

175 – 177 Cleveland Street, Redfern

Co-Living Boarding House Development

Clause 16A Variation Request – Height and FSR Development
Standards

On behalf of
EG
July 2021



Project Director

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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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Table of Contents

1	Introduction.....	1
2	Floor Space Ratio	3
2.1	Is the Planning Control in Question a Development Standard	3
2.2	Development Standard to be Varied	3
2.3	Background and Context to the Variation.....	4
3	Justification for the Contravention to the Development Standard .	6
3.1	Clause 16A(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case	6
3.1.1	The Objectives of the Standard are Achieved Notwithstanding Non-Compliance with the Standard (Wehbe #1)	7
3.1.2	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 (Wehbe#4).....	13
3.2	Clause 16A(3)(b): That there are sufficient environmental planning grounds to justify contravening the development standard.....	14
3.3	Clause 16A(4)(i): The written request has adequately addressed the matters required to be demonstrated by subclause (3), and	22
3.4	Clause 16A(4)(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	23
3.5	Secretary's Concurrence	24
4	Conclusion	27
5	Building Height	28
5.1	Is the Planning Control in Question a Development Standard	28
5.2	Development Standard to be Varied	28
5.3	Background and Context to the Variation.....	28
6	Justification for the Contravention to the Development Standard ..	30
6.1	Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case.....	30
6.1.1	The Objectives of the Standard are Achieved Notwithstanding Non-Compliance with the Standard (Wehbe #1)	30

6.1.2	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 (<i>Wehbe#4</i>).....	32
6.2	There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard.....	35
6.3	Clause 16A(4)(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	39
6.4	Secretary's Concurrence.....	39
6.5	Conclusion	Error! Bookmark not defined.

Schedule of Figures

Figure 1: Site Location and Applicable Maximum Residential FSR.....	3
Figure 2: Site in Existing Conditions Viewed Looking South East from Cleveland Street 15	
Figure 3: Site with Proposed Envelope Viewed Looking South East from Cleveland Street 15	
Figure 4: Existing Site Viewed with Proposed Envelope Viewed Looking South East Down Cleveland Street	16
Figure 5: Shadow Cast by the Proposal at 9am	18
Figure 6: Shadow Cast by the Proposal at 10am	18
Figure 7: Site Location and Applicable Maximum Residential FSR.....	28
Figure 8: Height Context Surrounding the Site on the Southern Side of Cleveland Street 31	
Figure 9: Proposed Envelope Viewed from Cleveland Street.....	33
Figure 10: Proposed Envelope Viewed from Eveleigh Street	33
Figure 11: Proposed Envelope Viewed from Woodburn Street	34
Figure 12: Proposed Envelope at Level Five.....	34
Figure 13: The Proposal with a Percieved Five Storey Height	36
Figure 14: The Proposed Envelope Viewed Looking South East	37
Figure 15: A Compliant Envelope Viewed Looking South East	37
Figure 16: The Proposed Envelope Viewed Looking East From Cleveland Street	38
Figure 17: The Non-Compliant Envelope Viewed Looking East From Cleveland Street 38	

1 Introduction

The two 16A Exceptions to Development Standards (Variation Requests) set out in this report have been prepared by Mecone on behalf of EG (the Proponent). They are submitted to the Department of Planning, Industry and Environment (DPIE) in support of a State Significant Development Application (SSDA) for a boarding house development at 175 – 177 Cleveland Street and 1 – 5 Woodburn Street, Redfern. They have been prepared pursuant to Clause 16A of the *State Environmental Planning Policy (State Significant Precincts) 2005* (the SSP SEPP).

The first Variation Request seeks to vary the residential Floor Space Ratio (FSR) Development Standard of 1:1 set out under Clause 21 (2) within the SSP SEPP. Notwithstanding the variation, the proposed development complies with the overall FSR of 3.5:1 that applies under Clause 21 (2) of the SSP SEPP and Clause 29(1)(c)(i) of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARH SEPP) which establish an FSR of 3:1 and a bonus FSR of 0.5:1, respectively.

The second requests to vary the Storey Height Development Standard set out under Clause 21 (1) of the SSP SEPP which prescribes a maximum five (5) storey height limit. Notwithstanding the height exceedance, the proposal is commensurate in height with the developments for the site approved under SSD 7064, and largely presents as being five storeys when viewed from the streetscape.

The objective of Clause 16A is to allow flexibility in the application of numerical development standards. It enables a consent authority to vary a development standard within an environmental planning instrument (EPI). It requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,
- That there are sufficient environmental planning grounds to justify contravening the development standard, and
- 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.

This Variation Request applies the principles arising from the following decisions of the NSW Land and Environment Court (LEC) set out in:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSW LEC 1511; and
- *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552.

In applying the principles established in *Wehbe v Pittwater Council [2007] NSWLEC 827*, the 16A Exceptions to Development Standards demonstrate that the proposed variation to the residential FSR and storey height meet the following key tests:

- *Wehbe Test 1* – The objectives of the standard are achieved notwithstanding non-compliance with the standard; and
- *Wehbe Test 4* – The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

For the reasons addressed in this report, the consent authority can be satisfied that compliance with the residential FSR development standard is unreasonable and unnecessary since the objectives of the standard and the zone are achieved notwithstanding the non-compliance.

As required by subclause 16A(5)(c), concurrence of the Planning Secretary of the DPIE is also required before the consent authority can grant development consent. The matters required to be considered by the Planning Secretary are addressed in **Sections 4.5** and **6.5**.

This Variation Requests should be read in conjunction with the Environmental Impact Statement (EIS) prepared by Mecone dated May 2021 and the Architectural Plans prepared by Mark Shapiro Architects at **Appendix B**.

2 Floor Space Ratio

2.1 Is the Planning Control in Question a Development Standard

The residential FSR prescribed by Clause 21 (2) of the SPP SEPP is a development standard.

2.2 Development Standard to be Varied

Clause 21 (2) *Height, Floor Space Ratio and Gross Floor Area Restrictions* states that 'The floor space ratio of a building on any land that is the subject of the Floor Space Ratio Map is not to exceed the floor space ratio shown for the land on that map'.

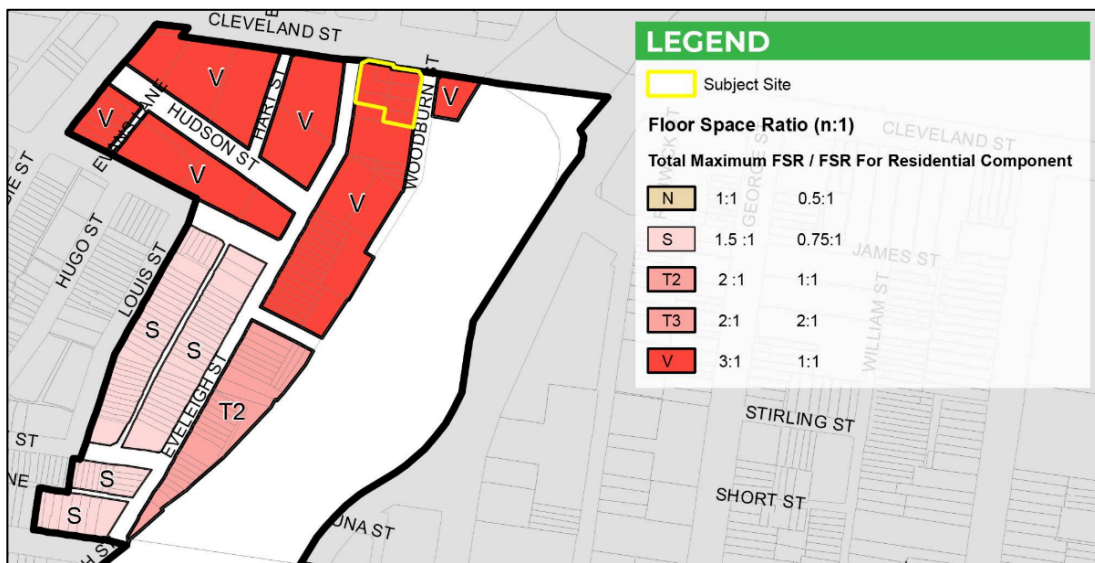


Figure 1: Site Location and Applicable Maximum Residential FSR
(Source: SPP SEPP)

As shown in the figure above, the Floor Space Ratio Map prescribes a residential FSR of 1:1 and a maximum overall FSR of 3:1 for the site. In addition to the base FSR of 3:1, the site is eligible for an FSR bonus of 0.5:1 pursuant to subclause 29(1)(c)(i) of the ARH SEPP bringing the total FSR maximum to 3.5:1.

The development proposes a boarding house use which is defined by the *Standard Instrument – Principal Local Environmental Plan (2006)* as a type of residential accommodation. The GFA associated with the boarding house use (excluding the café) amounts to 3,582.84m². Based on a site area of 1,062.1m², this equates to a non-compliant residential FSR of 3.37:1.

The table below sets out the proposed distribution of FSR and non-compliance with the residential FSR.

Proposed FSR Distribution			
FSR Type	Provision	Control	Proposed
Residential FSR	SSP SEPP – Part 3, Clause 21(2)	<ul style="list-style-type: none"> 1:1 residential 	<ul style="list-style-type: none"> 2.87:1 residential FSR

Proposed FSR Distribution			
FSR Type	Provision	Control	Proposed
		<ul style="list-style-type: none"> 2:1 non residential uses 	<ul style="list-style-type: none"> 0.10:1 non-residential
Bonus Residential FSR	ARH SEPP - Clause 29(1)(c)(i)	0.5:1	0.5:1
Total	Floor Space Ratio - total	3.5:1	3.47:1
Non-compliant FSR			2.87:1 residential FSR (when accounting for the 0.5:1 ARH SEPP bonus), resulting in a 1.87:1 FSR variation to the maximum 1:1 residential FSR limit.

Notwithstanding the non-compliance with the residential FSR, the proposal complies with the overall permissible FSR for the site. Specifically, the proposal provides a GFA of 3,685.63m² which equates to a compliant FSR of 3.47:1.

2.3 Background and Context to the Variation

Historically the Land and Environment Court (LEC) and the State Government has supported a variation to the residential FSR development standard on the site. The relevant approvals are addressed below.

