



MELIORA
PROJECTS

DESCRIPTION: **The Belvedere**

Use of land for the purpose of a residential flat building

- Erection of a 9-storey building with 56 dwellings, two basement levels for car parking, as well as an ancillary wellness space and an office.
- Land amalgamation and strata subdivision

ADDRESS: 42 Donald Street and 5-7 Church Street, Nelson Bay 2315
A/-/DP417172, B/-/DP417172, 15/A/DP5616

PROJECT#: Meliora Projects - J19612

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QUALITY CONTROL

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1 EXECUTIVE SUMMARY

Introduction

This Clause 4.6 Variation Request supports a State Significant Development (SSD) application for *The Belvedere*, a nine-storey residential flat building at 42 Donald Street and 5–7 Church Street, Nelson Bay. **The development seeks a minor 6% variation to the maximum building height** prescribed under Clause 4.3 of the *Port Stephens Local Environmental Plan 2013* (PSLEP 2013), increasing the permissible height **from 28 metres to approximately 29.7 metres at the highest point**.

The proposal is promoted by **Fortezza Group** with architectural design by **HAL Architects** and planning documentation by **Meliora Projects**. The development has been declared State Significant Development under s. 4.36(3) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) via *SSD Declaration Order 2025 (No 3)*.

Nature and Extent of the Variation

The height exceedance arises from discrete architectural elements located centrally within the building envelope, associated primarily with the lift overrun, other services and communal open space roof/shade features. These components are minor in scale, visually recessed, and imperceptible from the surrounding public domain. The majority of the built form complies with the 28 m control, with less than 5% of the roof plane contributing to the exceedance.

The variation is therefore quantitative rather than qualitative in nature and does not alter the perceived scale, massing, or character of the development. The proposal remains consistent with the desired future character for the D5 Nelson Bay Centre – Town Living & Commercial Precinct and is supported by comprehensive urban design, amenity and visual impact assessments (HAL Architects, 2025).

Justification Summary

This request demonstrates that strict compliance with the 28 m height limit is both **unreasonable and unnecessary**, and that there are **sufficient environmental planning grounds** to justify the variation. The proposal achieves all objectives of Clause 4.3 and delivers a superior environmental and architectural outcome compared with a compliant envelope.

The design represents a contextually appropriate, well-proportioned building that contributes positively to the evolving Nelson Bay skyline. It provides improved residential amenity, enhances streetscape quality through active frontages, and achieves design excellence under the *Apartment Design Guide* and *Better Placed* principles.

Urban Design and Amenity Outcomes

The development successfully integrates with its mixed-use centre context. The proposal is highly articulated, with deep balconies, recesses, and landscaped voids that minimise perceived bulk and foster a sense of lightness.

Architectural testing demonstrates full compliance with solar access and ventilation benchmarks. Overshadowing of adjacent properties is negligible, and no adverse wind, reflectivity, privacy or view loss impacts are identified.

The proposed 29.7 m height facilitates the inclusion of rooftop communal facilities, which enhance social amenity and equity of view access for all residents. These elements could not reasonably be achieved within the 28 m limit without compromising floor-to-ceiling heights, internal efficiency, housing supply outcomes and the project's architectural integrity.

Strategic and Policy Alignment

The proposal directly supports the objectives of the *Hunter Regional Plan 2041*, *NSW Housing Strategy 2041*, the *Port Stephens LSPS*, and the *Nelson Bay Town Centre and Foreshore Delivery Program*. It advances housing supply and diversity within an identified growth centre, optimises use of existing infrastructure, and delivers a high-quality urban design response that enhances the town centre's liveability and economic vitality.

The proposal achieves the objectives of the E1 Local Centre and R3 Medium Density Residential zones by facilitating mixed residential use and ground-level activation that reinforces Nelson Bay's role as a vibrant coastal hub. The variation does not create precedent concerns, as greater height exceedances have been supported nearby at 11–15 Church Street and 1 Yacaaba Street (approved heights up to 30.8 m or ~14% above control). These examples evidence Council's recognition of the town centre's transition toward a mid-rise character consistent with the Nelson Bay urban design framework.

Environmental Planning Grounds

Environmental planning grounds that justify the variation include:

- **Design excellence and architectural resolution** consistent with Better Placed and ADG principles;
- **Amenity performance** exceeding non-discretionary Housing SEPP standards;
- **Contextual compatibility** with the desired future character of Nelson Bay Centre;
- **Negligible environmental impacts**, with comprehensive mitigation measures; and
- **Strategic alignment** with local, regional and State planning frameworks promoting compact, walkable centres and housing diversity.

Conclusion

The Clause 4.6 variation is minor, technically well-founded, and results in no detrimental environmental, social, or visual outcomes. The proposed design achieves the underlying objectives of Clause 4.3 and the PSLEP 2013 while delivering superior amenity, design quality, and public benefit. It is considered that this report is sufficient for the consent authority to be satisfied that the requirements of Clause 4.6(3) are met and that development consent be granted accordingly.

2 SITE ANALYSIS

2.1 Site Description

Address	42 Donald Street, Nelson Bay 2315 7 Church Street, Nelson Bay 2315 5 Church Street, Nelson Bay 2315	
Lot/Section/DP	- B/-/DP417172 - A/-/DP417172 15/A/DP5616	
Site Area	2,203m²	
Environmental Planning Instrument/s	- State Environmental Planning Policy (Planning Systems) 2021 - State Environmental Planning Policy (Resilience and Hazards) 2021 - State Environmental Planning Policy (Housing) 2022 - State Environmental Planning Policy (Sustainable Buildings) 2022 - Port Stephens Local Environmental Plan 2013	
Development Control Plan	Port Stephens Development Control Plan 2014	
Precinct	D5 Nelson Bay Centre – Town Living & Commercial Precinct	
Zone	E1 Local Centre	R3 Medium Density Residential
Zone Objectives	- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area. - To encourage investment in local commercial development that generates employment opportunities and economic growth. - To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area. - To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.	- To provide for the housing needs of the community within a medium density residential environment. - To provide a variety of housing types within a medium density residential environment. - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

