

# CLAUSE 4.6 WRITTEN REQUEST CLAUSE 4.4 FLOOR SPACE RATIO

## RESIDENTIAL FLAT BUILDING

237 WHARF ROAD, NEWCASTLE NSW 2300  
(LOT 102 DP736173, LOT 1 DP747803)



**CLIENT:** TAMBA PTY LTD C/- EJE ARCHITECTURE

**DATE:** 4 NOVEMBER 2024

**PREPARED BY:**





# CONTENTS

<b>1.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>2.</b>	<b>SITE AND PROPOSED DEVELOPMENT .....</b>	<b>2</b>
<b>4.1</b>	<b>THE SITE .....</b>	<b>2</b>
<b>4.2</b>	<b>THE PROPOSED DEVELOPMENT .....</b>	<b>5</b>
<b>3.</b>	<b>PLANNING INSTRUMENT, DEVELOPMENT STANDARD AND PROPOSED VARIATION ....</b>	<b>9</b>
<b>4.3</b>	<b>ENVIRONMENTAL PLANNING INSTRUMENT TO BE VARIED .....</b>	<b>9</b>
<b>4.4</b>	<b>ZONING .....</b>	<b>9</b>
<b>4.5</b>	<b>DEVELOPMENT STANDARD TO BE VARIED .....</b>	<b>9</b>
<b>4.6</b>	<b>TYPE OF DEVELOPMENT STANDARD .....</b>	<b>9</b>
<b>4.7</b>	<b>NUMERIC VALUE OF THE DEVELOPMENT STANDARD .....</b>	<b>9</b>
<b>4.8</b>	<b>EXTENT OF VARIATION .....</b>	<b>10</b>
<b>4.9</b>	<b>VISUAL REPRESENTATION .....</b>	<b>10</b>
<b>4.</b>	<b>JUSTIFICATION FOR THE PROPOSED VARIATION .....</b>	<b>11</b>
<b>4.10</b>	<b>HOW IS COMPLIANCE WITH THE STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE .....</b>	<b>11</b>
	ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD ACHIEVED NOTWITHSTANDING THE NON-COMPLIANCE? .....	12
	ARE THE UNDERLYING OBJECTIVES OR PURPOSE OF THE DEVELOPMENT STANDARD NOT RELEVANT TO THE DEVELOPMENT? .....	17
	WOULD THE UNDERLYING OBJECTIVE OR PURPOSE BE DEFEATED OR THWARTED IF COMPLIANCE WAS REQUIRED? .....	17
	HAS THE DEVELOPMENT STANDARD BEEN VIRTUALLY ABANDONED OR DESTROYED BY THE COUNCIL'S OWN ACTIONS IN GRANTING CONSENTS DEPARTING FROM THE STANDARD? .....	17
	IS THE ZONING OF THE LAND UNREASONABLE OR INAPPROPRIATE SO THAT THE DEVELOPMENT STANDARD IS ALSO UNREASONABLE OR UNNECESSARY? .....	18
<b>4.11</b>	<b>ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD .....</b>	<b>18</b>
<b>4.12</b>	<b>OTHER RELEVANT INFORMATION .....</b>	<b>26</b>

This document is issued to Tamba Pty Ltd c/- EJE for the purpose of supporting a development application. It should not be used for any other purpose. The report must not be reproduced in whole or in part except with the prior consent of de Witt Consulting and subject to inclusion of an acknowledgement of the source. No information as to the contents or subject matter of this document or any part thereof may be communicated in any manner to any third party without the prior consent of de Witt Consulting.

Whilst reasonable attempts have been made to ensure that the contents of this report are accurate and complete at the time of writing, de Witt Consulting disclaims any responsibility for loss or damage that may be occasioned directly or indirectly through the use of, or reliance on, the contents of this report.