SSD 6371

On 28 January 2015, the Minister granted consent to SSD 6371 relating to a mixed use development with student and residential accommodation for the northern and western portion of the site at 175 – 177 Cleveland Street. The proposal included student accommodation with an FSR of 1.71:1 and a residential component with an FSR of 1.27:1. The proposal was accompanied by a SEPP 1 Objection to vary the maximum residential FSR cap of 1:1. The consent authority determined that the variation was reasonable, noting the following:

'Further, the Department is satisfied the current market demand for retail and commercial floor space is limited and the proposal will provide student accommodation currently in demand in the area. In addition, while student accommodation are defined as a residential use, student accommodation are not purely residential and operate more similarly to serviced apartments (being a commercial use) and will provide for approximately 5 full time employment jobs when operational'. – DPIE SSD Assessment Report January 2015.

The above examples demonstrate that historically the consent authority has recognised that a boarding house use has the potential to support employment generation and is a viable and suitable use for the site notwithstanding its designation as residential accommodation under the standard instrument.

SSD 7064

SSD 7064 which was recommended for approval by the DPIE on 6 December 2016 and approved by the LEC on the 22 March 2018, after receiving a refusal from the Independent Planning and Assessment Commission (IPC) on the 20 February 2017, proposed a non-compliant residential FSR of 1.20:1 for a scheme that accommodated hotel, residential and retail uses. This scheme was later modified under SSD 7064 (MOD 1) to provide a non-residential FSR of 2.32:1.

Surrounding Development

The nature of the surrounding development, which includes a number of boarding house developments, is integral to assessing the appropriateness of the proposed variation to the development standard. The prevalence of student accommodation in the surrounding area confirms that historically consent authorities have recognised that commercial uses in this location are less viable and have supported alternative uses including student accommodation which are a viable use and suitable for the locality.

Examples include the following:

- *Urbanest Student Accommodation* (SSD 4949-2011) - Located to the direct west (40m) at 157 - 163 Abercrombie Street, Redfern at the intersection of Cleveland and Eveleigh Streets.
- *Iglu Student Accommodation* (SSD 6724) – Located to the south (550m) at 60 – 78 Regent Street, Redfern.
- *Iglu Student Accommodation* (SSD 9275) – Located to the south (600m) at 70 – 88 Regent Street.

It is noted that the site located at 157 – 163 Cleveland Street, Redfern, which accommodates the *Urbanest Student accommodation* facility approved under SSD 4949-2011, is subject to the same 1:1 residential FSR development standard nominated under the former *State Environmental Planning Policy (Major Development) 2005*. Notwithstanding, the DPIE granted consent for a residential development with an FSR of 3:1.

The assessment associated with the SSD indicates that the variation was supported by the consent authority on the grounds that compliance with the residential FSR development standard would hinder the achievement of the objectives of several objectives the Business-Mixed Use zone, which seek to permit residential development that is compatible with the non-residential development. The provision of student accommodation in the zone was considered to better provide a compatible use to the surrounding non-residential development and appropriate for the location given its proximity to a range of educational establishments and therefore better reflect the zone objectives.

In light of the above, it is clear there are precedents for delivering boarding house accommodation on nearby sites as well as the granting of development approvals for substantial variations to the residential FSR control prescribed by the SPP SEPP.

3 Justification for the Contravention to the Development Standard

Clause 16A Exceptions to Development Standards of the SPP SEPP provides that:

- (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 that –
- a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - b) that there are sufficient environmental planning grounds to justify contravening the development standard.
- (4) Development consent must not be granted for development that contravenes a development standard unless –
- a) the consent authority is satisfied that –
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
 - b) the concurrence of the Planning Secretary has been obtained.

In justifying the development standard assistance has been taken from the decisions of the LEC and the NSW Court of Appeal in the following:

- *Wehbe v Pittwater Council [2007] NSWLEC 827*;
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*;
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSW LEC 118*;
- *Turland v Wingecarribee Shire Council [2018] NSW LEC 1511*; and
- *Baron Corporation Pty Ltd v The Council of the City of Sydney [2018] NSWLEC 1552*.

The matters contained in clause 16(A) Exceptions to Development Standards of the SPP SEPP with regards to the maximum residential FSR and storey height are addressed below.

3.1 Clause 16A(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

As detailed in *Williams v Ku-ring-gai Municipal Council [2017] NSWLEC 1098*, *Wehbe v Pittwater Council [2007] NSWLEC 827* at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. The approaches are as follows:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (*Wehbe #1*).
- The underlying object or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (*Wehbe#2*)
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (*Wehbe#3*).
- 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 (*Wehbe#4*).
- 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 (*Wehbe#5*).

With respect to the subject variation request, *Wehbe Test #1* and *Wehbe Test #4* as described in *Williams* are of relevance and are addressed in the sections below.

3.1.1 The Objectives of the Standard are Achieved Notwithstanding Non-Compliance with the Standard (*Wehbe #1*)

The SPP SEPP does not detail objectives for the FSR development standard. Notwithstanding this, strategic planning documents highlight the impetus for the FSR development standard. Specifically, the *Redfern-Waterloo Built Environment Plan (Stage One)* (August 2006) (the Plan) prepared by the Redfern-Waterloo Authority sets out the strategic planning framework for the precinct. It identifies the rationale for the amendments to the planning control and from this the implicit objectives of the FSR development standard can be interpreted.

The Plan designates the site as occupying the northern portion of the Eveleigh Street precinct. The objectives for the precinct are taken to be:

- Ensure development responds to the scale, form and design of surrounding development;
- Facilitate medium scale density development that will provide a barrier between the railway line and the lower density development to the west;
- To provide sufficient floor space to meet anticipated development for the foreseeable future;
- To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic;
- To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure; and
- To ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

Objective 1: *Ensure development responds to the scale, form and design of surrounding development.*

The proposed envelope has been designed and scaled to sit within the parameters of the envelope approved under (SSD 7064 MOD 1). In particular, the portion of the envelope where it fronts Cleveland Street reaches six (6) storeys as per the approved envelope and decreases in scale towards the south where it interfaces with the development sited along Eveleigh Street and Woodburn Street. This development decreases in height to five storeys to align with the height of the development located at 6 – 8 Woodburn Street. At the eastern frontage, the envelope decreases to two storeys to align with the height of the building at 6 – 8 Eveleigh Street. The envelope massing therefore provides a continuous building height alignment along both street frontages.

The form and design of the proposal responds to the character of the adjoining development. The development at 6 – 8 Woodburn Street consists of a residential flat building with an off white brick masonry façade with arc shaped windows. Similarly, the development at 6 – 8 Eveleigh Street consists of a residential flat building with a red brick façade comprising windows and balconies. The proposed architectural expression is characterised by masonry brickwork and windows featuring fixed vertical louvres which are sized to reflect proportions of the windows associated with the abovementioned neighbouring developments. It is considered to provide a residential quality that is complementary to these adjoining developments.

Objective 2: *To provide sufficient floor space to meet anticipated development for the foreseeable future.*

The proposal seeks consent for a co-living boarding house development and retail floor space. The additional residential floor space and associated variation to the FSR development standard will meet the anticipated demand for boarding house accommodation which is exacerbated by housing shortages and affordability constraints. Sydney remains critically unaffordable with the average rental household in Greater Sydney spending 24 per cent of its total income on rent and with the average rental household generally required to travel at least 15 – 49km to access the CBD office market.¹ As identified in the Social Impact Assessment (SIA) that accompanies the EIS at **Appendix D**, boarding house accommodation plays an integral role in housing key workers. In light of this, the proposal represents an opportunity to diversify the availability of housing options in a locality that is well serviced by public transport and in proximity to the CBD office market.

In addition, the SIA identifies that the locality is occupied by a higher proportion of students relative to other areas of Greater Sydney. Accordingly, the development has the capacity to provide additional housing for the local student population.

The site is also located in proximity to Central Precinct which is earmarked to emerge as Sydney's technology and innovation precinct. The precinct is located a short distance from the site (800m) and will support the creation of 25,000 new jobs. Any reduction in employment on the subject site will be more than offset by the additional employment being created at the Central Precinct. The innovation precinct will foster collaboration with universities which lie in proximity to the site. The

¹ Rental Affordability Housing Index (December 2020 Key Findings)
https://www.sgsep.com.au/assets/main/Projects/SGS-Economics-and-Planning_RAI-2020-FINAL.pdf

development proposes a state-of-the-art co-living boarding house which will increase the supply of short-stay housing for the growing office market and the existing and expanding education sector.

Objective 3: To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic.

The SEPP (Affordable Rental Housing) 2009 requires the provision of 60 off-street car parking spaces. However, consistent with Council's approach to limit the reliance on private vehicles, the proposal makes provision for only 8 off-street car parking spaces. The proposed parking arrangements result in just 1 vehicle trip per hour during the weekday AM and PM peak periods. In contrast, the development approved under SSD 064 (MOD 1) was projected to generate 17 vehicle trips per hour during peak periods, therefore representing a significant increase from the proposal. The traffic report that accompanies the EIS concludes that the traffic generation resulting from the proposal will have an imperceptible impact on the surrounding road network and intersections.

In light of the above, the findings of the traffic assessment demonstrate that notwithstanding the variation to the residential FSR control, the proposed off-street parking arrangements do not provide an intensity of use that results in unacceptable vehicle and pedestrian movements.

The proposal has the capacity to accommodate 120 lodgers when occupied at maximum capacity. It is not envisaged that the proposed intensity of use will give rise to unreasonable pedestrian traffic.

Objective 4: To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure.

Being located within walking distance of Redfern and Central Railway Stations, the site receives ample access to public transport infrastructure. It will also benefit from the nearby Waterloo Metro Station once this becomes operational in 2024.

Given the site's use as a boarding house, close walking distance to employment including the CBD and nearby universities and access to public transport, the proposed variation to the residential FSR development standard will place additional pressure on the surrounding road network beyond that of a complying scheme. The Traffic and Parking Assessment prepared by Varga Traffic Planning that accompanies the EIS confirms that the proposal will generate only one vehicle trip per hour during the weekday AM and PM peak commuter periods.