2.2 Site Imagery and Searches Excerpts



Figure 1 - Sat Image - Subject Site



Figure 2 – Image facing west from Church Street towards Lot A (vacant), Lot 15 (existing house on left), and Lot B (shop, behind fence down the sloping site) (Google Maps)



Figure 3 – Image from Donald Street facing northwest towards Lot B (existing Shop) and Lot A (vacant) (Google Maps)



Figure 4 – Image facing northeast from the intersection of Donald Street and Church Street, showing the extent of streetscape improvements including footpath, street trees (Google Maps)

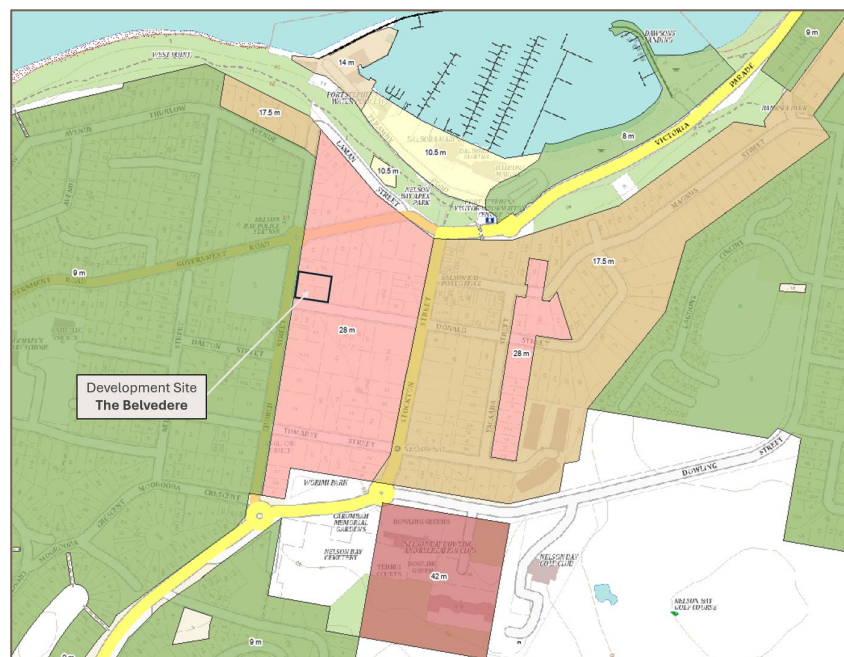
2.3 Maps - Port Stephens Local Environmental Plan 2013

The following mapping has been extracted from the NSW Digital EPI Viewer.

Height of Buildings Map

28m (all lots) (Cl. 4.3)

9m for land immediately west (opposite side of Church St).



3 PROPOSED DEVELOPMENT

3.1 Project Overview:

The Belvedere is a proposed State Significant Development (SSD) located at 5-7 Church Street and 42 Donald Street, Nelson Bay (the site), within the Port Stephens LGA.

The project is being delivered by Fortezza Group with architectural design by HAL Architect. Meliora Projects, formerly known as Ryan Planning and Development at the time of EOI submission to the Planning Secretary, has been engaged for the preparation of this Environmental Impact Statement.

The \$65,409,024 (Excl GST) development comprises a nine-storey residential flat building (eight levels plus rooftop), including 34 two-bedroom apartments, 22 three-bedroom apartments, a manager's office, and a suite of shared rooftop and landscaped amenities, including a pool, gym, spa, and communal open spaces. The ground floor includes a gym, wellness and amenities area accessible from the grand lobby.

The proposal seeks to deliver a high-quality residential product that responds to Nelson Bay's evolving character and housing needs. Beyond this, the development represents a direct contribution towards the location's economic resilience and vitality through a well-supported permanent population increase in a core commercial centre.

The project has been declared SSD by the Minister for Planning under section 4.36(3) of the EP&A Act 1979, via SSD Declaration Order 2025 (No 3) (published 18 March 2025), following a recommendation by the Housing Delivery Authority (OI No. 234944, dated 7 March 2025). As the proposal includes residential accommodation, referral to the Independent Planning Commission under s.4.36(3B) was not required.



Figure 5- Artist's Impression by HAL Architects

3.2 Development Summary:

Site Area	2,203m ² per survey (Survey, CMS Surveyors, November 2023)
Frontage Width	53.265m to Donald Street and 41.35m to Church Street
Building Height (Max)	29.7m (Approx. per plans)
Number of Storeys	9 Storeys incl. rooftop facilities
Setbacks	▪ 6.93m Donald Street (primary street frontage) ▪ 3.6m Church Street (secondary street frontage) ▪ 7.41m to Side boundary (north – Zone R3 land) ▪ 3.6m Side boundary (east – E1 Zone land)
Total Dwellings	56 dwellings ▪ 2-Bed: 34 ▪ 3-Bed: 22
Manager's Office Space	25.28m ²
Access	6.755m crossover to Donald Street, no vehicle access to Church St
Car Parking	98 parking spaces (78 residential, 18 visitor incl. 2 inclusive, and 1 commercial)
Gross Floor Area (GFA)	6,115.46m ² (per, Development Matrix within Notification Plan Drawings, The Belvedere, HAL Architects, September 2025)
Floor Space Ratio (FSR)	2.8:1 (per, Development Matrix within Notification Plan Drawings, The Belvedere, HAL Architects, September 2025)
Communal Open Space	593.96 m ² (27%) ▪ Grand Lobby: 71.22m² ▪ Roof Terrace: 365.69m² ▪ Stretching Lawn: 44.42m² ▪ Wellness: 112.63m²
Landscaping	▪ Deep Soil: 289.82 m² (13%) ▪ Containerised Planting: 552.68m² (24.9%)
Private Open Space	2004.90m ² ranging from 14.59m ² to 145.81m ²

