

Clause 4.6 Request to vary a Development Standard

Build-to-rent Housing and mixed-use development
270 Pacific Highway, Crows Nest, 2065



Submitted to Department of Planning, Housing and
Infrastructure
on behalf of Silvernight

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1. Introduction

This is a written request (the Request) to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *North Sydney Local Environmental Plan 2013* (NSLEP 2013).

This Request relates to Clause 4.3 Height of buildings of the NSLEP 2013.

This Request has considered the detailed guidance within the NSW Department of Planning and Environment (DPE) guideline *Varying Development Standards: A Guide, August 2011* (DPE Guide) and planning system circular PS 20-002 *Varying Development Standards, May 2020*, and addresses the findings and established principles (as relevant) in the following judgements of the NSW Land and Environment Court (the Court):

- *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070
- *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189
- *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- *Big Property Pty Ltd v Randwick City Council* [2021] NSWLEC 1161
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131

The following sections of this Request critically analyse the proposed variation to the maximum 54m height of building standard applying to the site, its impact and reasonableness.

This analysis demonstrates that an exception to the height of buildings development standard is warranted in this instance.

It is important to note that this Clause 4.6 request has been prepared in accordance with the position adopted in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 (Merman) in regard to the calculation of building height. Further information is provided at Section 3.1 of this report.

2. Planning Overview

The *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) includes various development standards as a means of achieving environmental planning objectives.

Clause 4.6 of the Standard Instrument allows a consent authority to consider and grant consent to a development even in the circumstance where that development would contravene a development standard.

The DPE Guide recommends that any request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment. Table 1 below provides a summary of the relevant planning context and provides an overview of the proposed variation.

Information Requirement	Comment
Relevant Applicable Planning Instrument	North Sydney Local Environmental Plan 2013
Zoning of the Land	MU1 Mixed Use
Objectives of the Zone	<p>The objectives of the zone MU1 are:</p> <ul style="list-style-type: none"> • <i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i> • <i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i> • <i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i> • <i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i> • <i>To create interesting and vibrant mixed-use centres with safe, high quality urban environments with residential amenity.</i> • <i>To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.</i>
Development Standard to be Varied	Height of buildings
Nature of the Development Standard	A numerical building height control (54m).
Relevant Development Standard Clause	Clause 4.3 of the NSLEP 2013.
Objectives of the Development standard	<p>The objectives of Clause 4.3 height of buildings development standard are:</p> <p>a) <i>to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient;</i></p>

Information Requirement	Comment
	<p>b) to promote the retention and, if appropriate, sharing of existing views;</p> <p>c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development;</p> <p>d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings</p> <p>e) to ensure compatibility between development, particularly at zone boundaries;</p> <p>f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area; and</p> <p>g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living.</p>
Development Standard Numeric Control for the Site	Maximum height 54m (refer to Figure 1).
Proposed Numeric Control (based on Merman methodology)	<p>59.52m</p> <p>The highest point of the building is the lift overrun at RL 152.70 and is the result of.</p> <p>The proposal is 2.45m above the 54m height plane (RL151.64) when measured from ground level (finished) which is the traditional methodology. However, when using the Merman methodology, the proposal is 5.52m above the 54m height plane (RL 147.50).</p> <p>It is noted that the existing lift pits in the basement car park which represent the lowest point of ground level (existing), are not located directly beneath those elements of the building proposed to reach the maximum height exceedance of RL 152.70 (refer Figure 5 and Figure 6). Therefore, the highest point is measured from the level of the existing basement (i.e. RL 93.18) to the highest point of the roof (i.e. RL 150.3), rather than the bottom of the lift pits.</p>
Percentage Variation Between the Proposal and the Planning Instrument (based on Merman methodology)	The proposed height ranges from 50.75m to 59.52m. Meaning, the maximum exceedance is 5.52m (10.2% increase)

Table 1: DPE Guide recommended planning information and numeric overview

Maximum Building Height (m)

A	1	T2	26
J	8.5	U1	30
K	10	U2	33
L	11	W1	40
M	12	W2	42
N1	13	X	49
N2	14.5	Y1	50
O1	15	Y2	54
O2	16	Z	56
Q1	19.15	AD	132
Q2	20	AF	180
R	21	Area 1	Refer to Clause 4.3A
S	24	Area 2	Refer to Clause 4.3A(2A)
T1	25	Area 3	Refer to Clause 4.3A(2B)



Figure 1: Clause 4.3 Height of buildings map (Source: NSLEP 2013)

3. The Site and Proposed Development

This Request supports a SSDA for the development of a mixed-use development at 270 Pacific Highway, Crows Nest (the site). The site has an area of approximately 3,792m². The site location is shown at the figures below.



Figure 2: Site locality plan (Base Source: Nearmaps)



Figure 3: The site in its immediate context (Base Source: Nearmaps)

The proposed development comprises the following:

- demolition of two existing 5 storey commercial buildings
- construction of a mixed-use development including:
 - 2 basement parking levels
 - 3 podium levels comprising
 - non-residential uses such as medical centre, retail
 - residential uses, in the form of build to rent apartments and mews together with associated residential amenity facilities such as a gym and sauna, steam room, outdoor pool, class space, cinema room, co-working space
 - 13 storeys of residential uses in the tower, comprising 168 apartments (including 42 adaptable apartments)
 - communal open space
 - landscaping on ground, level 2 – level 15
 - rooftop solar panels
 - internal and external residential amenities space on roof top
- construction of an office and 2 substations fronting Bruce Street
- retention of the rear service lane with upgrades to paving and landscaping
- streetscape upgrades
- site landscaping

Architectural Plans have been prepared by Fitzpatrick and Partners (Appendix 1).

The proposed maximum height is 59.52m, exceeding the NSLEP 2013 height development standard by 5.52m (10.2%).

The extent of this non-compliance is located within the northern tower and north-eastern portion of the building, shown within the figures below and described in section 3.1.

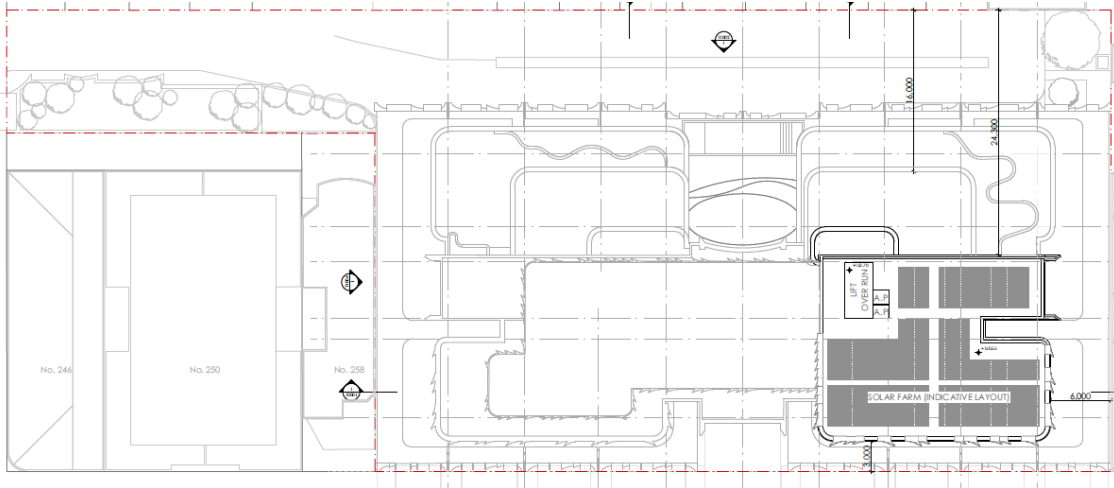


Figure 4: Roof Plan (Source: Fitzpatrick Partners)