The proposed variation request simply seeks to increase the provision of residential floor space (in the form of boarding house floor space) above the 1:1 residential FSR development standard. In light of this, it should be recognised that commercial floor space typically results in higher levels of traffic generation relative to residential floor space. This is exemplified by the traffic generation rates prescribed by the RMS Guide to Traffic Generating Developments. The guide nominates a rate of 2 trips per 100m² of GFA for commercial premises. Whilst the RMS Guide to Traffic Generating Developments does not specify a rate for boarding houses, it specifies a rate of 0.5 – 0.65 trips per dwelling for medium density flat buildings.

The exceedance of the residential FSR development standard will therefore result in less traffic generation than a scheme that complied with the standard and provided a greater proportion of commercial floor space.

In light of the above, it can reasonably be concluded that the provision of residential floor space in lieu of the commercial floor space envisaged by the FSR development standard will not result in an intensity of development that cannot be supported by infrastructure in the form of the surrounding road network or public transport.

Objective 5: to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

The desired future character for the area is established by the *Redfern – Waterloo Built Environment Plan (Stage One) August 2006 Plan*. Under this Plan, the site forms part of the Eveleigh Street Strategic Site. The proposal's consistency with the relevant built form and land use objectives is addressed in the table below.

Implied Objective	Comment
Ensuring appropriate business development opportunities are provided within the site.	The proposal will provide business development opportunities for a future boarding house operator and café / retail business owners.
Encouraging employment activity.	The proposal incorporates employment generating uses comprising retail premises and boarding house (co-living) accommodation. The proposed boarding house will necessitate the employment of on-site staff such as clerical staff, café staff, a boarding house manager, security personnel, and cleaners. Therefore, both uses will provide opportunities for job creation. As such, the variation to the FSR development standard will not preclude the opportunity for the development to encourage employment opportunities.
Providing for residential development.	The proposal relates to a boarding house which is type of residential development as defined by the <i>Standard Instrument – Principal Local Environmental Plan (2006)</i> .
Facilitate the development of quality housing for existing and new residents that: <ul style="list-style-type: none"> - provides a range of housing types that respond to the social mix of the area. 	The proposal relates to a boarding house for co-living purposes. It responds to the social mix of the area in that it will cater to the locality's large student population that benefits from the proximity to a range of tertiary educational institutions.

Implied Objective	Comment
<ul style="list-style-type: none"> - Provides cultural appropriate and sustainable housing for Aboriginal residents; - Is designing and located to respond to external factors including the railway corridor and Cleveland Street, to maximise amenity. 	<p>The proposal has sought to respond to external factors such as the nearby railway corridor. The use relates to temporary residential accommodation that are not required to meet the residential amenity standards that apply to residential flat buildings. Notwithstanding this, design measures have been incorporated in order to minimise amenity impacts that may arise due to the site's proximity to the railway corridor. Specifically, non-habitable areas such as lobby areas, plant / storage, communal areas and roof top plant have been strategically located along the building's eastern aspect where it orientates towards the railway corridor.</p>
<p>Ensuring development responds to the scale, form and design of surrounding development.</p>	<p>The proposed distribution of mass has sought to respond to the scale of the surrounding development. The envelope fronting Eveleigh Street decreases in height from six storeys to two storeys to align with the building located at 6 – 8 Eveleigh Street. Similarly, the envelope fronting Woodburn Street presents as being five stories to align with the height of the building at 6 – 8 Woodburn Street.</p> <p>The proposal has a five storey presentation when viewed from Cleveland Street. The upper storey is recessed from the building parapet to minimise its visibility when viewed from the ground plane. In consequence, the envelope at this aspect aligns with the height of the neighbouring buildings on Cleveland Street and sits comfortably in the streetscape.</p> <p>The architectural expression incorporates brickwork and minimal glazing to ensure it reflects a residential quality that is complementary to the adjoining residential flat buildings. The landscape strategy for the site is to introduce perimeter planting at the upper levels which will soften the appearance of the development when viewed from the street level and improve the visual quality of the streetscape which currently contained</p>

Implied Objective	Comment
	outdated building stock and minimal landscaping.
Increased height and floor space ratio along the railway corridor to provide a buffer to the lower scale development to the west.	<p>The proposal has a maximum height of six storeys and complies with the maximum FSR of 3.5:1. The development's greatest bulk is concentrated along Cleveland Street where the site interfaces with residential flat buildings rather than lower scale developments.</p> <p>The bulk decreases in scale towards the rear to provide an appropriate transition in height to the lower scale residential development located southward.</p>
Ensuring active uses adjoining and overlook existing and new open space to provide passive surveillance.	Active uses are proposed at ground level fronting Cleveland and Eveleigh Streets. These uses consist of a café and the site's primary entrance point which will maximise passive surveillance.
Encouraging active non-residential uses at street level and along pedestrian paths to improve pedestrian safety and amenity.	
Ensuring landscaping, tree planting, lighting and good design of civic spaces, streets and pedestrian paths.	Street tree planting is proposed along Cleveland Street. Landscaping is proposed at the upper levels of the development and will contribute greenery to the locality.
Ensuring development fronts and overlooks public streets to facilitate passive surveillance.	The proposed retail use / café is orientated towards Eveleigh and Cleveland streets and incorporates glazed fenestration and will maximise sightlines to and from the development. The primary entry / lobby area occupies the corner of Woodburn and Eveleigh streets and will facilitate passive surveillance over both streets.
Limiting blank facades and extensive car entry / parking and servicing areas along public streets.	As shown at Appendix B , each elevation is highly articulated due to the inclusion of windows, vertical louvres and privacy screening devices. The vehicular access point is located on the far southern end of the façade fronting Eveleigh Street to maximise the extent of the active frontage.

Objective 4: To promote a balance between commercial and residential development in the Redfern precinct and to limit residential development in areas of limited amenity.

The variation to the development standard is not inconsistent with the objective. The surrounding development predominantly consists of residential flat buildings. Examples include the residential flat building to the immediate south east and south west at 6 – 8 Eveleigh Street and 6 - 8 Woodburn Street, respectively. These precedents confirm that from an approvals perspective, residential development is considered to be an acceptable for the locality.

The proposal relates to a boarding house which is not subject to the same amenity requirements as other residential development such as apartment buildings. Notwithstanding this, the assessment included in **Section 5.0** of the EIS demonstrates that the proposal is capable of meeting a range of amenity requirements prescribed by the Apartment Design Guide (ADG).

3.1.2 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 (*Wehbe#4*).

Ground 4: Precedents for varying the residential FSR.

As outlined in **Section 3.0**, there are existing precedents for varying the residential FSR development standard to facilitate the delivery of boarding house accommodation.

SSD 7064

The development relates to the subject site and includes a part five and part six storey mixed-use development comprising a hotel, residential flat building and two retail / commercial tenancies.

On 22 March 2018, the LEC granted consent to the proposal which has an FSR of 3.25:1 and therefore contravenes the permissible 3:1 FSR nominated by the SPP SEPP. Further, the residential component was approved with an FSR of 1.35:1 representing a non-compliance with the permissible 1:1 residential FSR nominated by the SPP SEPP.

SSD 4949

The site located at 157 – 163 Cleveland Street, Redfern, which accommodates the Urbanest Student Accommodation facility, is subject to the same 1:1 residential FSR development standard nominated under the former Major Development SEPP. Notwithstanding, the approved student boarding house development for the site (SSD 4949) has a maximum residential FSR of 3:1.

The DPIE in their assessment of the application considered that compliance with the residential FSR Development Standard was both unreasonable and unnecessary in the circumstances of the case due to the following:

- Compliance with the FSR development standard would hinder several objectives of the Business – Mixed Use zone which seeks to provide a mix of

residential opportunities and to permit residential development compatible with non-residential development; and

- The proposed boarding house use would generate job creation.

The reasons for supporting the variation to the residential FSR Development Standard are considered to be applicable to the proposal. As with the site at 157 – 163 Cleveland Street, the surrounding development comprises a mix of residential flat buildings, student accommodation, shop top housing with ground level retail and short stay accommodation.

The proposed boarding house use is compatible with both the surrounding commercial and residential development given that it provides a mix of uses that are consistent with the uses located in the immediate vicinity of the site.

3.2 Clause 16A(3)(b): That there are sufficient environmental planning grounds to justify contravening the development standard

The environmental planning grounds to justify the contravention of the development standard are addressed below.

Ground 1: There are no resultant amenity impacts.

The proposed development does not result in any additional or adverse environmental planning impacts. Specifically, there will be no visual impacts, privacy, overshadowing or traffic impacts.

Visual Impacts and Height Transition

A visual impact assessment has been prepared by Urbaine Architecture and is included at **Appendix C** of the EIS. It demonstrates that the proposal, which complies with the maximum FSR development standard and generally sits within the parameters of the approved envelope, will provide acceptable visual impacts.

The proposal will be most visible when viewed looking towards the south from Cleveland Street. When viewed looking from this vantage point, the proposal sits comfortably within the streetscape and aligns with the height plane established by the adjoining buildings which largely consist of residential flat buildings (refer to **Figures 2 - 3**).



Figure 2: Site in Existing Conditions Viewed Looking South East from Cleveland Street
(Source: Urbaine Architecture)



Figure 3: Site with Proposed Envelope Viewed Looking South East from Cleveland Street
(Source: Urbaine Architecture)

Due to the westward sloping topography of Cleveland Street, the proposed envelope will provide a gradual transition from the development to the immediate east which reaches five (5) storeys and will continue the building alignment along Cleveland Street which as shown in the figure below is currently disrupted by the absence of a building of a comparable scale (refer to **Figure 4**).



Figure 4: Existing Site Viewed with Proposed Envelope Viewed Looking South East Down Cleveland Street
(Source: Urbaine Architecture)

The Visual Impact Assessment considers that the scale of the envelope combined with the architectural expression and materials are complementary to the adjoining buildings that front Cleveland Street and reinforce the character that typifies the area.

It is noted that the non-compliant residential FSR has no material impact on the scale of the envelope given that the proposal complies with the maximum permissible FSR for the site. Additionally, the approved envelope continues to sit within the parameters of the envelope approved under SSD 7064 (as modified by SSD 7064 MOD 1).