3.3 Proposed Variation

The subject development is being **proposed with a maximum building height of 29.7m**, which is in contravention of the applicable **maximum building height standard of 28m** set under Clause 4.3 of the Port Stephens Local Environmental Plan 2013. **This equates to a variation extent of 6%**

At the time of this report's production, Clause 4.3 was published per the format below, noting that the 28m maximum height of buildings standard is set via Subclause (2) and the associated HOB mapping –

4.3 Height of buildings

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

(a) to ensure the height of buildings is appropriate for the context and character of the area,

(b) to ensure building heights reflect the hierarchy of centres and land use structure.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

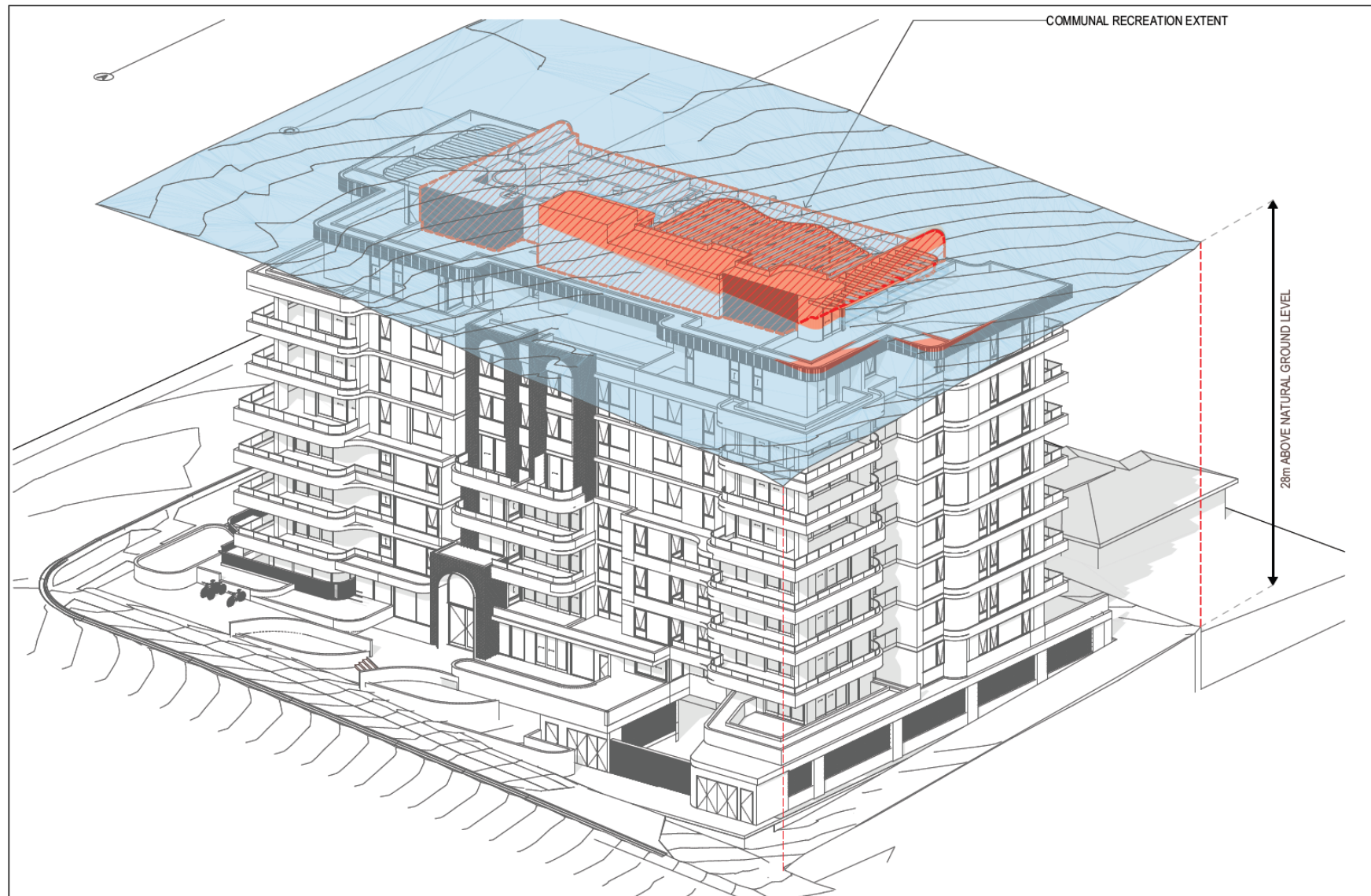


Figure 6 - Excerpt from Primary Architectural Plan Set, HAL Architects, September 2025 (3d Height Plane)



Figure 7 - Excerpt from Primary Architectural Plan Set, HAL Architects, September 2025 (Southern Elevation)



Figure 8 - Excerpt from Primary Architectural Plan Set, HAL Architects, September 2025 (Eastern and Western Elevations)

42 Donald Street, and 5 & 7 Church Street, Nelson Bay 2315

15/A/DP 5616, A/-/DP417172, B/-/DP417172



Figure 9 - Excerpt from Primary Architectural Plan Set, HAL Architects, September 2025 (Northern Elevation)