Version	Prepared by:	Reviewed by:	Released by:
<b>1</b>	<b>Name:</b> Josh Taylor-Real <b>Position:</b> Senior Town Planner	<b>Name:</b> Emma Mason <b>Position:</b> Principal Town Planner	<b>Name:</b> Emma Mason <b>Position:</b> Principal Town Planner <b>Date:</b> 5 December 2023
<b>2</b>	<b>Name:</b> Samara Jayne <b>Position:</b> Town Planner	<b>Name:</b> Matthew de Witt <b>Position:</b> Deputy Principal Town Planner	<b>Name:</b> Matthew de Witt <b>Position:</b> Deputy Principal Town Planner <b>Date:</b> 10 January 2025
<b>3</b>	<b>Name:</b> Samara Jayne <b>Position:</b> Town Planner	<b>Name:</b> Matthew de Witt <b>Position:</b> Deputy Principal Town Planner	<b>Name:</b> Emma Mason <b>Position:</b> Principal Town Planner <b>Date:</b> 10 January 2025

**Copyright:** The concepts and information contained in this document are the property of de Witt Consulting. Use or copying of this document in whole or part without the written permission of de Witt Consulting constitutes an infringement of copyright.

## 1. INTRODUCTION

Development standards are a means to achieve an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

This written request seeks a variation to Clause 4.4 of the Newcastle Local Environmental Plan (LEP) 2012 which prescribes a maximum Floor Space Ratio (FSR) of 1.5:1 to the subject site.

This submission has been prepared with regards to a development application for a residential flat building on land known as 237 Wharf Road, Newcastle NSW 2300 (Lot 102 DP736173, Lot 1 DP747803) (the site).

As detailed in this request, the proposed development is considered to meet the requirements prescribed under Clause 4.6 of the Newcastle LEP 2012, as the development standard is considered unreasonable and the development displays sufficient environmental planning grounds to warrant contravention of the development standard.

Clause 4.6 states the following:

### **4.6 Exceptions to development standards**

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

*(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.*

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

*(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.*

#### **Note—**

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

*(5) (Repealed)*

*(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

**Note—**

When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (caa) clause 5.5,
- (ca) clause 8.2.

The use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this written request.

## 2. SITE AND PROPOSED DEVELOPMENT

### 2.1 THE SITE

<b>Address</b>	237 Wharf Road, Newcastle NSW 2300
<b>Lot and DP</b>	Lot 102 DP736173 & Lot 1 DP747803
<b>Zone</b>	MU1 Mixed Use
<b>Land Area</b>	2,625.2m <sup>2</sup>
<b>Existing Structures</b>	Existing commercial building

The site is irregular in shape with a north-south orientation and has a frontage to Wharf Road of 67.05 metres (m). The site has an area of 2,625.2 square metres (m<sup>2</sup>) and is essentially flat. The site is located within an urban area within the city centre opposite Hunter River foreshore. The foreshore is located approximately 35m to the north.

A two-storey commercial building with semi basement parking occupies the site. Landscaping comprises native and introduced trees and ground covers in formal planted gardens typical of an urban environment. Vehicle access to the site is via a driveway crossing at the north east of the site.

The southern boundary lies adjacent a large land parcel identified in the Newcastle Development Control Plan (DCP) 2012, Section 6.01 Newcastle City Centre & DCP 2023, Section E5 Newcastle City Centre, as a proposed laneway. The land to the south previously formed part of the heavy rail corridor.

The lot immediately east is identified as a key site on the Key Sites Map of Newcastle Local Environmental Plan 2012 (LEP). Land to the west accommodates a three-storey commercial building of similar form to the subject site.





**Figure 1:** Aerial view. Subject site outlined in red (source: aerial © Aerometrex 2024)



**Figure 2:** Location plan. Site outlined in red (source: aerial © Aerometrex 2024)



The following site photos depict the site and surrounding features.



**Photo 1:** View of the future laneway site facing west.



**Photo 2:** View of the rear of the existing building facing north-west.



**Photo 3:** View along the Brown Street corridor facing southwest.



**Photo 4:** View of the adjoining carpark facing east.



**Photo 5:** View towards the Hunter River facing north.



**Photo 6:** View of the existing driveway access.



**Photo 7:** View of the existing building entrance facing southwest.



**Photo 8:** View along Wharf Road facing west.

## 2.2 THE PROPOSED DEVELOPMENT

The DA is seeking consent to demolish existing commercial structure and erect a residential flat building consisting of a six (6) storey building with 20 units, resident facilities and associated car parking. The residential development will consist of the following:

### *Basement Level*

- Carpark consisting of 39 parking spaces which includes 38 residential car spaces and 1 service/car wash space. Additional storage areas are provided for the 38 residential car spaces.
- Carpark is accessed via a curved two lane vehicle ramp off Wharf Road.
- Two designated bin areas accessed next to the lift lobby.
- Associated plant areas.