Given the above, the proposed variation to the residential floor space will not give rise to visual impacts and does not preclude the delivery of a development that sits cohesively within the streetscape.

Amenity

The proposal has been designed to satisfy the amenity requirements of the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (ARH SEPP) and the City of Sydney (Council's) boarding house provisions contained within the Sydney Development Control Plan 2012 (SDCP 2012). The proposal is entirely consistent with the provisions of the ARH SEPP and achieves a high degree of compliance with the SDCP 2012. In particular, the scheme achieves the following:

- All rooms comply with the minimum and maximum room size requirements set out by the ARH SPP;
- Every room within the development will be furnished with a bed, desk, wardrobe, kitchenette, stove, fridge and storage space;

- The proposal complies with the minimum bicycle and motorcycle parking requirements of the ARH SEPP;
- The communal living areas located at Level 5 and the outdoor common areas at Level 5 – 6 receive a minimum of 3 hours direct sunlight between 9am and 3pm during mid-winter.
- The proposal greatly exceeds the minimum Private Open Space requirement nominated by the ARH SEPP which requires the provision of at 20m² of private open space. Cumulatively, the proposal provides 1,209.57m² of private open space comprising 816.64m² of external common area and 392.92m² of internal common area.
- The private balcony associated with the Manager's Room greatly exceeds the minimum ARH SEPP requirement of 8m² by providing an area of 22m².
- All rooms have glazed windows that exceed 10% of the floor area.
- Indoor communal living areas receive a minimum of 2 hours solar access to at least 50% of the windows between 9am and 3pm on 21 June.

A comprehensive assessment of the proposal's compliance with the SDCP 2012 and ARH SEPP accompanies the SEE within the EIS and at **Appendix E**.

Traffic

Varga Traffic Planning have assessed the traffic generation associated with the proposal. Based on the provision of only 8 vehicle spaces, the proposal, notwithstanding the variation to the residential FSR development standard, will generate 1 vehicle trips per hour during the morning and evening peak commuter periods. The level of traffic generation is considered to be minor and will have no impact on the surrounding road network.

Overshadowing

Mark Shapiro Architects have prepared an overshadowing analysis which demonstrates that the proposal will provide minor and acceptable shadow impacts. The analysis provides a comparison between the shadow cast by the approved development and the proposed.

The analysis demonstrates that the shadow cast by the proposal largely falls within the limits of the shadow cast by the approved development (refer to **Appendix B**). Where the proposal does result in additional overshadowing, it impacts the roof of the residential flat building to the east at 165 – 173 Cleveland Street for a limited duration between 9am and 10am on the 21st of June (refer to **Figure 5**). It is noted that during this time period, the western located habitable rooms of this development would also be impacted by both the approved envelope and a complying envelope.

In addition, a minor amount of overshadowing impacts the western elevation of 179 Cleveland Street which relates to a hotel use (refer to **Figure 6**). However, the impact is minor and consistent with the shadow cast from a complying scheme. Given the commercial nature of the use, this overshadowing will have no impact on residential amenity.

At all other times during the Winter Solstice, the additional overshadowing generated by the development affects only the surrounding street network.

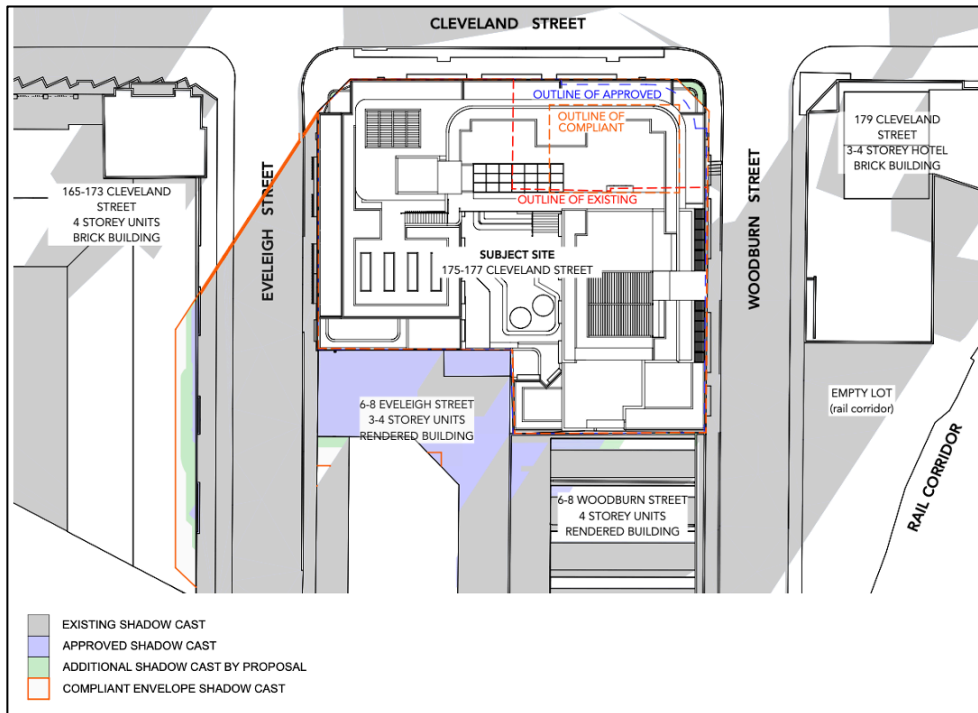


Figure 5: Shadow Cast by the Proposal at 9am
(Source: Mark Shapiro Architects)

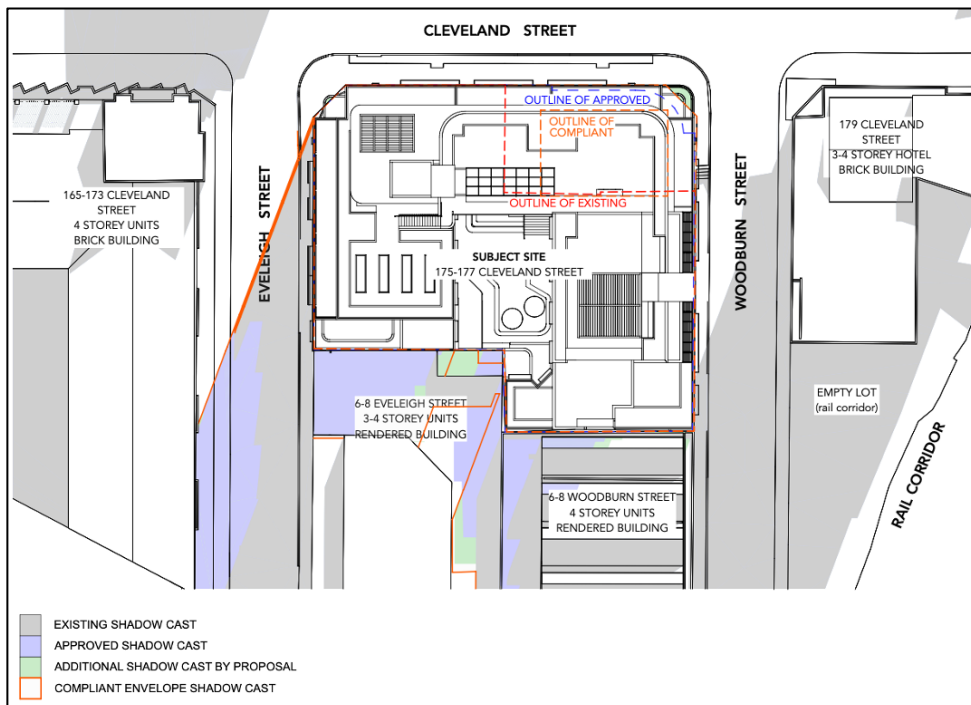


Figure 6: Shadow Cast by the Proposal at 10am
(Source: Mark Shapiro Architects)

Privacy

Due consideration has been given to visual privacy impacts. The only residential use in immediate proximity to the site relates to the residential flat building to the direct west. The proposal provides a 10.5m building separation distance to this residential flat building located at 165 – 173 Cleveland Street. It is noted that the ADG does not apply to boarding houses and accordingly the building separation distances prescribed by *Section 2F Building Separation* do not apply. The proposed building separation is considered reasonable due to the following:

- The Acoustic Report prepared by Acoustic Logic at **Appendix G** confirms that the proposal will not provide unacceptable acoustic impacts;
- The site is located within a dense urban environment where variations to the ADG building separation requirements are typical;
- The residential flat building at 165 – 173 Cleveland Street reaches three storeys and in consequence the proposed communal areas and units at level 4 and above will not be afforded direct sightlines to this development.
- The envelope aligns with the established setback alignment along Eveleigh Street which is reinforced by the siting of the building at 8 Eveleigh Street. It is noted this building contains residential uses and also does not provide the required building separation.
- The proposal incorporates vertical louvres which will limit sightlines.
- The western elevation incorporates Juliette Balconies that do not afford occupants the opportunity to position themselves directly adjacent to the adjacent residential flat building;

In assessing the visual privacy impacts, it is important to note that the contravention of the residential FSR will facilitate the provision of short stay accommodation. Accordingly, rooms will not be occupied at all times.

Ground 2: The proportion of residential floor space is appropriate for the zoning.

The SPP SEPP designates the site as forming part of the Business Zone – Mixed Use. Key relevant objectives for the zone are to:

- *Support the development of sustainable communities with a mix of employment, educational, cultural and residential opportunities;* and
- *To permit residential development that is compatible with non-residential development.*

The proposed quantity of residential uses will allow the development as a whole to better meet the aforementioned objectives. The residential uses proposed relate to a boarding house development that will provide a genuine mixed use outcome.

The boarding house will facilitate employment opportunities whilst addressing the demand for high-quality rental accommodation. This provision of high quality rental accommodation will encourage a greater number of visitors to occupy the site who will benefit from nearby retail, cultural and educational uses and will support local businesses in the community.

It is intended that the boarding house will operate as a purpose-built co-living development that incorporates generous amounts of communal living area. This use will introduce a unique residential housing option to the locality and its communal spaces will foster a sense of community.