42 Donald Street, and 5 & 7 Church Street, Nelson Bay 2315

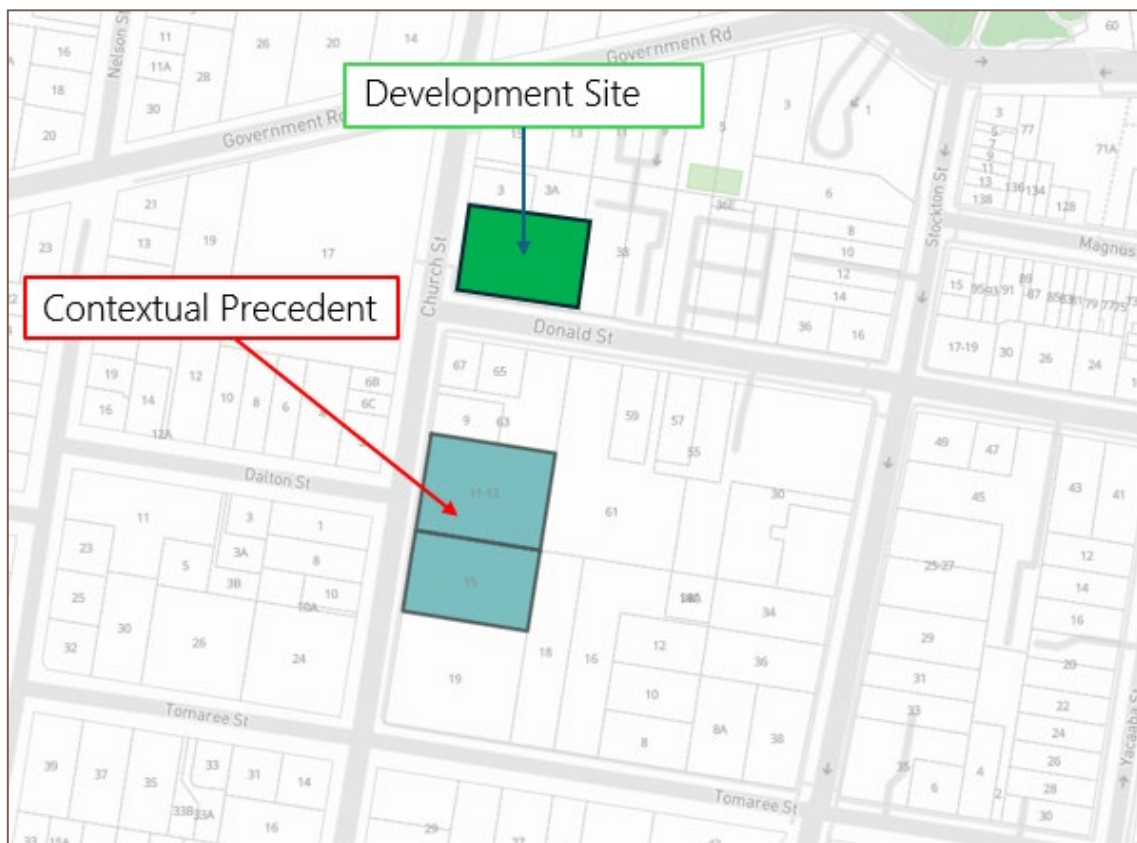
15/A/DP 5616, A/-/DP417172, B/-/DP417172

3.4 Impact Summary:

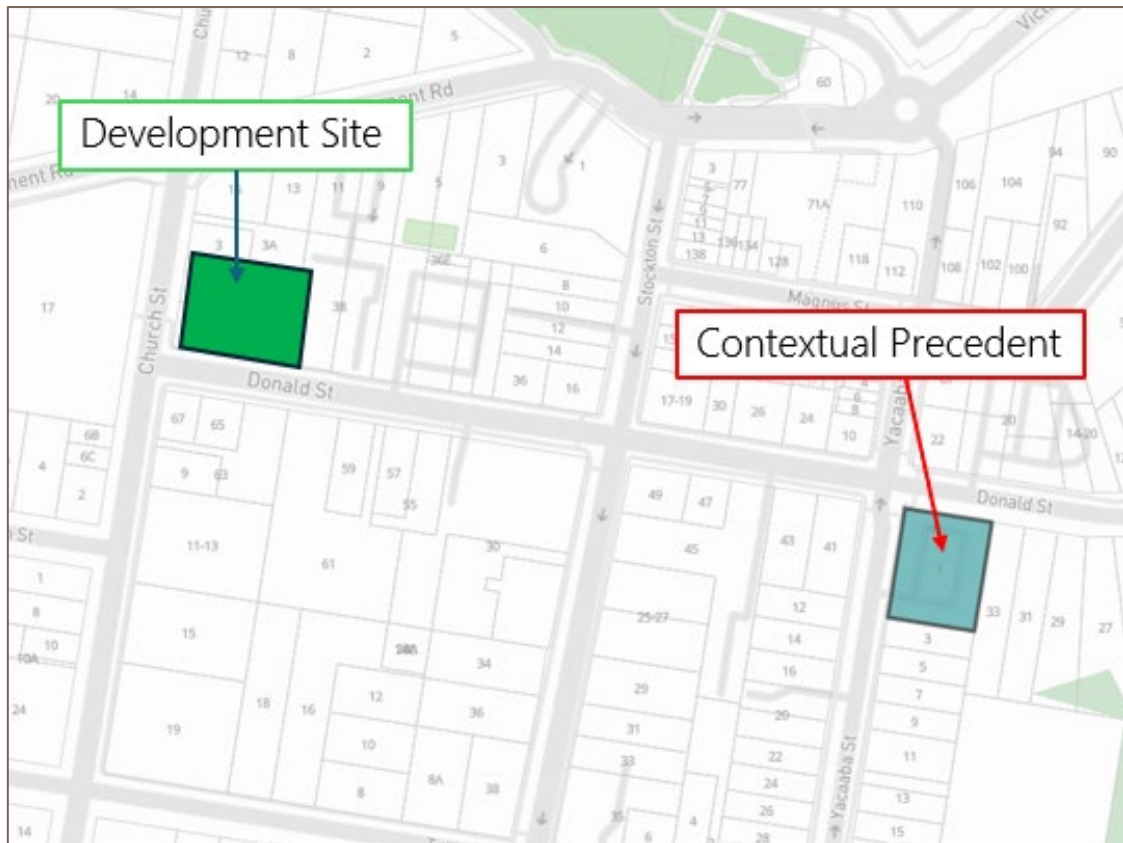
Aspect	Finding
Solar Access	Complies with ADG targets and amenity outcomes both within the development and the locality, as demonstrated. No adverse impacts are envisaged from the development, and outcomes are seen to be equitable with or without the contravention of Clause 4.3 of the LEP
Views	No unreasonable view loss; massing recedes above 7th level.
Visual Impact	High articulation reduces bulk; height is well proportioned in the streetscape. Areas subject to the contravention are recessed and not perceptible from the public domain immediately surrounding the development.
Privacy	No occupiable floor space is above the applicable maximum building height standard, nor are any openings or similar features that would equate to adverse outcomes with regard to privacy amenity.
Wind/Reflectivity	Acceptable per architectural assessment.
Noise/Traffic	Unchanged by height variation.
Urban Heat and Microclimate	Rooftop planting and vertical greenery reduce ambient temperatures and contribute to local microclimate moderation.
Accessibility and Inclusivity	Universal access extends from the public footpath through the lobby to rooftop communal spaces, promoting equitable access across the development.