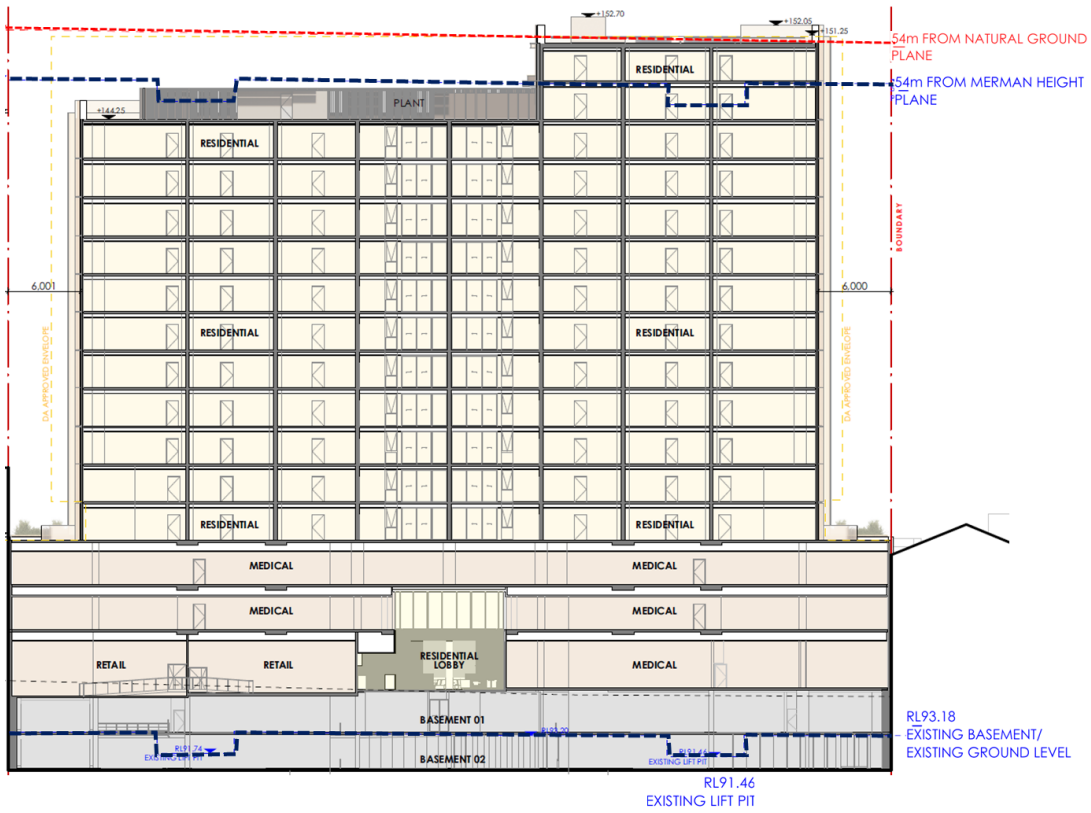


Figure 5: North/south section Plan (Source: Fitzpatrick Partners)

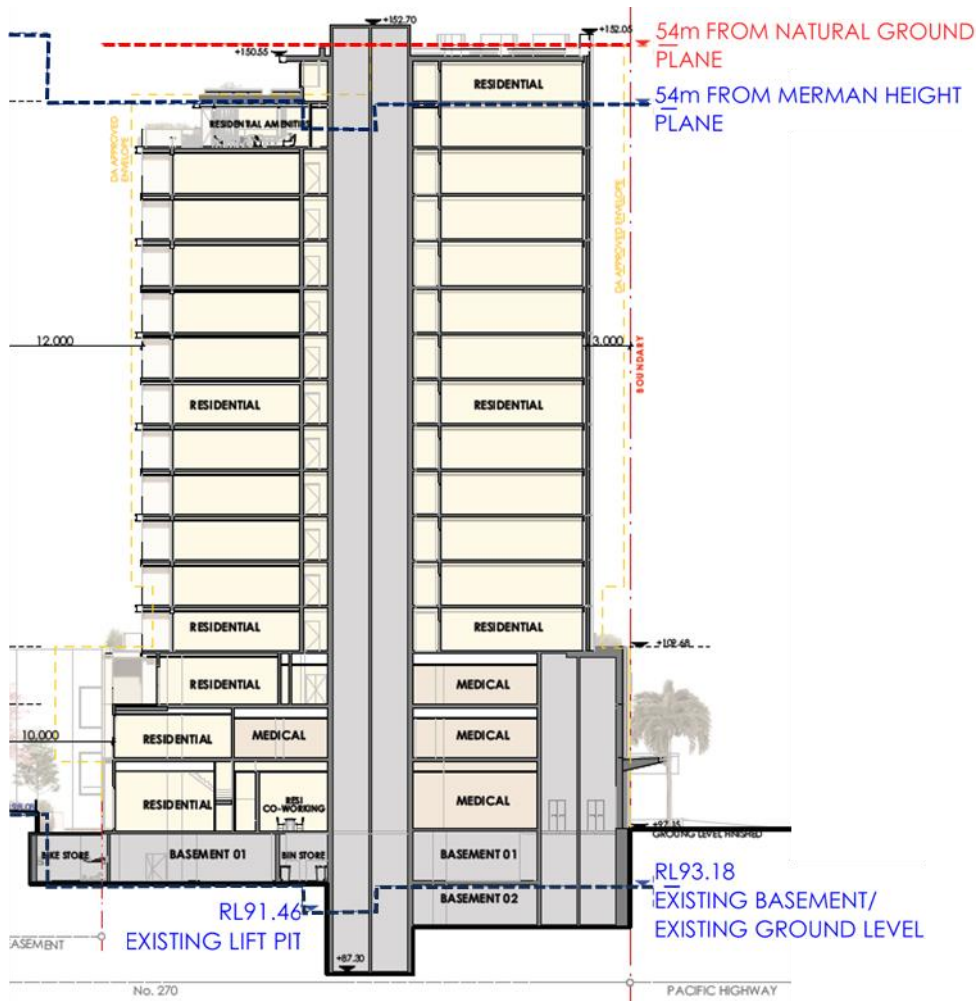


Figure 6: East/west section plan (Source: Fitzpatrick Partners)

3.1. Proposed variation

A small portion of the building exceeds the 54m height plane when measured from natural ground level, ie, ground level (finished). This portion comprising the parapet/architectural roof feature and lift over run, is located on the north-eastern part of the building and is proposed to exceed the 54m height plane (as measured from natural ground level) by 3.38m.

However, this Clause 4.6 request has largely been prepared to justify a height exceedance as a result of the position adopted by the Court in *Merman*.

In *Merman*, the Court determined that the existing ground level at the site was the excavated ground level (or existing basement) below the existing building. The building height was then calculated from the bottom of this existing basement.

This approach differs from a conventional merit-based approach to measuring building height, which is based on the existing topography of the site and ground floor of an existing building.

It is noted the conventional approach of measuring height was followed at the subject site as part of the *St Leonards Crows Nest 2036 Plan* (2036 Plan) and the subsequently gazetted Planning Proposal (PP1/21, now PP-2021-6564), which included conceptual architectural plans showing building height measured from the footpath (existing ground level) at the boundary of the site (refer the figures below).

The conventional approach is traditionally adopted by consent authorities, including (in the past) the Court. In *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (*Bettar*) and *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (*Stamford*), the Court found that existing ground level should not be taken literally and that a building should be considered in its context. In *Bettar*, the level of the footpath at the boundary of the site was taken as the existing ground level, and in *Stamford*, the Court took an average between the ground level of the public domain and the level of the excavated portion of the site.

Notwithstanding the above, the more recent jurisprudence of the Court is consistent with *Merman: Triple Blue Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1065 (at [47]); *Stokes v Waverley Council (No 3)* [2020] NSWLEC 1224 at [59].

When *Merman* is applied to the proposed development, the bottom of the existing lift pit is considered the existing ground level. At its lowest point, the basement has an RL of 91.46 and measures approximately 5.7m below the existing topography of the site and ground floor of the existing building .

The Architectural Plans prepared by Fitzpatrick and Partners provided at Appendix 1 provide further details. The plans form part of this Clause 4.6 request.

Whilst this Clause 4.6 addresses the case of *Merman*, the approach taken in the *Bettar* and *Stamford*, and also adopted by the previous Planning Proposal (PP-2021-6564) at the site (which set the 54m control), is considered to be a more appropriate method to assess the merits of the building height. In *Merman*, the Court said (at [74]) that:

The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

In *Merman*, the clause 4.6 request was evaluated against a height plan that was extrapolated by the surrounding topography of the site, as per the *Bettar* decision. The Clause 4.6 request was upheld.