### *Ground / podium Level*

- Outdoor terraces and pool.
- Two (2) x three bedroom units:
  - Master bedroom with walk in wardrobe and ensuite
  - 2 x bedrooms with ensuite
  - Living, dining, kitchen space with pantry
  - Family room
  - Laundry room
  - Terrace with spa
- Resident lounge and gym.
- Concierge and lobby area.
- Amenities facilities (one accessible and two unisex).
- Residential wine cellar.

### *Levels 1 to 4*

- Four (4) x three bedroom units:
  - Master bedroom with walk in wardrobe and ensuite
  - 2 x bedrooms with ensuite
  - Living, dining, kitchen space with pantry
  - Family room
  - Laundry room
  - Large balconies fronting Wharf Road and smaller balconies fronting the rear laneway.

### *Penthouse Level*

- Two (2) x three bedroom units:
  - Master bedroom with walk in wardrobe and ensuite
  - 2 x bedrooms with ensuite
  - Living, dining, kitchen space with pantry
  - Family room
  - Laundry room
  - Wrap around terrace with spa and fire pit and secondary terrace off bedroom 2 and 3.

Floor plans are not provided within this document for privacy reasons but can be found in the architectural plan set provided with the DA package. The table below summarises the gross floor area (GFA) of each level. The GFA excludes the carparking area, lifts, stairs, services, balconies with outer walls of less than 1.4m and areas for common circulation as per the definition of GFA within LEP 2012.

LEVEL	GFA (M <sup>2</sup> )
Basement	10.6
Podium ground floor	805.4
First floor	883.6
Second floor	883.6
Third floor	883.6
Fourth floor	883.6
Fifth floor	508.8
<b>TOTAL</b>	<b>4,859.2</b>

Visual representation of the development is provided in the site plan and elevation plans below.