3.5 Contextual Precedents

Address / Development	Approval Reference	Height Approved	Variation	Relevance
11 – 13 & 15 Church Street, Nelson Bay	DA 16-2021-703-1	30.79 m	9.9% to 14.9% (multiple approvals)	Close proximity to the subject site/proposed development. Representative of extensive consultation and assessment, subsequently of community expectations and prevailing character.



1 Yacaaba St, Nelson Bay 2315 NSW	DA 2021/045	29.8 m	9% to 14.5% (multiple approvals	Equitable corner location in the immediate locality of the proposed. Nearing completion and representative of the prevailing character of the centre.
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4 CLAUSE 4.6 ASSESSMENT FRAMEWORK

4.1 Clause 4.6:

The subject application is seeking to vary the Port Stephens Local Environmental Plan 2013, specifically the maximum height of building development standard set under Clause 4.3, (2) –

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

In order for consent to be issued with a contravention to a development standard, Clause 4.6 of the Port Stephens Local Environmental Plan 2013 must be engaged and the consent authority must be satisfied that the prescribed demonstrations have been provided –

(3) 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.

4.2 Applicable Legal Principles:

The application of Clause 4.6, as contained within relevant Local Environmental Plans (LEPs) in New South Wales, is intrinsically shaped by a series of landmark judgments handed down by the Land and Environment Court (NSW LEC). These judicial determinations provide the critical jurisprudential basis for assessing the degree to which a consent authority may be satisfied regarding the matters prescribed in Clause 4.6, (2) and Clause 4.6, (3).

The following key decisions establish and refine the operational principles governing the assessment of departures from prescribed numerical development standards under Clause 4.6 of the Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a):

4.2.1 *Wehbe v Pittwater Council* [2007] NSWLEC 827:

(The Foundational Framework)

The assessment process commences with the principles established in ***Wehbe v Pittwater Council* [2007] NSWLEC 827**, which articulated the five common, but not exclusive, ways a proponent may demonstrate that strict compliance with a development standard is **unreasonable or unnecessary**:

1. **Achievement of Objectives:** The underlying objectives of the development standard are met despite the numerical non-compliance.
2. **Standard Irrelevance:** The object or purpose of the standard is not relevant to the particular development or the site's circumstances, rendering strict compliance unnecessary.
3. **Thwarting of Purpose:** The underlying object or purpose of the standard would be defeated or demonstrably thwarted if strict adherence were mandated, thereby making compliance unreasonable.
4. **Abandonment/Precedent:** The development standard has been substantially vitiated or abandoned by the consent authority's own actions through the grant of numerous non-compliant consents, thereby rendering current compliance both unnecessary and unreasonable.
5. **Contextual Unreasonableness:** Compliance with the development standard is deemed unreasonable or inappropriate due to the specific existing use of the land or the current environmental character of the particular parcel of land, suggesting the standard's application to the site is flawed.

4.2.2 *Initial Action Pty Ltd v Woollahra MC* [2018] NSWLEC 118:

(Procedural and Substantive Clarification)

The matter of ***Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118** (Initial Action) provides crucial statutory interpretation concerning the correct application of Clause 4.6. This judgment confirmed two significant points:

- **Wehbe Endorsement:** It affirmed that the five common ways established in *Wehbe* remain the valid basis for establishing that strict compliance is unreasonable or unnecessary.
- **Environmental Planning Outcome:** Crucially, the Court determined that Clause 4.6 does not require a development contravening a development standard to demonstrate a **neutral or superior environmental planning outcome** compared to a fully compliant development. This removes a potentially onerous comparative burden from the proponent. Furthermore, the decision established that Clause 4.6(1) is an objective statement and not an operational provision, with the remaining subclauses constituting the operative requirements.

4.2.3 Linfield Developments Pty Ltd v Cumberland Council [2019] NSWLEC 131: (Extending the Third Test)

The decision in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 addressed and extended the application of the third *Wehbe* test, which focuses on the frustration of the standard's purpose.

The Court clarified that the third test extends beyond being "defeated or thwarted" to include situations where the underlying object or purpose would be "undermined" by requiring strict compliance. In the *Linfield* case, the Court found that requiring compliance would "thwart or undermine at least one of the objectives of the height control development standard," thereby validating the proposed variation on the basis that adherence would compromise a superior planning outcome.

4.2.4 SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 and Big Property Pty Ltd v Randwick City Council [2021] NSWLEC 1161: (Defining Desired Future Character)

A subsequent line of authority, commencing with **SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112** and affirmed in **Big Property Pty Ltd v Randwick City Council [2021] NSWLEC 1161**, has fundamentally redefined the role of numerical standards in determining the **desired future character** of an area.

- **SJD DB2:** This case introduced greater flexibility, concluding that the numerical controls and their associated **objectives should not be used in a highly rigid manner to strictly define the desired future character**. It confirmed that the desired future character is a broader concept, capable of being informed by other provisions of the LEP and, critically, by the pattern of existing and approved non-compliant development in the locality.
- **Big Property:** This judgment followed *SJD DB2* by affirming that development standards controlling the building envelope (such as height or FSR) are **generic standards** that do not necessarily account for:
 - Existing and approved non-compliant development.
 - Site-specific factors (e.g., site amalgamations, heritage considerations).
 - Incentive mechanisms within other Environmental Planning Instruments (EPIs), such as floor space ratio (FSR) bonuses, which inherently intensify development.