When applied at the site, the *Merman* approach reflects a height plane that differs significantly to the building form actually envisioned when the height controls set for the site under the previous Planning Proposal. At that time, the planning authority did not have before it any detailed development application or survey for the site (that would have shown that the existing ground level was below the finished ground level).

Strict adherence to a height plane measured for the technical existing ground levels would result in an illogical building height that follows the subsurface levels, including lifts pits, of the existing basement, which should have no bearing on the ultimate height of development on the site and which does not reflect the natural topography and future character of the area.

Accordingly, this Clause 4.6 request demonstrates that compliance with the height of buildings development standard, as measured in accordance with *Merman*, is unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify this contravention.

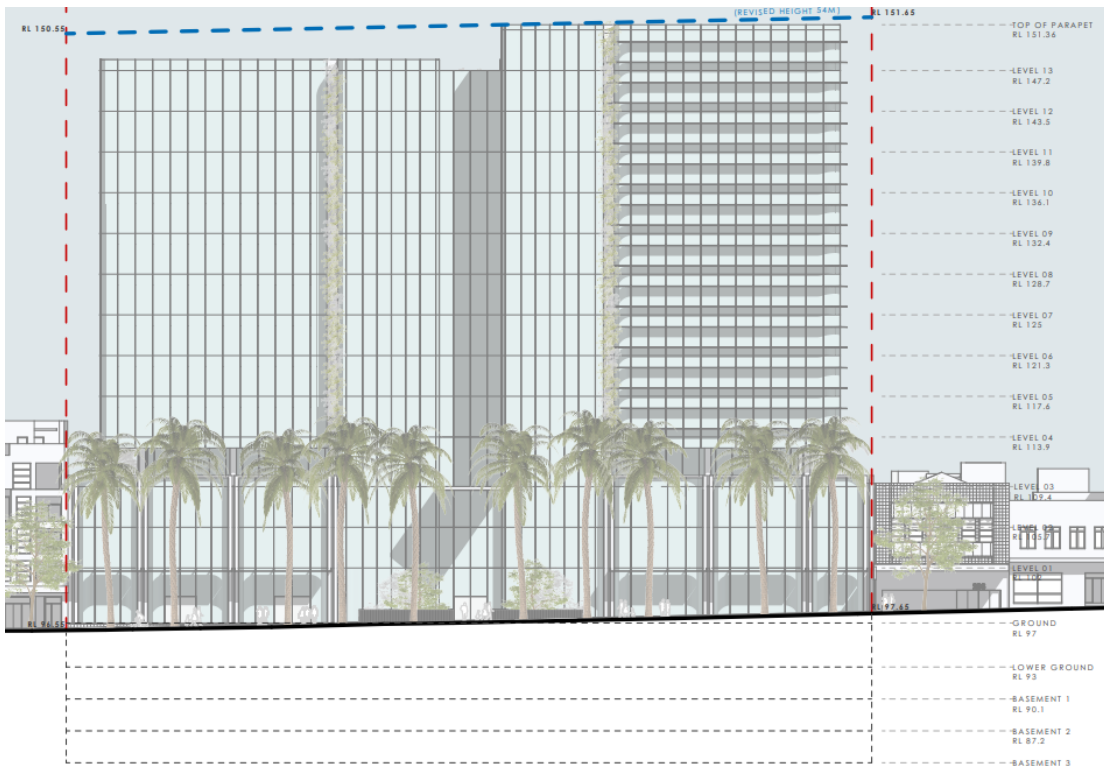


Figure 7: Eastern elevation from approved Planning Proposal (PP-2021-6564) conceptual drawings (Source: Fitzpatrick Partners)

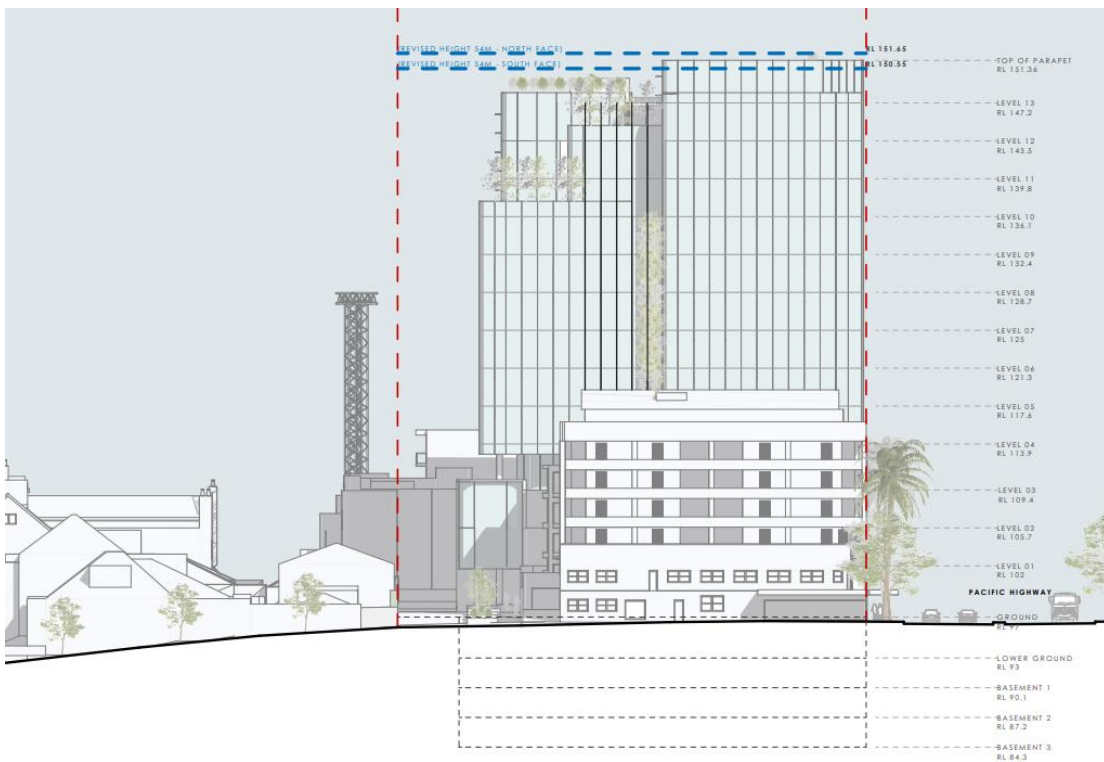


Figure 8: Southern elevation from approved Planning Proposal (PP-2021-6564) conceptual drawings (Source: Fitzpatrick Partners)

4. Planning background

4.1. Planning Proposal

On 9 June 2023, a site specific Planning Proposal (PP-2021-6564) was finalised by DPHI for the site which amended several controls within the NSLEP 2013, including increasing the maximum building height from 16m to 54m.

This Planning Proposal generally reflected the proposed controls for the site within the St Leonards and Crows Nest 2036 Plan (2036 Plan) which reinforced the emerging, high density character of the area.

4.2. Development Application

On 22 October 2024, the NSW Land and Environment Court approved a DA (DA193/23) for a 13 storey commercial building with basement parking.

Extracts from the approved plans are provided within Figure 9 and Figure 10 below.

Importantly, the proposed building height in the current has been substantially reduced from the previously approved building height across the vast majority of the building (see red outlined within Figure 11), which also allows for a stepped building form and an improved urban design outcome.