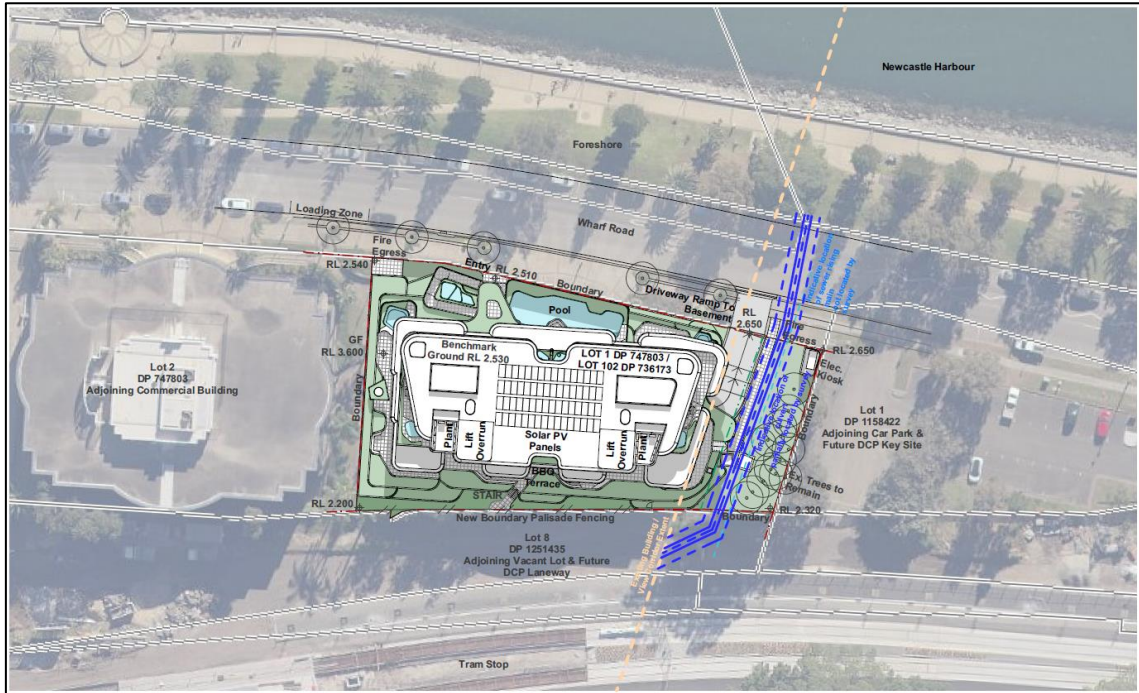


Figure 3: Site plan (source: EJE Architecture)

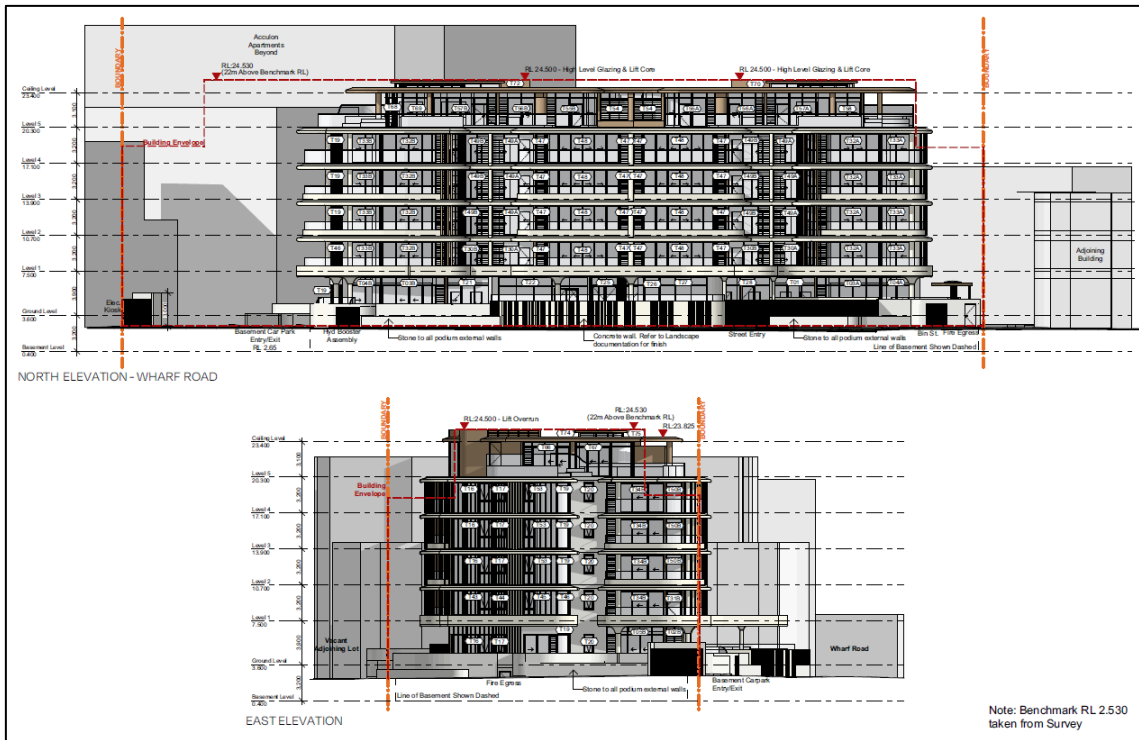
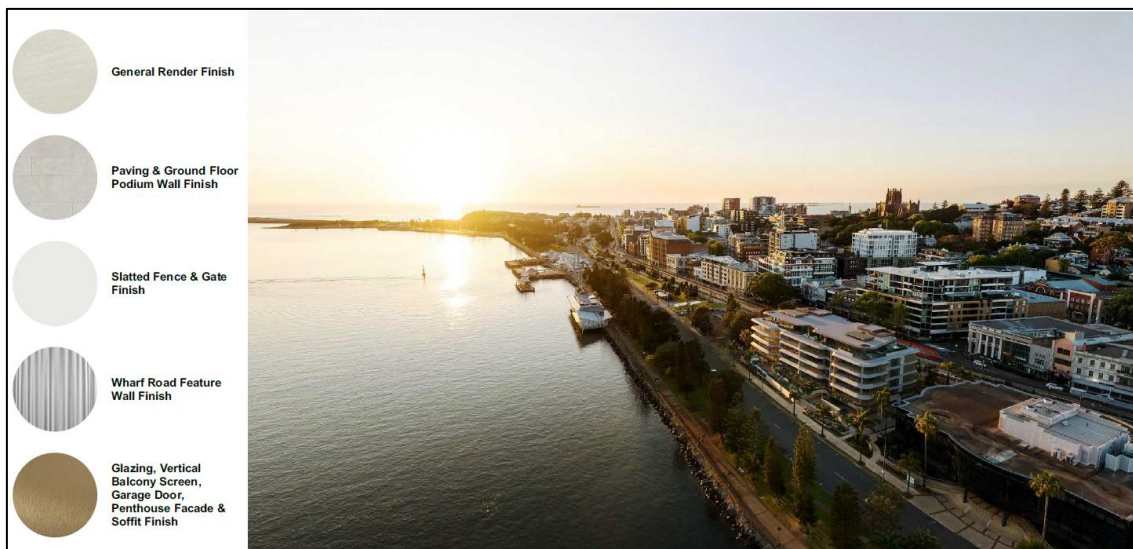