4.2.5 HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243:

(The Fixed Envelope Doctrine Rebutted)

The principles established in *SJD DB2* and *Big Property* were subsequently reinforced in **HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243** (HPG).

HPG determined with clarity that the **desired future character of a locality is not "determined and fixed" solely by the applicable development standards** for height and FSR, because these generic standards do not, in isolation, dictate the ultimate realised building envelope for a specific site. The assessment of desired future character can, and should, be evaluated by reference to a wider range of relevant environmental planning matters external to the control's objectives.

5 CLAUSE 4.6 ASSESSMENT:

5.1 Is Compliance Unreasonable or Unnecessary?

(Clause 4.6, (3), (a))

The judgment in Wehbe establishes at least five potential alternative grounds to ascertain whether strict compliance with a development standard is unreasonable or unnecessary. The following assessment applies these relevant tests to outline why compliance with the subject development standard is specifically considered unreasonable and unnecessary under the circumstances of the case.

5.1.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard:

It is considered that the objectives of Clause 4.3 of the Port Stephens Local Environmental Plan 2013 are achieved by the proposed development regardless of the subject contravention to the standard set under cl.4.3.

(a) The development, in particular the proposed maximum building height, is demonstrated to be appropriate for the context and character of the area.

- a. **Predominant Compliance:** In the first instance, it is seen that the proposed development has the majority of its built form located within compliance of the maximum building height standard set under Clause 4.3 of the PSLEP2013. When this is considered in tandem with the fact that the areas subject to the requested contravention are centrally located and not overtly perceptible, it is evident that the proposed development will retain compatibility with the character of the locality regardless of the subject contravention. It is considered unlikely that an observer from the public domain would identify any contravention to the maximum building height standard unless they were prompted; even then, quantifying a variation would be near impossible from such perspectives with the naked eye. So then it is reasonably established that the context and character of the locality are unaffected by the variation to the maximum building height as it is currently proposed.
- b. **Prevailing Character:** Further to the above, it is demonstrable that the proposed variation of 6% is lower than the prevailing outcomes exhibited for equitable developments in the immediate locality. Attention in particular is drawn to multiple approvals for 1 Yacaaba Street, Nelson Bay, as well as 11 to 15 Church Street, Nelson Bay, of which show consents for maximum height exceedances of >9%. Reiterating that the height contravention subject to this report is lesser (6%) and is retreated away from perceptible aspects of the development, it is considered to be further demonstrated that the proposed is compatible with the desired and prevailing character of the locality.

- c. Mitigation of Visual Bulk through Design Articulation: The architectural expression, as detailed in the Design Report and Architectural Plans, employs strategic depth and articulation in the façade, stepbacks from boundaries, and a varied material palette to create visual interest, avoiding the appearance of monolithic bulk. This approach ensures that the perceived scale of the development is managed to affect the creation of an attractive and human-scaled structure, enriching the public domain. The design controls bulk through architectural quality, and is evident as a complementary development with regard to the context and character of the locality.
- d. Contextual Response to Topography: The site's location and underlying topography have been considered, ensuring that the height integrates effectively with the existing and future desired context. Detailed external impact analysis in the EIS confirms that the impact on surrounding properties, including view loss and overshadowing, is acceptable and consistent with the anticipated impacts of developing a key strategic site within the town centre.

(b) *The development, inclusive of the subject contravention to the maximum building height, is a representation of building heights that reflect the hierarchy of centres and land use structure.*

- a. Predominant Compliance and Strategic Context: As mentioned above, the proposed development demonstrates compliance with the subject standard over the majority of its extent. In regard to a representation of building heights that are reflective of the hierarchy of standards, this is of enhanced relevance when considering the source of the current standard under consideration. In particular, it is noted that the 'Final Planning Proposal document (DOC19 577897), in reference to the then proposed and exhibited increased building heights, states –
 - i. *"The proposed amendments will achieve greater densities on the edges of the central village precinct, mirroring the topography of the town centre"...*
 - ii. *"This is also consistent with the objectives of the current Port Stephens Development Control Plan 2014 to ensure that buildings reinforce the natural amphitheatre landform of the town centre."*
 - iii. *"The resultant provisions include a variety of applicable maximum heights to take account of local topography and to maximise opportunities for view sharing and solar access. The height of building provisions have also been prepared in conjunction with relevant floor space ratios to maintain solar access, views and appropriate massing as observed from the public realm. The Planning Proposal is consistent with the considerations for setting height controls, contained within the Apartment Design Guidelines."*

It is then established that the 28m height limit standard is reflective of appropriate building heights for the locality. It is further seen to be evident that the subject 6% contravention is not reasonably contended to be such that these outcomes are thwarted by the built form as it is currently proposed. It is concluded that the development is representative of expected outcomes for surrounding properties

after the gazettal of LEP amendments stemming from the Nelson Bay Town Centre and Foreshore (PP-2021-378).

- b. Concentration of Density: The proposal concentrates a significant density of 56 dwellings on the site in direct compatibility with broader strategic planning objectives for the region. This level of intensification is critical to:
 - i. Fulfil Regional Housing Targets: By leveraging the site's location, the proposal directly contributes to the provision of housing supply in a significant centre for the region, where infrastructure capacity and service provision are readily available.
 - ii. Promote Walkable Catchments: This concentration supports the 'Better Connection' principles by placing residents within immediate walking distance of the town centre's commercial, retail, and public transport services. The subject locality intrinsically supports reduced reliance on private transport and enhances the commercial viability of the centre.
- c. Supporting Visual and Land Use Hierarchy: The nine-storey height provides an appropriate marker of density and intensity that is characteristic of a commercial core.
 - i. Visual Distinction: Development at the height proposed creates a clear visual distinction between the main commercial hub and the surrounding lower-density residential areas, thereby reinforcing the planning hierarchy and legibility of the town's structure.
 - ii. Optimal Site Utilisation: The height ensures that the most intensive development occurs in the precise location (the commercial core) best equipped to support it (services, transport, infrastructure), aligning the building height with the land use structure of the centre. The contemporary, cohesive design sets a high benchmark for the precinct's evolving character, supporting local economic vitality and investment.