Figure 9: Approved building footprint from Pacific Highway (Source: Fitzpatrick and Partners)



Figure 10: Approved building footprint from Bruce Street (Source: Fitzpatrick Partners)

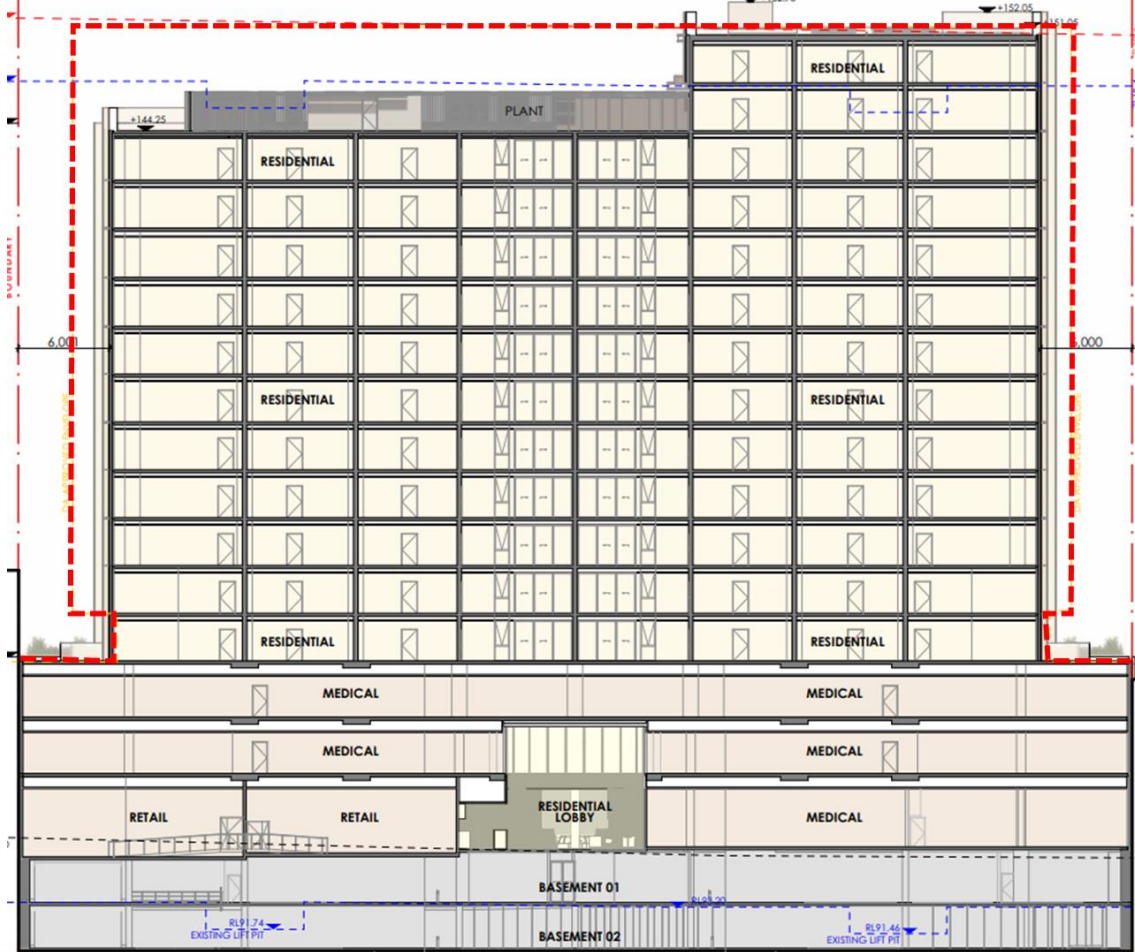


Figure 11: Approved building envelope outlined in red (Source: Fitzpatrick Partners)

4.3. Crows Nest Transport Orientated Development (TOD)

As shown within the Figure 12 below, the site is located within the Crows Nest Accelerated TOD precinct.

This TOD has significantly increased height and FSR controls to redefine Crows Nest as an area of high density characterised by tall buildings (see Figure 13). Therefore, any minor increases to height are not inconsistent with the vision and future desired character of the Crows Nest TOD precinct.

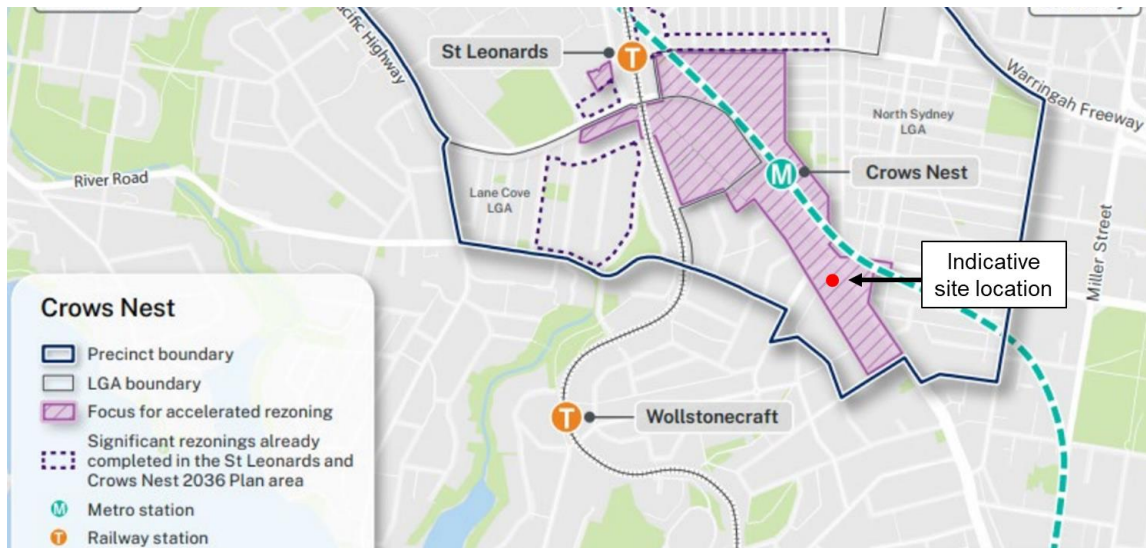


Figure 12: Crows Nest Accelerated TOD Precinct Boundary (Source: DPHI)



Figure 13: Strategic vision for Crows Nest (Source: Finalisation Report Crows Nest TOD)

5. Legislative Context

5.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the NSLEP 2013 sets out key assessment criteria which enables consent authorities to consider and grant development consent for a development that contravenes a development standard. The overarching objectives of this clause are contained in subclause (1) as detailed below:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

5.1.1. Clause 4.6(3)

Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

5.2. Relevant Judgements - NSW Land and Environment Court

The following key Land and Environment Court (NSW LEC) judgements provide guidance on key considerations in the assessment of a Clause 4.6 variation Request. These judgements focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation Requests:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- *Big Property Pty Ltd v Randwick City Council* [2021] NSWLEC 1161
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243

The key findings and established principles (as relevant) of the above judgements of the Land and Environment Court are summarised below.

5.2.1. **Wehbe v Pittwater Council (2007)**

This case establishes five potential grounds known as ‘Wehbe tests’ to ascertain whether strict compliance with a development standard is unreasonable or unnecessary, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
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; or
5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

5.2.2. **Initial Action Pty Ltd v Woollahra Municipal Council (2018)**

Initial Action Pty Ltd v Woollahra Municipal Council [2018] (Initial Action) further clarifies the correct approach for the consideration of clause 4.6 requests. Clause 4.6 does not require that a development that contravenes a development standard to have a *neutral or better* environmental planning outcome than a fully compliant development.

A legal consequence of the decision in *Initial Action* is that Clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

In *Initial Action*, the Court also confirmed that the five common ways of establishing that compliance with a development standard is unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007)* continue to apply.

5.2.3. **Linfield Developments Pty Ltd v Cumberland Council (2019)**

The ‘third’ Wehbe test is concerned with the underlying object or purpose of the development standard and that it would be defeated, thwarted or undermined if strict compliance was required. The reference to ‘undermined’ is an extension of Wehbe which was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]) (Linfield). In Linfield, the court found that:

“...requiring compliance would thwart or undermine at least one of the objectives of the height control development standard...”

5.2.4. **SJD DB2 Pty Ltd v Woollahra Council (2020)**

The *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (SJD) established greater flexibility in applying clause 4.6 to vary development standards where a better outcome would be achieved in the context of the site. This case concluded that the numerical controls and objectives associated with development standards

should not be used to strictly define desired future character. One relevant outcome of the case was that other provisions of the local environmental plan as well as development in the area that contravenes the development standard can indicate the desired future character of an area.