Figure 4: North and East Elevations (source: EJE Architecture)



**Figure 5: South and West Elevations** (source: EJE Architecture)



**Figure 6: Colours and Materials Schedule** (source: EJE Architecture)

The building is of high architectural design in its proposed form, scale and materials of choice. In the architect's statement:

*The architectural design is modern, with the aim to be timeless, with detailed attention paid to proportion both horizontal and vertical. Stylistically the development achieves an elegant soft aesthetic through the use of the flowing curves, layered elements and sophisticated materials including stone, rendered masonry, metal cladding and glass. The material articulation breaks down the bulk of the building appearance from the streetscape and responds to the human scale of the pedestrians passing by.*

*The overall design of this boutique residential development provides a quality urban design and architectural outcome that strongly contributes to the character of the Civic Precinct and Newcastle. The architecture is modern, yet timeless in its proportions and*

*materials, offering a high level of amenity for residents, with direct access to the community services and recreational facilities of Newcastle.*

*The design incorporates sustainable principles and will benchmark future developments to contribute to the streetscape and public realm. Establishing such a standard will produce not only quality future developments and a sense of place, but also enrich the character of the area and representing an exciting new residential offering to be appreciated by existing and new residents.*

The building has been designed in accordance with the Apartment Design Guide (ADG) to ensure a high level of amenity is provided to future residents. The development is substantially compliant with the provisions of Newcastle Development Control Plan (DCP) 2012.

### 3. PLANNING INSTRUMENT, DEVELOPMENT STANDARD AND PROPOSED VARIATION

#### 3.1 ENVIRONMENTAL PLANNING INSTRUMENT TO BE VARIED

The environmental planning instrument to be varied is Newcastle Local Environmental Plan (LEP) 2012.

#### 3.2 ZONING

The land is zoned MU1 Mixed Use pursuant to Newcastle LEP 2012.

CLAUSE	COMMENT
2.1 Land use zones	The site is zoned MU1 Mixed Use.
2.3 Zone objectives	<p>Objectives of the MU1 zone are as follows:</p> <ul style="list-style-type: none"> <li><i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i></li> <li><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></li> <li><i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i></li> <li><i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i></li> <li><i>To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.</i></li> </ul>

#### 3.3 DEVELOPMENT STANDARD TO BE VARIED

This written request seeks to vary clause 4.4 Floor space ratio of Newcastle LEP 2012.