The non-residential development in the surrounds largely consists of shop top housing that provides retail uses at street level and residential above. Consistent with these developments, the proposal will provide an active ground floor retail uses and residential floor space above. Although being a residential use, the proposed boarding house will continue to provide employment generating floor space and will contribute to the commercial objectives of the zone.

Ground 3: The development complies with the maximum floor space ratio.

Notwithstanding the non-compliance with the residential FSR development standard of 1:1, the proposal complies with the 3.5:1 maximum FSR development standard for the site including the affordable housing bonus. As such, the proposal provides a bulk and intensity of use commensurate with that envisaged by the planning controls.

Ground 4: Consistency with the Objects of the EP&A Act

In decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 it was recognised that the phrase 'environmental planning grounds' are not defined but nonetheless relates to the Objects set out in section 1.3 of the EP&A Act. It is considered the proposal is entirely consistent with the Objects of the EP&A Act for the reasons set out in the table below.

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 building stock contained within the site is outdated and contributes poorly to the appearance of the area. The proposed development will promote the economic and social welfare of the community by improving the built form in the area and contributing to its revitalisation. It will improve housing diversity and access to temporary accommodation at an affordable price.
b) To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The development will promote ecologically sustainable development by incorporating best practice sustainability measures.
c) To promote the orderly and economic use and development of land,	The proposal is consistent with the Object as it will deliver a building that: <ul style="list-style-type: none"> • Sits wholly within the envelope approved for the site and does not result in additional environmental impacts;

Object	Comment
	<ul style="list-style-type: none"> • Is compatible with the surrounding uses which include a mix of retail, student accommodation / boarding houses and residential; • The proposal will facilitate job creation which is consistent with the objectives for the applicable mixed use zone; and • The ground floor café fronting Cleveland Street will promote retail activation and will contribute to the revitalisation of the streetscape.
d) To promote the delivery and maintenance of affordable housing,	The proposed development will provide a co-Living housing option that offers affordable rents.
e) To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The proposed development will have no impact on threatened species or ecological communities.
f) To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The proposal is not located in a heritage conservation area and is not known to contain any items of Aboriginal cultural heritage. Further discussions is provided in the Archeological Archaeology Report prepared by Extent Heritage Advisors at Appendix H.
g) To promote good design and amenity of the built environment,	<p>The proposal is of high quality design. It incorporates a diversity of high quality durable materials and has been subject to review by the State Design Review Panel.</p> <p>The proposal complies with the amenity provisions established by the ARH SEPP and is therefore considered to achieve a high standard of amenity appropriate for its use as a boarding house.</p>
h) To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	The proposal complies with the relevant provisions of the BCA and will promote the health and safety of occupants.
i) To promote the sharing for the responsibility for environmental planning	The Object is not directly relevant to the proposal. Nonetheless, input from both local and State planning authorities will be

Object	Comment
and assessment between the different levels of government in the State,	provided to facilitate the assessment of the application.
j) To provide increased opportunity for community participation in environmental planning and assessment,	The proposed development will be publicly exhibited in accordance with Council's requirements.

Conclusions on clause 16A(3)(b)

It is considered that there are sufficient environmental planning grounds to justify the contravention to the residential FSR development standard due. In summary, the planning grounds are as follows:

- The provision of residential floor space associated with the proposed boarding house use does not result in additional amenity impacts.
- Does not preclude the achievement of the Objects of the EP&A Act.
- The building complies with the maximum FSR development standard(s) and in consequence does not represent an overdevelopment of the site.
- The strategic planning framework for the site envisages that the northern portion of the Eveleigh Precinct to which the site is located will accommodate a mixed use residential (medium density) development.
- Existing approvals demonstrate a strong precedent for varying the residential FSR in the instance the development relates to a boarding house.

3.3 Clause 16A(4)(i): The written request has adequately addressed the matters required to be demonstrated by subclause (3), and

Clause 16A(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

This Variation Request provides a comprehensive assessment of each of the matters addressed in sub-clause (3), including a detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This Variation Request also demonstrates that there are sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

3.4 Clause 16A(4)(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

Clause 16A(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The proposal's consistency with the implied objectives of the development standard is outlined in **Section 4.1.1**.

The proposal's consistency with the objectives of the *Business Zone – Mixed Use Zone* as outlined in the SPP SEPP is addressed in the table below.

Object	Comment
To support the development of sustainable communities with a mix of employment, educational, cultural and residential opportunities.	The proposal will revitalise an underutilised site by replacing its outdated building stock with a high quality development that exhibits design excellence. The additional residential (boarding house) floor space will promote housing diversity by facilitating the delivery of a co-living boarding house which will diversify the housing options in the locality and cater to the growing office market associated with Central Precinct. The boarding house combined with the retail use at ground level will provide 10 operational jobs per annum. Accordingly, the proposal will provide a mix of employment and residential opportunities.
To encourage employment generating activities by providing a range of office, business, educational, cultural and community activities in the Zone.	As noted above, the uses proposed are employment generating. Further, the proposal supports a range of uses in the zone, including short-stay accommodation and retail. The co-living development is suitable for students and therefore will indirectly support the educational activities in the zone.
To permit residential development that is compatible with non-residential development.	The proposal relates to retail floor space and residential development in the form of boarding house accommodation. The proposal therefore co-locates compatible land uses which balances the need for

Object	Comment
	residential accommodation close to the CBD and retail uses that provide needed services and activation. The proposed uses are consistent with the uses accommodated in the immediate vicinity of the site.
To maximise public transport patronage and encourage walking and cycling.	The site is proximate to employment generators and public transport. The ARH SEPP allows for the provision of 66 parking spaces. The proposal accommodates 8 parking spaces with the intent to reduce the reliance on private vehicles and encourage public transport patronage.
To ensure the vitality and safety of the community and public domain.	Relative to the existing building stock contained in the site, the proposal represents a substantial opportunity to revitalize local community connections and the public domain. The proposal includes public domain improvements at the corner of Eveleigh and Cleveland Street as well as street tree planting along all frontages. Due to the location of the retail premises and entrance points, the proposal will enhance the activation of the ground plane at all frontages and maximise opportunities for surveillance.
To ensure buildings achieve design excellence.	The proposed design has been informed by the feedback provided by the State Design Review Panel (SDRP) and is considered to provide a high quality development that reflects design excellence.
To promote landscaped areas with strong visual and aesthetic values to enhance the amenity of the area.	Comprehensive landscaping is provided throughout the development. Perimeter landscaping is provided at the upper levels. It will be visible from the streetscape and will soften the appearance of the development.

3.5 Secretary's Concurrence

Under Clause 16A(5) the consent authority must consider –

- a) *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

- b) *The public benefit of maintaining the development standard, and*
- c) *Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

These matters are addressed in detail below.

Clause 16A(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

The variation to the residential FSR development standard of the SSP SEPP will not raise any matter in which could be deemed to have State or Regional significance. Additionally, the proposed variation will not contravene any overarching State or regional objectives or standards.

Clause 16A(5)(b): The public benefit of maintaining the development standard.

It is considered that maintaining the development standard would not result in any public benefit in this situation. The variation of the residential FSR development standard facilitates the delivery of a state-of-the-art co-living development that better allows the proposal to meet the objectives of the Business Zone – Mixed Use which seeks to encourage a mix of residential type developments and to permit residential development where it is compatible with non-residential development. Furthermore, As the proposal relates to a residential use in the form of a boarding house, the exceedance of the residential development standard does not preclude the proposal from providing a sufficient quantum of employment generating floor space.

In addition to the above, it is considered that strict numerical compliance would encumber the various community and commercial benefits the proposed works would provide. The proposed variation will facilitate the following public benefits:

- The delivery of a unique rental product that offers high quality short-stay accommodation with significant communal open spaces areas;
- The provision of co-living rental accommodation that will cater to a broader audience, including those who demand housing at a more affordable market price, students and individuals seeking short-stay accommodation;
- The provision of residential accommodation in a locality well serviced by public transport, local services and educational establishments;
- The delivery of expansive external communal areas that provide the opportunity for the provision of comprehensive landscaping across the site which will contribute positively to the visual amenity of the streetscape;
- The provision of temporary accommodation suitable for a site that is constrained in terms of its proximity to the railway corridor and is not well suited to supporting long-term residential accommodation; and
- A use that results in lower traffic generation relative to a commercial use that would thus have a greater impact on the surrounding road network.

A high quality mixed use development that will provide active uses at street level, improved safety conditions across the site and will generally contribute to the urban renewal of the Redfern-Waterloo Authority Sites.

Clause 16A(5)(c): Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

Under clause 64 of the *Environmental Planning and Assessment Regulation (2000)*, the Secretary has given written notice dated 21 February 2018 to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6 (or any other provision of an environmental planning instrument to the same effect), subject to the conditions in the table in the notice.

The Planning Circular PS 20-0002, issued on 5 May 2020 (the Planning Circular), outlines the conditions for assuming concurrence. The Planning Circular establishes that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006* (with some exceptions). Clause 16A of the SSP SEPP contains provisions similar and of the same effect as Clause 4.6 of the *Standard Instrument (Local Environmental Plans) Order 2006*. Accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 16A of the SSP SEPP. This assumed concurrence notice takes effect immediately and applies to pending development applications.

Under the Planning Circular, this assumed concurrence is subject to conditions. Where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of Council unless the Council has requested it. The variation to the clause exceeds 10% and accordingly the Secretary's concurrence cannot be assumed.

It should be noted that whilst the variation exceeds 10%, the proposed FSR does not exceed the FSR Development Standard of 3.5:1 which applies under Clause 21(2) *Height, Floor Space Ratio and Gross Floor Area Restrictions* of the SRP SEPP and Clause 29(1)(c)(i) of the ARH SEPP.

4 Conclusion

The assessment above confirms that compliance with the maximum residential FSR development standard contained in Clause 16A of the SSP SEPP is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention to the development standard.