5.2.5. Big Property Pty Ltd v Randwick City Council (2021)

Big Property Pty Ltd v Randwick City Council [2021] NSWLEC 1161 (Big Property) is also a relevant case associated with a clause 4.6 request in the context of the desired future character of an area. This judgement followed *SJD DB2* and affirmed that the desired future character should not solely be determined by the development standards that control building envelopes, stating:

“...As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development...”

5.2.6. HPG Mosman Projects Pty Ltd v Mosman Municipal Council (2021)

Similar to the *Big Property* case, in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243* (HPG) a clause 4.6 request was considered in the context of desired future character. This case determined that desired future character of an area can be evaluated by reference to matters other than the controls and objectives of the development standard.

“...The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site”.

6. Assessment of the Variation to the height of building development standard

The NSLEP 2013 sets a standard height of buildings development control of 54m for the entire site.

The proposal seeks to increase the maximum height of building development control by 5.52m (10.2%) to accommodate a built form that is appropriate for the conditions of the site and its context, both physically and strategically, and also noting that the majority of the building is lower than the 54 m height plane

As discussed in section 4, the strategic vision for the site and wider area has been established by the planning controls under the Crows Nest Accelerated TOD Precinct.

Importantly, it is imperative to note that throughout the preparation, exhibition and finalisation of the Planning Proposal (PP-2021-6564) which led to the current 54m height control on the site, the height of the building was measured from the existing topography of the site and ground floor of the existing building. If the same measurement approach is taken, the proposed exceedance would be reduced to 1.51m (2.8%).

In addition, it is noted that the proposal provides a reduced height, bulk and scale when compared to the building that was approved for the site under DA193/23 on 22 October 2024.

The location of the proposed additional height in the north-eastern part of the building is a specific design response to:

- maximise the setback and minimise visual impacts from the public domain
- minimise overshadowing, particularly to the low-density residential properties immediately west

The following assessment comprehensively considers the provisions of Clause 4.6 with regard to the relevant case law.

6.1. Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

Wehbe establishes at least five potential alternative grounds to ascertain whether strict compliance with a development standard is unreasonable or unnecessary. An assessment against the relevant tests are provided below to outline how compliance with the height of building development standard is unreasonable and unnecessary.

6.1.1. Wehbe Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the height of building development standard will be achieved notwithstanding the non-compliance with the standard as outlined at Table 2.

Clause 4.3 Height of Buildings Development Standard

Objectives	Achievement of Objectives
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a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient*

- When measured from the centre line of the site, the site which falls by approximately:
 - 1m from north (RL97.64) to south (RL96.54)
 - 1.33m from east (RL96.88) to west (98.21)
- To respond to this cross fall and the current low density residential houses located to the west (noting these have recently been rezoned to R4 High Density Residential through the TOD reforms), the proposed building includes a stepped built form to the rear (west) as the land starts to fall and a stepped form from north to south.
- As shown within the figures below, the height of the tower component drops:
 - From north to south by 6.3m (RL 152.05 to 145.75)
 - From north-east to south-west by 14.2m (RL 152.05 to 137.85)
 - Refer drawing DA-11001 and DA-11002 in Appendix 1.



Figure 14: Elevation from Pacific Highway (Source: Fitzpatrick Partners)

Clause 4.3 Height of Buildings Development Standard

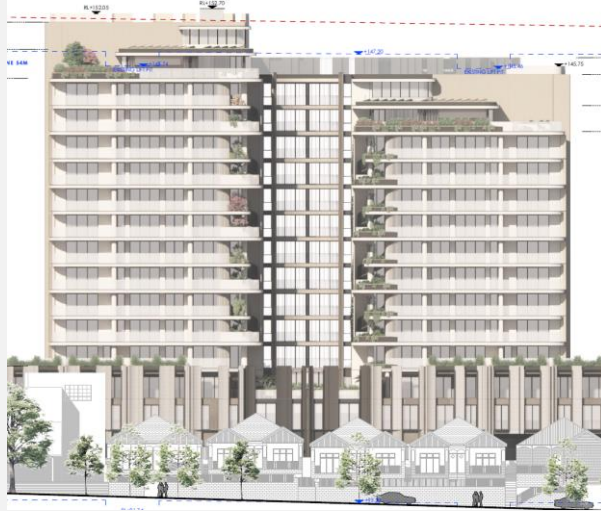


Figure 15: Elevation from Sinclair Street (Source: Fitzpatrick Partners)

b) *to promote the retention and, if appropriate, sharing of existing views*

- The proposed height exceedance will not block or restrict any important or existing views for the reasons outlined below.

North, south and east

- The site is located on the ridge of the Pacific Highway. Neighbouring properties to the north, south and east are also located on this ridge, meaning these neighbours are not located significantly up or down hill from the site. This lack of elevation change reduces incidences of overlooking and restricted views often caused by topographical changes.
- The existing building at the site is 5 storeys and the adjoining buildings to the north and south (which range from 3 to 6 storeys) are currently built to the boundary with no windows at the interface with the subject site. This limits their views of and over the site.
- The adjoining buildings to the north and south are also generally orientated to the east and west. Therefore, their balconies and windows face east and west, away from the subject site.
- On this basis of the above, the proposed height exceedance will not adversely impact on views from or of these properties.

West

- Existing residential properties to the west have a primary frontage to Sinclair Street and are generally orientated to this street.

Clause 4.3 Height of Buildings Development Standard

	<ul style="list-style-type: none"> • The site is elevated above these properties and potential views to the east from these properties are already restricted by this topography and the existing 5 storey buildings at the site. • The height exceedance is concentrated in the north eastern tower, resulting in minimal impacts on residential properties to the west. The isometric diagrams in Figure 16 and Figure 17 shows the location of the height exceedances. • It is also noted that there are no important or iconic views such as views of water or parkland that the proposed height exceedance will be capable of blocking within the immediate vicinity of the site. • Drawings DA-33 to DA-36 at Appendix 1 provide the elevations of the proposal demonstrating the above. • On this, the proposed height exceedance will not adversely impact on views from or of these properties.
<p>c) <i>to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development</i></p>	<p>The majority of the proposed development falls under the 54-metre height plane.</p> <p>The proposed height exceedances are generally limited to level 15, parapet/roof feature and roof top plant. These elements are located in the north-eastern part of the building to minimise overshadowing impacts.</p> <p>The height, bulk and scale of the development has been reduced when compared to the building envelop approved for the site under DA193/23. As detailed within the EIS and shown within Figure 18 below, the proposal results in an improved solar access outcome for residents located to the west of the site when compared to DA193/23 (refer to yellow shading which indicates the additional solar access). As indicated by the red shaded areas, the additional overshadowing impacts are negligible.</p>
<p>d) <i>to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings</i></p>	<p>The proposed height exceedance of does not result in any additional privacy impacts. The only habitable floor level that exceeds the height limit is Level 15 which is confined to the north-eastern corner of the building. Further, Level 15 comprises 4 units, plant and solar panels. Apartments are located in northeast corner and setback 24.3m from western. As a result, there will be no overlooking of low-density residences to the west</p>

Clause 4.3 Height of Buildings Development Standard

	<p>The western setback at level 15 is wholly compliant with the ADG setbacks/building separation requirements noting this part of the site interfaces with the Sinclair Street residences which have been recently rezoned to R4 High Density Residential through the TOD for Crows Nest.</p> <p>The north tower setback at Level 15 is not strictly compliant with the ADG setback/ building separation requirements, however this is considered acceptable as:</p> <ul style="list-style-type: none"> • The northern setback is compliant with the requirements of the NSDCP 2013 • Angled façades and privacy screens have been introduced to the northern facade to redirect views and minimise overlooking toward the neighbouring developments • Part 4 Build-to-rent housing, Section 75(2)(a) of the Housing SEPP provides that the design criteria set out in the ADG should be applied flexibly for BTR developments <p>The above design elements ensure the additional proposed height will not adversely impact on privacy for both surrounding properties and future residents at the site.</p>
<p>e) <i>to ensure compatibility between development, particularly at zone boundaries</i></p>	<p>Neighbouring sites to the north and south are also zoned MU1.</p> <p>The land to the west has been rezoned from R2 Low Density Residential to R4 High Density Residential under the recent TOD reforms, facilitating future redevelopment of these properties for higher density residential forms. The proposed scale of development is compatible with surrounding development and this is not compromised by the minor exceedance of the 54 m height controls in the north-eastern corner of the building.</p> <p>The proposal provides fully compliant ADG separation distances, thereby ensuring an appropriate transition to properties to the west is provided.</p>
<p>f) <i>to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area</i></p>	<p>The proposal is consistent with the desired future character of the area, noting the recent TOD reforms, planning proposals and SSDA's in proximity to the site.</p> <p>The height, bulk and scale of the development is reduced when compared to DA193/23, which was</p>