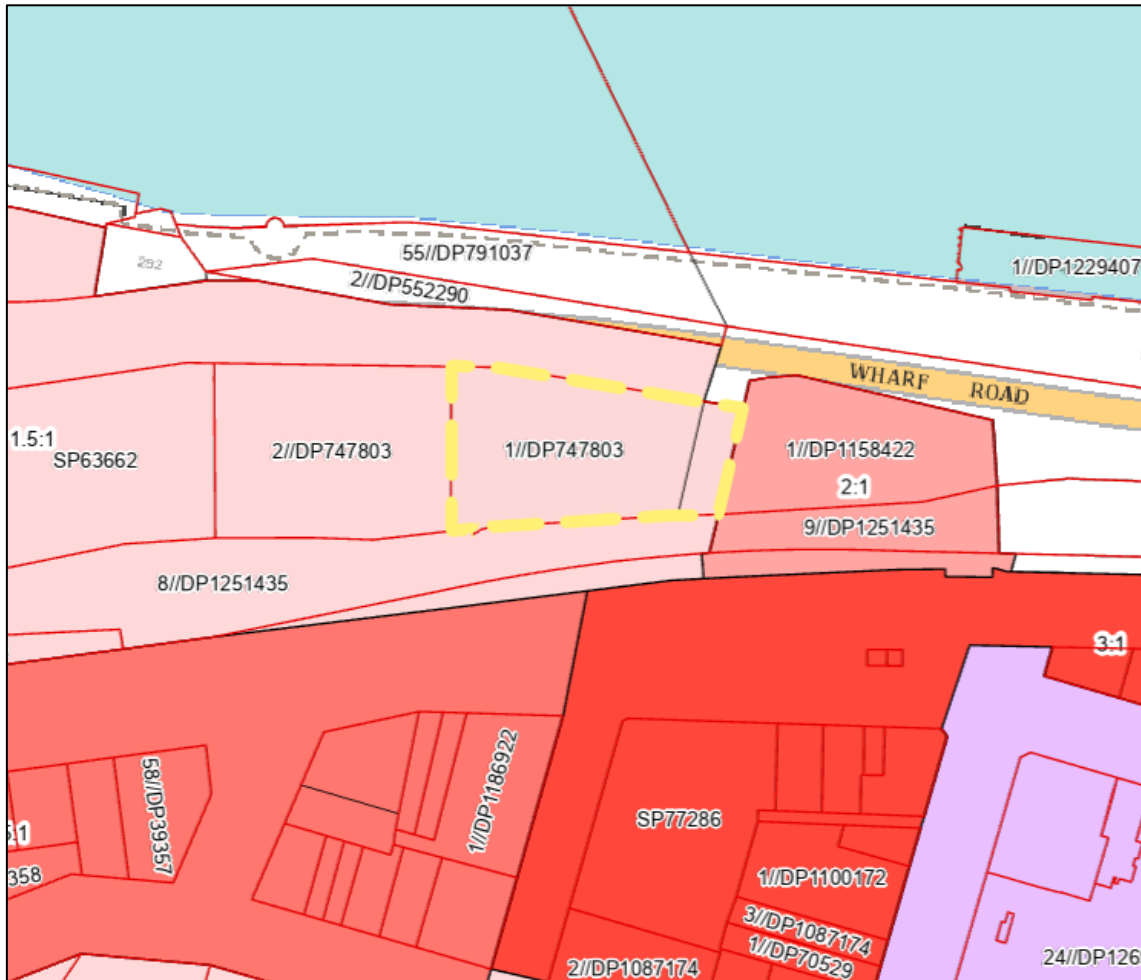
#### 3.4 TYPE OF DEVELOPMENT STANDARD

Floor space ratio is a numerical development standard.

#### 3.5 NUMERIC VALUE OF THE DEVELOPMENT STANDARD

A maximum floor space ratio of 1.5:1 applies to the subject site, as per *Figure 10* below.