5.1.2 *The underlying objective or purpose of the standard is not relevant to the development*

The underlying objective of the subject standard is considered to be relevant and achieved by the development as detailed above.

5.1.3 The underlying objective or purpose would be defeated or thwarted if compliance was required

In reality, it is considered likely that the development yield would be significantly reduced in a design that required strict numerical compliance with the standard. As demonstrated at 5.3.1, the development in its current form is seen to be representative of optimised outcomes in the context of the objectives of the standard under consideration. Compliance with the standard is envisaged to necessitate a reduction in the number of habitable dwelling levels for the development in order to keep service projections below the maximum building height standard

5.1.4 The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or:

Within the Nelson Bay Town Centre, Council has consistently granted consent for developments exceeding the 28 m height standard where design excellence, minimal environmental impact and contextual fit are demonstrated. Projects such as **11-15 Church Street (DA 16-2021-703-1)** and **1 Yacaaba Street (DA 2021/045)** have been approved with building heights of 29.8 m to 30.8 m—representing variations of up to 14.9%. These precedents confirm that the strict numerical control has been pragmatically applied and that Council recognises the strategic intent of the D5 Precinct to accommodate higher-density built form.

Given the number of comparable approvals within the immediate locality, it is evident that the 28m control no longer represents a fixed development envelope but rather a performance benchmark guiding overall scale and character. The pattern of consent demonstrates that the standard has been **effectively relaxed or abandoned in practice**, particularly for consolidated sites delivering superior design quality. The current proposal falls squarely within this established pattern and therefore satisfies the fourth Wehbe criterion.

5.1.5 The zoning of land was unreasonable or inappropriate, such that the standards for that zoning are also unreasonable or unnecessary:

It is not considered to be the case that the zoning of the subject site/s is unreasonable or inappropriate.

5.2 Is There Sufficient Environmental Planning Grounds to Justify the Contravention of the Development Standard

(Clause 4.6, (3), (b))

Clause 4.6(3)(b) of the Port Stephens Local Environmental Plan 2013 requires that there be sufficient environmental planning grounds to justify the contravention of the development standard. In considering whether sufficient environmental planning grounds exist to justify the contravention of the 28m height standard, it is necessary to evaluate the broader planning and environmental outcomes achieved by the development rather than the quantum of exceedance alone. The variation facilitates a high-quality architectural and urban design response that enhances residential amenity, contributes to the public domain, and supports the strategic objectives for the Nelson Bay.

5.2.1 Design Excellence and Architectural Resolution:

- The additional height enables full integration of roof plant and screening.
- Improved streetscape outcomes are attained by removing piecemeal mechanical enclosures.
- Rooftop terrace activation enhances passive surveillance and social interaction.

The modest exceedance in building height directly enables a higher standard of design resolution and architectural integration. Without the additional 1.7 m, essential rooftop elements such as the lift overrun, stair access, and acoustic-screened mechanical plant would protrude above the roofline as visually disparate structures. By incorporating these within a unified architectural envelope, the proposal achieves a cleaner skyline silhouette and reduces the apparent bulk that would otherwise result from exposed rooftop infrastructure. This outcome is consistent with the design excellence principles embedded in Schedule 9 of the State Environmental Planning Policy (Housing) 2021 and the Apartment Design Guide, which encourage the integration of building services and rooftop structures into the overall form. The variation therefore produces a superior urban design outcome, improving building appearance and minimising visual clutter when viewed from surrounding streets and vantage points overlooking Nelson Bay.

Moreover, the design facilitates equitable access to rooftop communal open space in accordance with the Building Code of Australia and ADG 3D-1, allowing all residents, including those with mobility impairments, to enjoy this shared amenity. Enforcing strict numeric compliance would compromise this functional and inclusive design intent—contradicting both accessibility and design-quality objectives. It is envisaged that a design response to rigid application of the subject standard would impact the viability of rooftop communal open space, requiring further ground level areas to be reserved, ultimately negatively impact the developments provision of housing supply and subsequently thwarting broader planning objectives for the region. Consequently, the exceedance represents a legitimate and desirable refinement of the built form that upholds the intent of Clause 4.3 rather than defeating it.

5.2.2 *Amenity and Performance Compliance:*

- ADG compliance: Apartments are shown to exceed minimum requirements for cross-ventilation (71%) and solar access (POS - 95%, Internal Living – 73%).
- Internal ceiling heights and floor-to-floor ratios maintain quality design and allow for required separations between levels for the constructability of the development.
- FSR complies (2.98:1 vs 3:1 development standard), confirming bulk within the intent of the standard.

The proposed variation does not translate into any perceptible increase in bulk, scale or adverse amenity impacts relative to a height-compliant scheme. The proposal fully complies with the applicable floor space ratio (3:1) and therefore does not intensify development beyond the quantum anticipated by the planning framework. Shadow analysis contained in the design package demonstrates that the 1.7 m increase does not generate additional unacceptable overshadowing of adjoining properties or the public domain beyond that created by a compliant 28 m envelope. Similarly, view-sharing assessments confirm that the incremental increase at the roof level does not diminish existing bay or district views from any neighbouring dwellings and is largely seen to be compatible with the strategic intent of the current maximum building heights of the locality.

Internally, the design achieves superior residential amenity outcomes, with over 71% of apartments cross-ventilated and 73% receiving at least two hours of direct solar access mid-winter, exceeding the ADG benchmarks. Ceiling heights and floor-to-floor dimensions are maintained to support daylight penetration and visual comfort. In this context, the height variation operates as a performance-based improvement, facilitating building efficiency and livability rather than increasing impact. These characteristics represent compelling environmental planning grounds because they demonstrate that the minor departure achieves the planning intent—high-amenity, sustainable housing within a centre, more effectively than strict compliance would.