Clause 4.3 Height of Buildings Development Standard

	<p>considered to deliver a development of an appropriate scale and density.</p> <p>Further, the exceedance is appropriate considering:</p> <ul style="list-style-type: none"> • it is minor and concentrated towards the north eastern portion of the building, ensuring no additional privacy concerns for neighbours as outlined earlier • results in negligible additional overshadowing when compared to DA193/2023 • the proposal incorporates several design features that allow the building to sit appropriately within the surrounding built form character, including a consistent street wall height with the neighbouring heritage item, suitable setbacks, a stepped building form as well as effective landscaping to integrate the building into the site • the allocation of GFA and resultant additional height to the east along the Pacific Highway has allowed for greater setbacks towards the rear (west), minimising impacts on the low density residential properties along Sinclair Street • the proposal is consistent with the future character of the area, noting recent planning proposals in proximity to the site and State government announcements that relate to density near major public transport
<p>g) <i>to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living.</i></p>	<p>N/A - the site is located in a MU1 Mixed-use zone.</p>

Table 2: Consistency with Clause 4.3 height of buildings development standards objectives

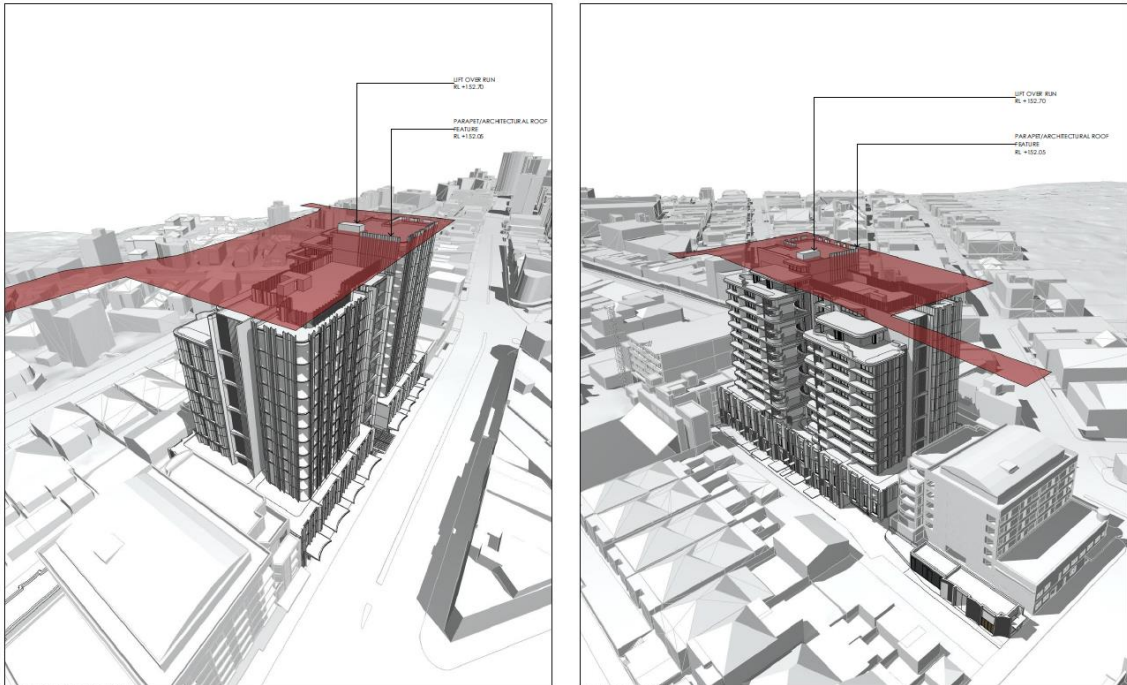


Figure 16: 54m height plane (measured from ground level existing) as viewed from Pacific Highway (Source: Fitzpatrick + Partners)

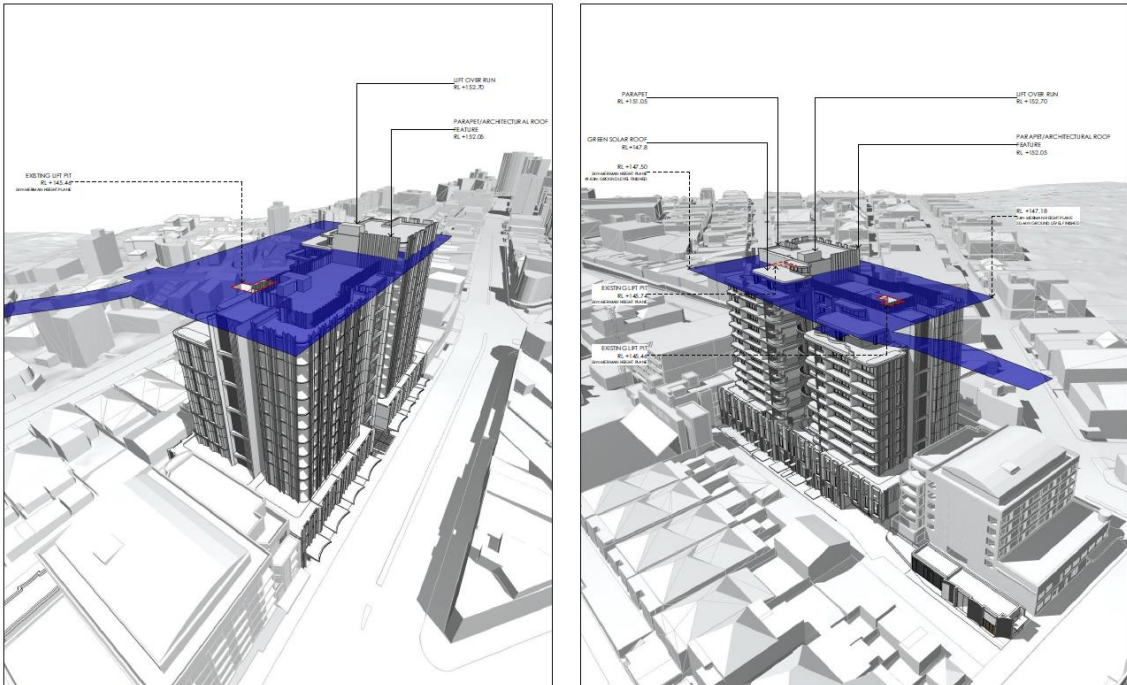


Figure 17: 54m height plane (measured from ground level existing) as viewed from Bruce Street (Source: Fitzpatrick + Partners)