This Variation Request demonstrates that notwithstanding the non-compliance with the residential FSR development standard, the proposal:

- Achieves the objectives of the development standard as set out in clause Clause 21 (2) of the SSP SEPP;
- Achieves the objectives of the Business Zone – Mixed Use Zone;
- Is in the public interest as it is consistent with the objectives of the development standards nominated under Clause 21 (2) of the SSP SEPP as well as the Business Zone – Mixed Use Zone;
- There is no public benefit in maintaining the residential FSR development standard;
- Provides employment generating uses on the site in the form of boarding house and retail uses;
- Facilitates the urban renewal of the Redfern-Waterloo Authority Sites planning area;
- Does not exceed the maximum FSR development standard of 3.5:1 that applies under both the ARH SEPP and the SSP SEPP;
- Facilitates the delivery of residential development that is compatible with the surrounding student accommodation and shop top housing developments and will contribute to the commercial objectives of the zone;
- Provides residential and commercial uses that are compatible and appropriate for the mixed use zoning;
- Maximises amenity by prioritising high quality communal areas and landscaping that will improve the amenity of the streetscape;
- Delivers a unique short-term housing product that will address the growing demand for the co-living housing typology in a locality well serviced by transport and services; and
- A use that results in lower traffic generation relative to a commercial use that would thus have a greater impact on the surrounding road network.

5 Building Height

5.1 Is the Planning Control in Question a Development Standard

The maximum storey height prescribed by Clause 21(1) of the SPP SEPP is a development standard.

5.2 Development Standard to be Varied

Clause 21(1) *Height, Floor Space Ratio and Gross Floor Area Restrictions* states that 'The height of a building on any land that is the subject of the Height of Buildings Map is not to exceed the maximum height shown for the land on that map'.

The 5 storey height limit is illustrated in **Figure 7**.

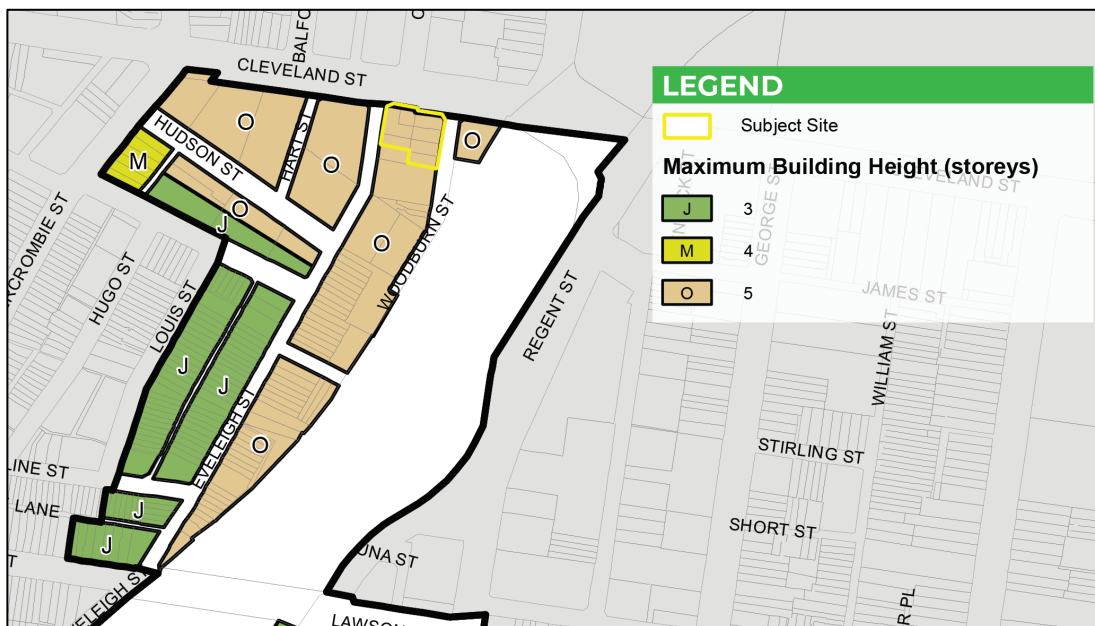


Figure 7: Site Location and Applicable Maximum Residential FSR
(Source: SPP SEPP)

As shown in the figure above, the Height of Buildings Map prescribes a maximum height of five (5) storeys. The proposal reaches six (6) storeys in height (in limited locations) and therefore varies the development standard.

5.3 Background and Context to the Variation

Existing approvals for the site grant consent for an envelope of a commensurate scale which exceeds the five (5) storey height limit. These are discussed below.

The development includes a part five and part six storey mixed-use development comprising a hotel, residential flat building and two retail / commercial tenancies. The application was supported by the DPIE in their assessment report dated December 2016. The application was subsequently refused by the IPC on 20 February 2017. The reasons for refusal related to the following:

- The former *State Environmental Planning Policy No. 1 Development Standards (SEPP 1)* objections were considered not to be well founded;

- Adverse impacts on the streetscape and public domain; and
- Impacts on the amenity of residents.

On 22 March 2018, the LEC granted consent to the proposal. The approved development is a part five (5) part six (6) storey building and reaches a maximum height of RL 43.3 when measured to the lift core and RL 40.1 when measured from the parapet fronting Cleveland Street. The proposal has been designed to sit within this envelope. A detailed discussion is provided in Section 7.1.2.

6 Justification for the Contravention to the Development Standard

6.1 Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

6.1.1 The Objectives of the Standard are Achieved Notwithstanding Non-Compliance with the Standard (Wehbe #1)

The implied objectives informed by the *Redfern-Waterloo Built Environment Plan (Stage 1) 2006* and the Independent Planning Commission's (IPC's) assessment report dated 20 February 2017 associated with SSD 7064 are as follows:

- Ensure that development is of a similar size and scale to existing development so that it is compatible with the streetscape; and
- To promote the sharing of views.

Objective 1: Ensure that development is of a similar size and scale to existing development so that it is compatible with the streetscape.

The site is located on the southern side of Cleveland Street where the development varies in height from five (5) to six (6) storeys. Specifically, the development along the southern side of Cleveland Street in which the proposal is scaled as follows:

- 187 Cleveland Street - Reaches six (6) storeys in height.
- 179 Cleveland Street – Consists of a part five (5) and six (6) storey building;
- 165 – 173 Cleveland Street – Consists of a part three (3) and five (5) storey building; and
- 142 Abercrombie Street (corner of Cleveland Street and Abercrombie Street) – Reaches five (5) storeys.

Figure 8 illustrates the streetscape context in which the proposal will be viewed.



Figure 8: Height Context Surrounding the Site on the Southern Side of Cleveland Street
(Source: Mecone / Nearmap)

As shown in **Figure 5**, the development presents as being five (5) storeys when viewed from Cleveland Street. The non-compliant sixth storey is visible only from limited locations including the southern end of Woodburn Street where the site's topography is uneven and Eveleigh Street where the non-compliant storey is setback from the building line and has minimal visibility. Accordingly, the additional sixth storey is proposed in response to the uneven topography. To maintain a consistent building height plane in the context of this uneven topography, an additional part storey is required.

When viewed in the broader context of Cleveland Street, the proposal facilitates an improved transition in scale relative to the existing development contained within the site and is compatible with the development in the streetscape (refer to **Figure 4 – 5**). As shown in **Figure 5**, the proposed envelope aligns with the height of the development to the immediate east at 179 Cleveland Street and presents as being equivalent in bulk and scale. The proposal also aligns with the height of the development that extends westward down Cleveland Street and does not present as being overly bulky or obtrusive in appearance.

Objective 1: To promote the sharing of views.

The proposed variation will not result in significant impacts to views from surrounding buildings or public spaces. As noted above, the proposal generally reaches five (5) storeys in height and sits within the envelope approved for the site. In this respect, the view impacts associated with the proposal are no greater than that envisaged by the planning controls or previous approvals for the site.

6.1.2 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 (*Wehbe#4*).

The proposed contravention to the height development standard needs to be assessed with respect to previous approvals for the site which have contravened the five (5) storey height limit. Previous approvals confirm that there is a clear pattern of abandonment with respect to the application of the maximum height development standard. Exemplary of this is the approved mixed-use hotel, residential and retail development (SSD 7064) for the site which provides a part 5 and part 6 storey envelope.

The proposal has been designed to sit within the parameters of the approved envelope. As shown in the figures below, the proposal generally adopts the same envelope configuration as the development approved under SSD 7064 and in many locations provides a reduced bulk.

The envelope reaches a maximum height of RL 42.9m when measured to the lift core which represents its highest point. It therefore sits below the maximum height of the approved envelope which reaches RL 43.45m. Consistent with the approved envelope, the massing steps down in height to RL 30.60m to align with the parapet of the building located at 6 – 8 Eveleigh Street. At the eastern elevation fronting Woodburn Street, the envelope decreases in height to RL 37.30m to also align with the height of the parapet of the neighbouring building at 6 – 8 Woodburn Street which represents a smaller massing relative to the approved envelope.

The non-compliant sixth storey is setback from the street frontages in accordance with the approved development (refer to **Figure 9**). The following setbacks are provided:

- Northern setback to Cleveland Street: 2.5m;
- Eastern setback to Woodburn Street: 2.5m; and
- Western setback to Eveleigh Street: 1.2m.

Figures 9 – 12 illustrates how the proposed envelope sits within the approved.

In addition to the above, it is important to highlight that the envelope approved under SSD 6371, which provides a compliant height of five storeys, has a greater height when measured from the building parapet. Specifically, the approved envelope reaches 18.2m when measured from the ground floor to the building's parapet. By contrast, the proposal has a reduced height of 17.2m when measured from ground level to the building's parapet.

Whilst the proposal departs from the height development standard, the scale of the envelope, including its siting, remains consistent with the development approved under SSD 7064 and smaller in scale relative to the development approved under SSD 5397 which reached a compliant height of five storeys. In light of this, existing approvals confirm that the development standard has been abandoned by previous consents or where they did comply provided a commensurate height when measured in metres.

