Will provide a significant upgrade to the existing sports facilities and provide additional capacity for wellbeing facilities on the site, which are currently over capacity or of poor quality;
- Will allow for the ongoing renewal of Kambala School, which has been operating on-site for the educational benefit of the local community since 1913; and
- Will have little to no adverse impact on amenity of adjoining sites.

### 4.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

(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.*

These matters are addressed in detail below.

#### 4.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the clause 4.3 height of buildings development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, A Plan for Growing Sydney in that it:

- allows for the use of the Site to continue to provide local, high quality educational opportunities;
- is well located to public transport connections; and
- does not affect any heritage assets.

#### 4.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As demonstrated above, there is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height proposed responds to the significant topographical change on the site and would not give rise to any adverse environmental impacts.

The Site is unique in that the blanket building height applying to the locality under the LEP does not consider the variation in topography and the steep drop from New South Head Road at the north-eastern boundary of the site. It is not considered that there would be any public benefit for the height of the existing building to be reduced, particularly where key planning issues deriving from height, such as view impact and overshadowing, have been resolved through architectural design.

**4.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.**

There are no other matters required to be taken into account by the Secretary.

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## 5.0 Conclusion

The assessment above demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the Woollahra LEP 2014 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the height of buildings development standard, the proposed development:

- The State Significant educational establishment is not required to achieve strict compliance with the height of buildings clause contained within the Woollahra LEP.
- The proposed development achieves the objectives of the height of buildings development standard because:
  - The height of the development is in line with the future desired character of the area;
  - The height provides an appropriate transition in scale to surrounding residential zones;
  - The height of the development does not result in an adverse impact on the amenity for any adjoining residences beyond what would be considered reasonable;
  - The development is consistent with the development potential of the site, which is not limited by the Hornsby LEP height limit but rather by the Education SEPP;
  - The development is sympathetic to the heritage items on site and will allow for the appropriate transition in height to these items; and
  - Views to the harbour from public places are not impacted.
- The proposed development is consistent with the objectives of the SP2 Infrastructure zone.
- The proposed development is in the public interest in light of the numerous positive social, ecological, design and economic impacts it will deliver for the site.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Woollahra LEP 2014.