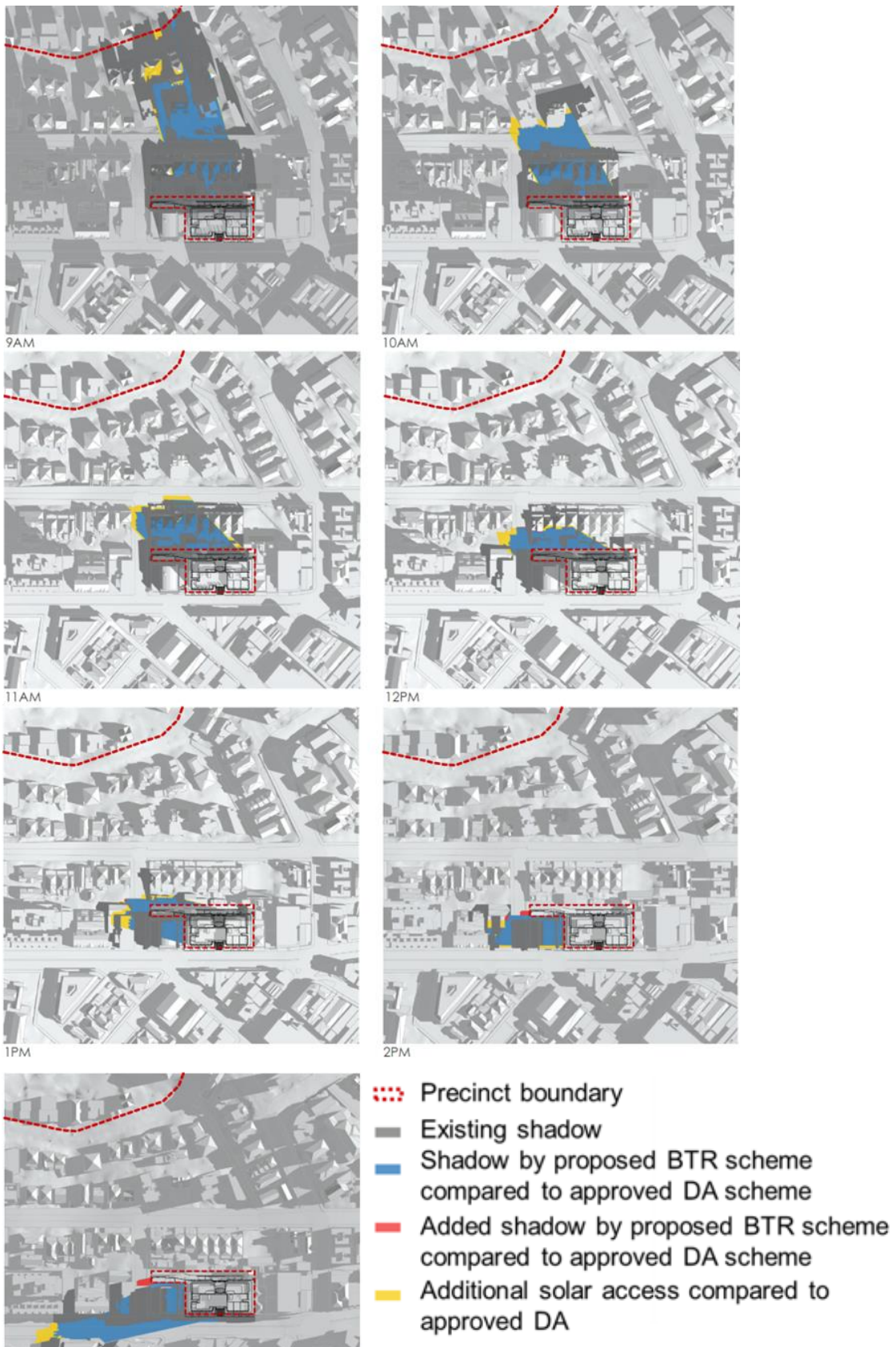


Figure 18: Overshadowing diagrams (Source: Fitzpatrick Partners)

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge said (at [34]) that:

establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary.

In this matter it has been demonstrated that the contravention does not cause any material environmental harm (of a kind that the objectives seek to avoid).

6.1.2. Wehbe Test 3: The underlying object or purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable

Strict compliance with the height of building development standard would defeat, thwart and undermine the underlying object or purpose of the height of building development standard. This was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]).

The objects that would be defeated, thwarted or undermined if strict compliance was required in this case are clause 4.3(1)(a) and clause 4.3(1)(f) of the NSLEP 2013, as detailed below.

Clause 4.3(1)(a) states:

to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient

Objective 4.3(1)(a) would be undermined if strict compliance was required.

The site has a fall of 1.1m north (RL97.64) to south (RL96.54) and approx. 1.33m from east (RL96.88) to west (98.21) (if measured from the centre line of the site). To respond to this cross fall and the low density residential located to the west, the proposed building includes a stepped built form to the rear (west) as the land starts to fall.

The height of the tower component drops from north to south by 6.3m (RL 152.05 to 145.75) and from north-east to south-west by 14.2m (RL 152.05 to 137.85). Refer drawing DA-11001 - DA-11002-4 in Appendix 1.

If strict compliance with the height control were required, as a result of the height being calculated from the bottom of the existing lift pits in the basement, it would result in a development which is unable to reflect the natural topography of the land.

Further, it would result in the site being developed under different circumstances to buildings in the surrounding area, including new development associated with the Crows Nest area, which were built in reference to the natural topography and surrounding built form. Ultimately, this would affect the perception of the site and ability to align with the future character of the area.

Clause 4.3(1)(f) states:

to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area

The height exceedance ensures the proposal aligns with objective (f) — and is superior, in this respect, to a strictly height-compliant proposal.

The desired future character of an area is set by a range of factors, other than a specific objective of a development standard, as outlined in recent court cases. Specifically, *SJD*, *Big Property* and *HPG* determined that the desired future character of an area should be evaluated by reference to matters such as other applicable environmental planning instruments, surrounding development and the specific nature of the site.

In the context of the site, nearby developments and the Crows Nest TOD program should be considered, and is discussed in greater detail below.

Surrounding development

Surrounding development is a clear indicator of future character of an area. Nearby developments include:

- the Crows Nest Metro Over Station Development which comprises residential, tourist and visitor accommodation, commercial and social infrastructure and is up to 27 storeys in height at 477-521 Pacific Highway and 14 Clarke Street, Crows Nest (approved in 2020)
- 22-storey state significant development for a mixed use tower including 188 apartments at 9-11 Falcon Street, Crows Nest (Fiveways Triangle Site) (approved in 2024)
- three residential flat buildings ranging from 3 to 6 storeys comprising approximately 74 units and 187m² of non-residential floor area at 25-57 Falcon Street, Crows Nest (approved in 2022)
- an 8-storey mixed use retail and residential building at 31-33 Albany Street, Crows Nest (approved in 2016)

TOD Reforms

- DPHI has identified major stations to be rezoned for increased density for the purpose of providing homes and vibrant communities nearby transport hubs.
- Crows Nest has been identified as one of 8 accelerated precincts and was rezoned in November 2024.
- The Crows Nest TOD is set to deliver 5,900 new homes by 2039.
- Relevantly, the TOD rezoned a significant area directly west of the site from low to medium density residential to high density residential (see green dashed area on the figure below).
- This upzoning will redefine the character of the site's immediate locality into an area of high-density housing, with non-residential uses at lower levels along the Pacific Highway
- Furthermore, the TOD reforms show a clear intention for the future character of the area to have increased densities, and particularly to house more people.

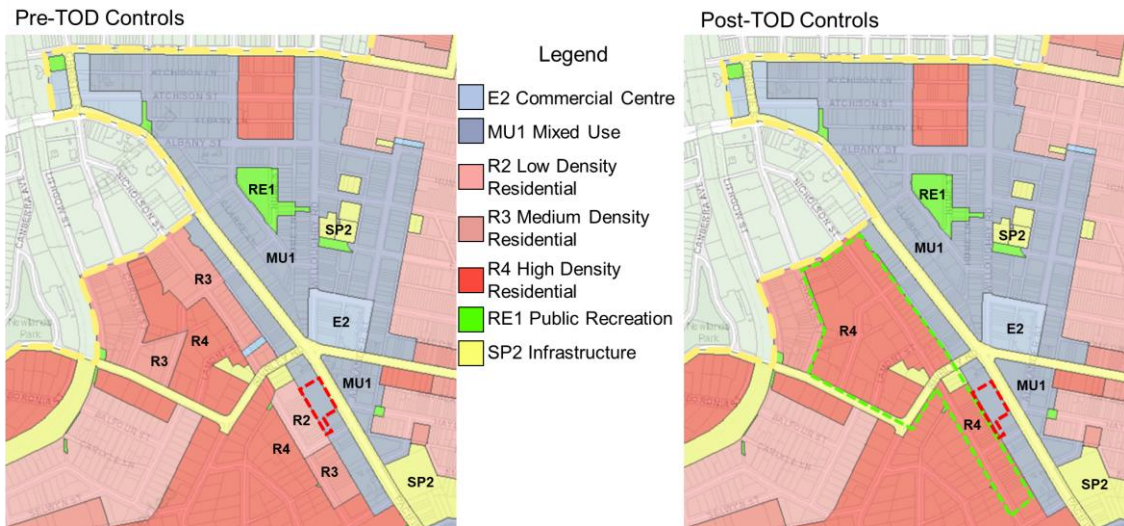


Figure 19: Zoning pre and post TOD controls

PP-2021-6564

- In addition to the height control being varied, other controls applying to the site should be considered when determining the desired future character of an area and whether a proposal aligns.
- PP-2021-6564 set a maximum FSR of 5.6:1 for the site through Clause 4.4 of NSLEP 2013. This FSR control establishes a clear intention to encourage development on the site of a sufficient bulk and scale.
- The proposed non-compliant height allows the development to comply with the FSR control, whilst ensuring an appropriate urban design outcome at the site.