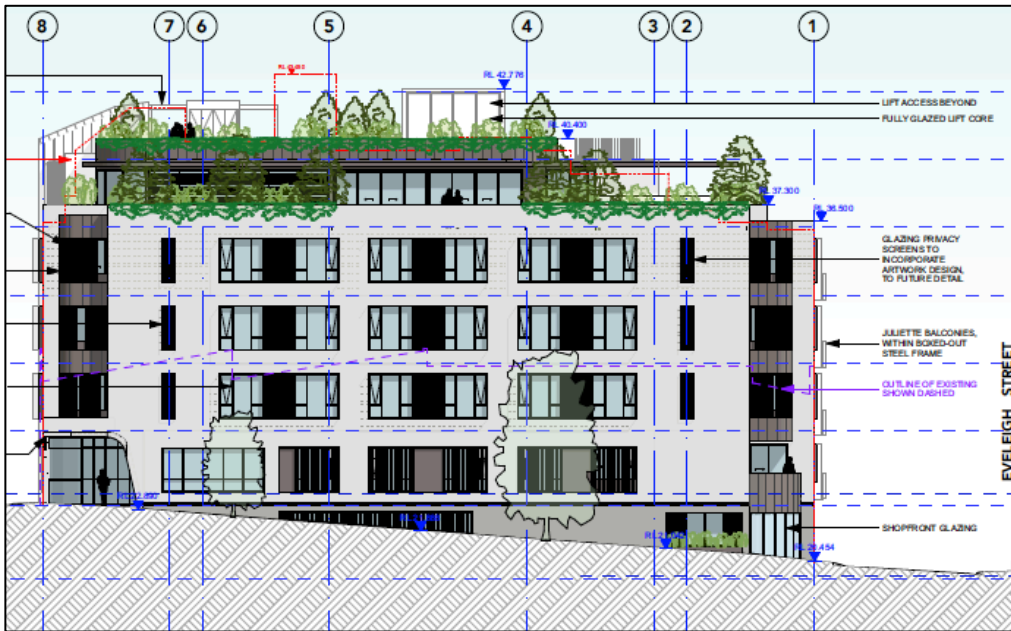


Figure 9: Proposed Envelope Viewed from Cleveland Street
 (Source: Mark Shapiro Architects)

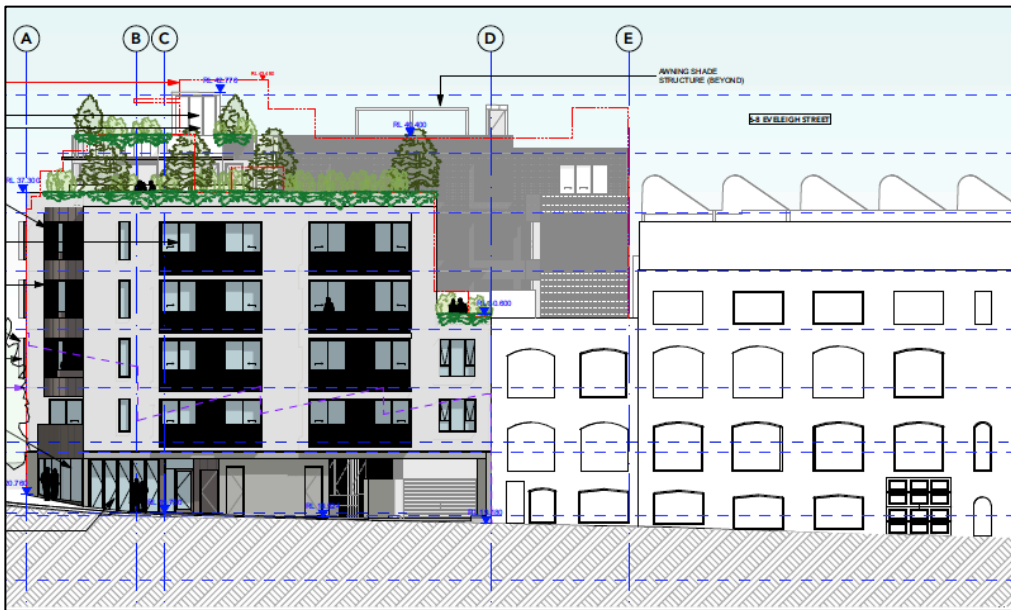


Figure 10: Proposed Envelope Viewed from Eveleigh Street
 (Source: Mark Shapiro Architects)

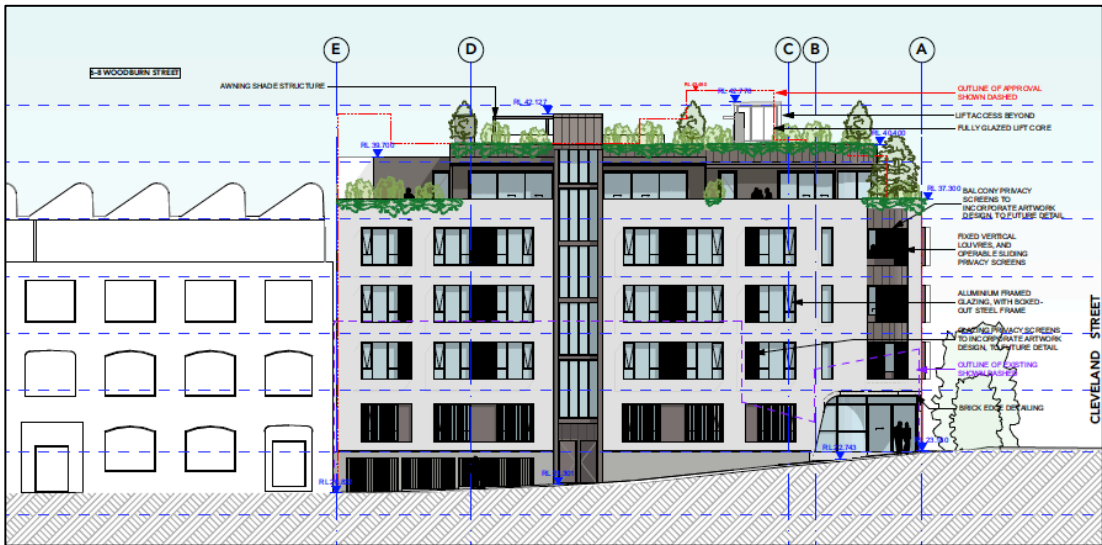


Figure 11: Proposed Envelope Viewed from Woodburn Street
(Source: Mark Shapiro Architects)

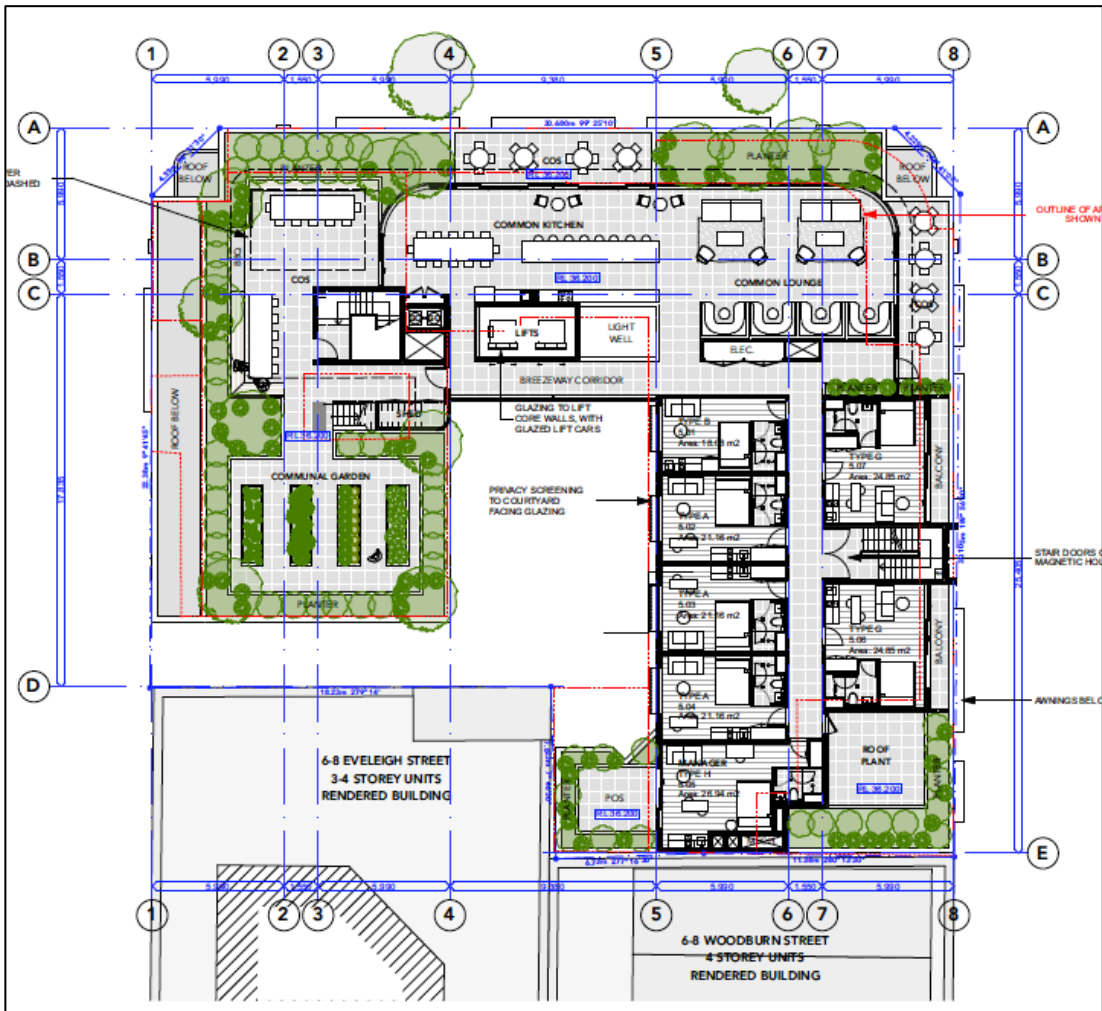


Figure 12: Proposed Envelope at Level Five
(Source: Mark Shapiro Architects)

6.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 16A(3) of the SPP SEPP requires that the contravention of the development standard be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. Consistent with the approach taken in *Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42], the focus is on the aspect of the development that contravenes the development standard, and not the development as a whole. In this instance, the relevant aspect of the development is the additional building height that exceeds the development standard. In light of this, 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.

- Responds to the character of the streetscape;
- Provides acceptable amenity impacts; and
- Provides acceptable solar access and overshadowing impact.

These environmental planning grounds are discussed below.