5.2.3 *Context and Desired Future Character:*

The Nelson Bay Centre is identified in the *Port Stephens LSPS 2020* as a focus for increased density and height. Buildings of up to 31m are approved and representative of the prevailing skyline for the centre. The proposal's height sits comfortably within that envelope and is consistent with *SJD DB2* and *Big Property* principles.

The Nelson Bay centre is explicitly identified in the Port Stephens Local Strategic Planning Statement 2020 and the Hunter Regional Plan 2041 as a designated location for urban consolidation and medium-to-high-rise housing. The planning vision encourages increased building height and density within the E1 Local Centre and R3 Medium Density Residential zones to reinforce the township's role as a coastal service centre. Within this evolving context, the prevailing built form already comprises buildings (approved) between approximately 26 m and 31 m in height, establishing an accepted skyline datum. Representative approvals, such as those outlined in earlier sections of this report, demonstrate that controlled variations have been consistently supported where justified by design quality and minimal environmental impact.

The proposed height of 29.7 m, therefore, aligns with the desired and prevailing future character rather than exceeding it. The development maintains a clearly articulated podium and tower form, with the upper levels visually receding through step-backs and lighter-weight architectural treatment. When viewed from Donald Street, the proposal reads as part of a cohesive centre skyline, reinforcing rather than dominating the surrounding emergent townscape. The minor exceedance is imperceptible in public domain views and allows the building to perform an appropriate landmark function at a key intersection within the centre. These contextual factors provide strong environmental planning grounds. The proposal is an orderly response to its urban setting, advancing rather than compromising the strategic vision for Nelson Bay.

5.2.4 *No Adverse Environmental Impact:*

- **Solar Access:** Shadow diagrams show acceptable outcomes with regard to shadow impact on public spaces and habitable spaces.
- **View Sharing:** The proposed development is representative of the impacts that were envisaged and assessed as part of the Planning Proposal process that saw the current maximum building heights adopted.
- **Visual Impact:** Minor and indistinguishable impacts are imparted from the proposed versus from a compliant envelope.
- **Privacy, Wind, Noise:** Unchanged relative to compliance.

Detailed technical assessments contained in the Environmental Impact Statement and Design Report confirm that the additional height produces no unacceptable environmental impacts. Shadow modelling undertaken for the winter solstice shows that any additional shadowing generated by the 1.7 m exceedance is not contributory towards any adverse solar access outcomes. View analysis indicates that sightlines from sensitive vantage points, including properties along Church Street and upper-level dwellings on Donald Street, remain as intended from the investigations that informed the current maximum building height standard. Privacy separation distances comply with the ADG's requirements or have otherwise proposed amelioration measures such as visual-privacy screens where encroachments occur.

Because the exceedance occurs above the habitable roof level, it generates no additional noise, traffic, or wind effects beyond that expected of a compliant design, and does not alter servicing or stormwater arrangements. Air-conditioning condensers and mechanical plant are acoustically enclosed within the increased roof space, thereby improving acoustic amenity for both occupants and neighbours. In environmental terms, the variation is therefore entirely neutral—or beneficial—compared with a compliant design. These findings establish that the contravention is environmentally inconsequential, meeting the Clause 4.6 requirement that there be positive and site-specific planning grounds to justify departure.

5.2.5 Strategic Alignment:

- **Hunter Regional Plan 2041** designates Nelson Bay as a key local centre for consolidation.
- **Port Stephens Housing Strategy 2020** targets medium-rise apartments within centres.

The proposed development advances the objectives of multiple higher-order strategic plans and delivers tangible public benefits. The Hunter Regional Plan 2041 and Port Stephens Housing Strategy 2020 both prioritise medium-rise housing within existing centres to leverage infrastructure and reduce urban sprawl. By facilitating 56 new dwellings within walking distance of shops, transport and services, the proposal contributes directly to these strategic housing and sustainability outcomes. The additional height does not increase dwelling yield above the standard but enables a more efficient and enduring building envelope, as well as project viability of the yield below the standard, thereby reducing lifecycle energy demand, maintenance costs and facilitating a density that is reflective of broader strategic intents.

At the local level, the project includes upgrades to the adjoining footpath, new street trees and widened verges consistent with the public-domain objectives of the Port Stephens DCP. The development also enhances activation along Donald Street through an articulated ground-floor interface and extended awning cover, improving pedestrian amenity and safety. The increase in residential occupation in the centre is also directly contributory to enhanced economic stimulus via construction, increased patronage for local business and overall economic vitality amelioration through the local walkable catchment. Collectively, these outcomes constitute public-interest benefits that outweigh any negligible impact of the height exceedance. The variation therefore supports the orderly and economic use and development of land as required by Section 1.3 of the Environmental Planning and Assessment Act 1979 and provides sufficient environmental planning grounds for approval.

6 CONCLUSION

In conclusion, it is considered that the requirements of Clause 4.6(4)(a)(i) have been satisfactorily addressed.

The Belvedere represents a well-considered and contextually appropriate response to its strategic location within the Nelson Bay town centre. The Clause 4.6 Variation Request has demonstrated that:

- Compliance with Clause 4.3 (Height of Buildings) is **unreasonable and unnecessary**, as the objectives of the standard are achieved notwithstanding the non-compliance;
- The variation is **minor in magnitude** (6%) and arises from functional and aesthetic building elements that enhance communal amenity without introducing additional impact;
- The proposal delivers **superior architectural and urban design outcomes**, verified by HAL Architects and supported by a Design Verification Statement;
- There are **sufficient environmental planning grounds**, including improved amenity, public domain activation, and alignment with strategic housing objectives; and
- The variation does not generate any unacceptable impacts in terms of solar access, privacy, bulk and scale, wind, noise, traffic or visual dominance.

Recommendation:

That the consent authority be satisfied that the requirements of Clause 4.6(3)(a) and (b) have been adequately demonstrated, and that strict compliance with the maximum height standard is unreasonable and unnecessary in this case. Accordingly, it is recommended that the minor contravention to Clause 4.3 of the Port Stephens Local Environmental Plan 2013 be supported and the development approved subject to standard conditions of consent.