Nature of the site

- The proposal has been designed in response to the natural topography of the site which consists of an approximate 1.1m fall north to south, and a cross fall of 1.33 metres from east to west.
- The highest part of the building has been located towards the north-eastern part of the site which ensures the majority of the height exceedance is located on the Pacific Highway side. This location is also well separated from the low density residential properties to the west, therefore minimising view and overshadowing impacts and ensuring visual bulk is also located away from these properties. The isometric diagram in the figures below shows the location of the height exceedance.
- The building has also been designed to step down as the site slopes, resulting in an articulated built form that is visually interesting and respectful of the properties to the west.

It is noted the above assessment of character places more weight to the desired future character, than the existing character. This is considered appropriate as the site is located in an area undergoing substantial urban transition.

In summary, a strictly compliant scheme would fail to deliver a development that aligns the desired future character of the site as determined by the matters outlined in the *SJD*, *Big Property* and *HPG* court cases.

6.2. Clause 4.6(3)(b) – Environmental Planning Grounds to Justify Contravening the Development Standard

The development, including the height of building non-compliances, will provide for a high quality mixed-use building that provides much needed residential accommodation and employment generating uses in a highly accessible location.

It is important to note, the proposed variation is largely the result of the anomaly resulting from the excavation of the existing site, which was not taken into account when the site-specific control was set through PP- PP-2021-6564.

There are sound planning grounds and significant benefits to justify contravening the height of building development standards of which are outlined in the following sections.

6.2.1. Improved Urban Design outcomes

Section 1.3(g) of the EP&A Act provides that it is an objective of the Act to:

to promote good design and amenity of the built environment ...

The proposed development has been designed in accordance with the planned capacity for the site as outlined within NSLEP 2013 and the Crows Nest TOD. The development of the site will significantly contribute to economic development of the Crows Nest Precinct and its ability to meet the housing targets prescribed by the National Housing Accord (discussed further in the EIS).

In summary, the proposed height variation is considered acceptable in regard to its urban design and responsiveness to the topography and local context for the following reasons:

- The majority of the building complies with the 54 m height control as measured from both ground level (finished) and, per Merman, ground level (existing). The areas of non-compliance are confined to the north-eastern corner of the building and contribute to the stepped form of the building without contributing to its perceived bulk and scale.
- The exceedance in height results in minimal additional overshadowing when compared to a height compliant scheme. It is noted that the proposal complies with the ADG's solar access requirements of 2 hours of solar access to neighbouring properties between 9AM and 3PM on the winter solstice.
- The development in a precinct identified for substantial growth. There are other nearby developments along Pacific Highway in the Crows Nest Precinct which are substantially higher in height – i.e. Five Ways, located immediately opposite the site on the Pacific Highway. The minor height exceedance will not detract from the existing and future character of the area.
- The proposed height will allow for a building with landmark qualities - an instantly recognisable development, which is desirable for a site of this size, location and importance.

- The predominant building envelope is fully compliant with the 16-storey height set by NSLEP 2013
- There are no additional privacy concerns as a result of the non-complaint height.

The proposed non-compliant height allows the development to achieve a better urban design outcome for the site thereby:

- promoting good design and amenity of the built environment (as per section 1.3(g) of the EP&A Act)
- promoting the social and economic welfare of the community and a better environment by the proper development of the State's land resources (as per section 1.3(a) of the EP&A Act)
- promoting the orderly and economic use of the land (as per section 1.3(c) of the EP&A Act)
- supporting a diversity of housing, medical centre retail and retail premises uses that generate housing and employment opportunities (as per the first zone objective of the MU1 zone)



Figure 20: The proposal as viewed from the Pacific Highway from the west (Source: Fitzpatrick + Partners)



Figure 21: Proposed development as viewed from the Pacific Highway travelling west (Source: Fitzpatrick + Partners)



Figure 22: Proposed development as viewed from Sinclair/Bruce Streets (Source: Fitzpatrick + Partners)

6.2.2. The proposed development is consistent with the objectives of the zone

The site is located within an MU1 Mixed-use zone, where shop-top housing/residential flat buildings/commercial premises are explicitly permitted with consent. Nearby developments are also proposing similar mixes of land uses.

MU1 Mixed Use zone	
Objectives	Achievement of Objectives
<ul style="list-style-type: none"> To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities, 	<p>The proposal will provide ground-level retail tenancies and space dedicated to a medical centre within the building podium, generating employment opportunities in an accessible location. It is estimated that the proposal will generate 334 jobs during construction and 160 during operation.</p>
<ul style="list-style-type: none"> To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces. 	<p>The proposed retail uses at ground level, combined with the lobby to the BRT and medical uses within the podium ensure the delivery of an active frontage to Pacific Highway.</p>
<ul style="list-style-type: none"> To minimise conflict between land uses within this zone and land uses within adjoining zones. 	<p>The site is zoned MU1 Mixed Use. The proposed non-residential (medical, retail premises and office premises) and residential (BTR) uses are entirely consistent with the intended mixed use outcome of the zone. The proposal has been designed to eliminate potential conflicts between the proposed uses as it reflects the adjoining land. For example, development fronting Pacific Highway has a commercial street frontage whilst uses orientated to Sinclair Street are residential to be compatible to the R4 High Density Residential zone to the west.</p>
<ul style="list-style-type: none"> To encourage business, retail, community and other non-residential land uses on the ground floor of buildings. 	<p>As mentioned above, ground level tenancies will be dedicated to retail and medical purposes.</p>
<ul style="list-style-type: none"> To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity. 	<p>The development will contribute to the vibrancy and safety of the surrounding urban environment, through it's unique architectural design and passive surveillance over the public domain.</p> <p>The non-compliance in height will not cause overshadowing over public spaces or cause any other negative impacts.</p> <p>The proposal provides a building with landmark qualities - an instantly recognisable development, which is desirable for a site of this size, location and importance.</p>
<ul style="list-style-type: none"> To maintain existing commercial space and allow for residential development in 	<p>The proposed development will have medical, commercial and retail uses on the bottom</p>

MU1 Mixed Use zone

mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.

three levels fronting Pacific Highway, with the rest of the floor are being dedicated to residential purposes, achieving this objective.

7. Conclusion

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstance and this Request has been shown to satisfy the provisions of 4.6(3) and 4.6(4) of the NSLEP 2013.

The height variation as a result of the application of *Merman* is justified for the following reasons:

- The departure from the height development standard is only due to the excavation of the site for a basement and lift pits.
- The areas of non-compliance (above the 54m height plane) are concentrated towards north-east of the site, minimising privacy, overshadowing and visual impacts of the exceedance on residential properties to the west.
- The proposed development remains consistent with the desired character of the area, by contributing towards the residential dwelling goals, and matching the desired character of the area. Particularly noting that the site is within the Crows Nest Accelerated TOD precinct.
- The proposed development achieves the objectives of the MU1 zone and the height of buildings development standard despite the non-compliance.
- The height increase does not restrict the ability for the proposed development from providing a high quality urban design outcome that is considerate of adjoining land uses and built form as:
 - the exceedance will not be visible from ground level, and as a result will not reduce the amenity of neighbouring dwellings to the west of the site.
 - the built form of the proposal aligns with the desired character of the Pacific Highway corridor, with a series of high density buildings being developed within both Crows Nest and St Leonards.

Overall, and for the reasons set out above, the proposed development represents a superior outcome for the site that is justified. Therefore, it is appropriate that the development standard be varied as proposed.