Ground 1: Responds to the character of the streetscape

The proposal, inclusive of the variation, provides a built form outcome that is sympathetic to the character of the streetscape. The non-compliant sixth storey relates to the envelope fronting Eveleigh Street and responds to the fall of the site in this location. The sixth storey is setback and will have minimal visibility when viewed from the streetscape and the proposal will present as being five storeys.

As noted previously, the actual building height when expressed in metres is lower than the height in metres approved under SSD 5397 and consequently the sixth storey is accommodated within the approved five storey envelope. Accordingly, the visual impacts associated with the non-compliant storey height will be not greater than the development approved under SSD 5397.

Ground 3: Provides acceptable amenity impacts

The positioning of the non-compliant storey is restricted to the eastern portion of the site where the communal facilities are accommodated. However, this additional storey only registers as being a six storey building in limited locations, including the far south eastern elevation and the western elevation where there is a change in ground level. Specifically, the non-compliance is attributed to the change in ground level where the site slopes by 2.62m from the north eastern corner to the south east corner, and 4m from the north eastern corner to the south western corner (refer to **Figures 9** and **11**). In addition, the sixth storey is recessed behind the building parapet by a 2.5m setback to both the eastern and northern street frontages.



Figure 13: The Proposal with a Perceived Five Storey Height
(Source: Mark Shapiro Architects)

As shown in the figure above, the building presents as being five storeys when viewed from the streetscape and aligns with the building height line established by the neighbouring buildings along all three street frontages. As such, the proposed building inclusive of the variation will continue to maintain the amenity of the public domain as the proposal will contribute to a continuous building height alignment of five storeys when viewed from Cleveland Street.

The Visual Impact Analysis that accompanies the EIS at **Appendix 18** demonstrates that the non-compliant storey height provides an imperceptible impact on the streetscape relative to a complying scheme. As shown in the figures below, the perceived scale of the envelope is commensurate with that of a non-complying development. In addition, the additional height does not reduce the extent of the views from each of the vantage points, with the envelope merely reducing the degree of sky observable from the public domain.

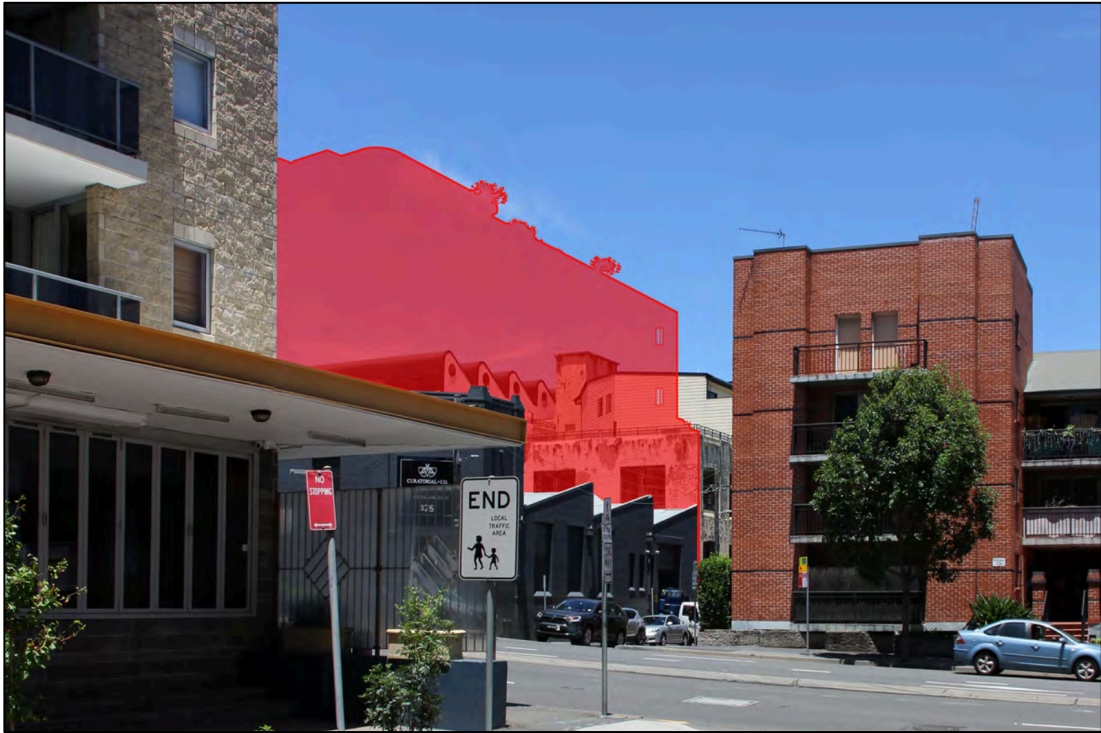


Figure 14: The Proposed Envelope Viewed Looking South East
(Source: Urbaine Architecture)

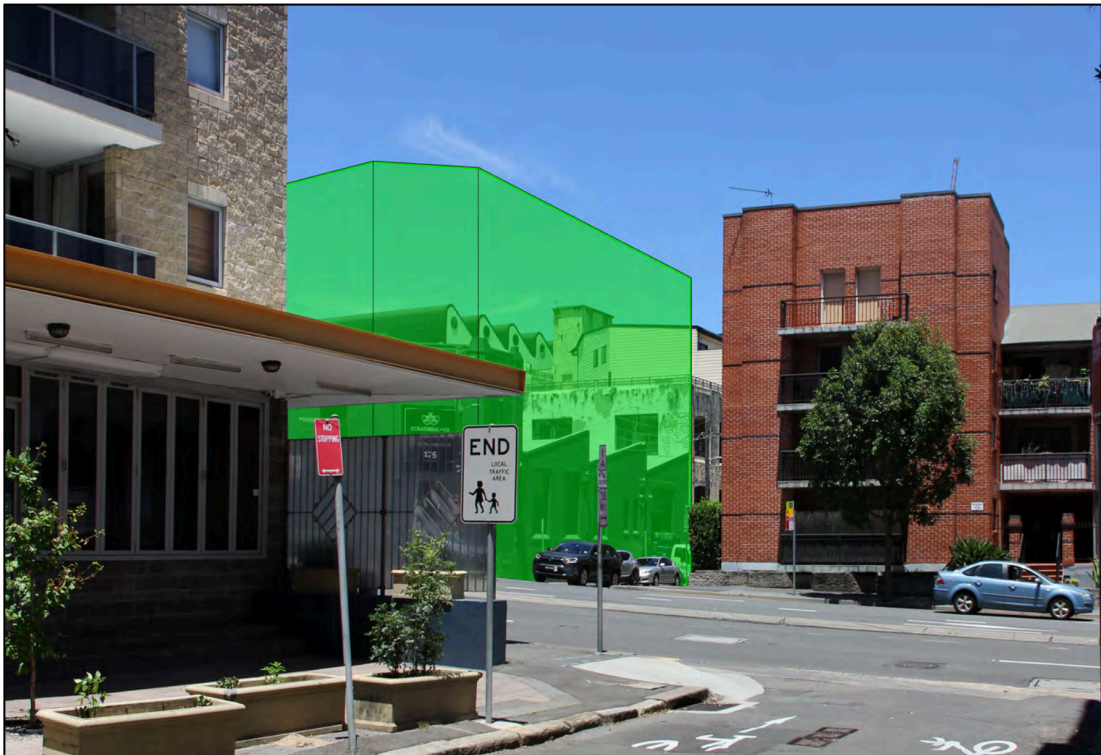


Figure 15: A Compliant Envelope Viewed Looking South East
(Source: Urbaine Architecture)



Figure 16: The Proposed Envelope Viewed Looking East From Cleveland Street
(Source: Urbaine Architecture)



Figure 17: The Non-Compliant Envelope Viewed Looking East From Cleveland Street
(Source: Urbaine Architecture)

Ground 4: Provides acceptable overshadowing and solar access impacts.

The overshadowing impacts associated with the proposal are addressed in **Section 4.2**.

6.3 Clause 16A(4)(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

The proposal's consistency with the objectives associated with the Business Zone - Mixed Use is addressed in **Section 3.4**. The proposal's consistency with the implied objectives for the maximum storey height development standard is addressed in **Section 6.1.1**.

6.4 Secretary's Concurrence

Under Clause 16A(5) the consent authority must consider –

- d) *Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- e) *The public benefit of maintaining the development standard, and*
- f) *Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

These matters are addressed in detail below.

Clause 16A(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

The variation to the storey height development standard nominated by clause 21(1) of the SSP SEPP will not raise any matter in which could be deemed to have State or Regional significance. Additionally, the proposed variation will not contravene any overarching State or regional objectives or standards.

Clause 16A(5)(b): The public benefit of maintaining the development standard.

There is no public benefit in maintaining the storey height development standard in this instance. As outlined in **Section 6.4** above, there are sufficient environmental planning grounds to warrant the contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

Clause 16A(5)(c): Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

None.

7 Conclusion

The assessment detailed above demonstrates that compliance with the maximum storey height development standard contained in Clause 21(1) of the SPP SEPP is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention.

It is considered that the height variation allows for the orderly and economic use of land. This 16A Exceptions to Development Standards demonstrates that notwithstanding the technical non-compliance with the storey height development standard, the height variation facilitates the orderly economic use of land, whilst also providing for an improved planning outcome.

This 16A Exceptions to Development Standards demonstrates that notwithstanding the non-compliance with the storey height development standard:

- That the implied objectives of the development standard are achieved, particularly in that the proposal responds to the scale of the development in the immediate vicinity of the site;
- There are sufficient environmental planning grounds to justify the variation, as:
 - The proposed height is commensurate with the developments approved for the site under SSD 7064 and SSD 6371;
 - The site has an uneven topography which contributes to the variation to the development standard and a perceived height of six storeys in limited locations where the site is affected by an uneven slope;
 - The additional storey is recessed behind the building's parapet and has minimal visibility when viewed from the surrounding streetscape.
- The proposal is consistent with the objectives of the Business-Mixed Use zone;
- Provides acceptable solar access and overshadowing impacts and will not impact sensitive residential uses;
- The proposal provides a public benefit in that it will replace the existing outdated building stock contained within the site with a high quality co-living boarding house development that will promote housing diversity and increase the supply of short-stay accommodation in a suitable location close to Sydney's CBD, educational institutions and transport infrastructure.