**Figure 10:** Floor Space Ratio Map – subject site outlined in yellow (Source: NSW Planning Portal)

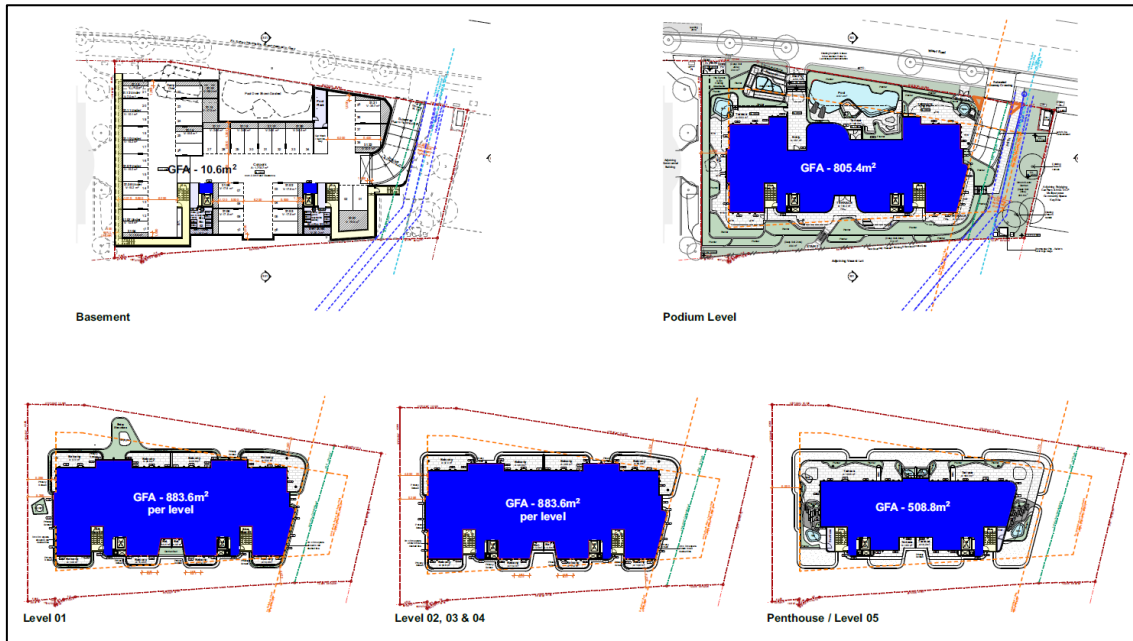
### 3.6 EXTENT OF VARIATION

The proposal exceeds the maximum floor space ratio development standard by 0.35:1 which is a percentage variation of 23.3%.

The maximum floor space ratio is 1.5:1. Based on a total site area of 2,625.2m<sup>2</sup>, the maximum allowable GFA is 3,937.8m<sup>2</sup>. The proposal has a total gross floor area of 4,859.2m<sup>2</sup> represented as a floor space ratio of 1.85:1.

### 3.7 VISUAL REPRESENTATION

The distribution of floor area across the site is represented in *Figure 11*.



**Figure 11:** GFA Calculations (Source: EJE Architecture)

#### 4. JUSTIFICATION FOR THE PROPOSED VARIATION

The exceedance of floor space is not directly attributed to, or associated with any one specific area or room that does not form a necessary part of the proposed high amenity and contemporary design. The floor space of the proposed development is generated by the need for high quality, livable, and spaciouly dimensioned residential accommodation. The development is substantially consistent with surrounding built form in the locality, much of which consists of generously sized multi-storey residential flat building developments and commercial office buildings reflective of the City Centre. In particular it is compatible with more recent residential flat buildings or mixed-use developments such as at neighbouring Honeysuckle.

It is our submission that the exceedance provides for increased internal and external amenity and functionality for future residents, and will not adversely impact on the amenity of adjoining properties, nor will the variation compromise the future character of the area. As such, a degree of flexibility is considered reasonable in this instance and anticipated under the LEP where justification is made. Further discussion is provided below.

##### 4.1 HOW IS COMPLIANCE WITH THE STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE

With reference to Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827, the first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance.

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy.

5 PART TEST	COMMENT
Are the objectives of the development standard achieved notwithstanding the non-compliance?	The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development provides an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.
Are the underlying objectives or purpose of the development standard not relevant to the development?	A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
Are the underlying objectives or purpose of the development standard not relevant to the development?	A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
Has the development standard been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard?	A fourth way is to establish that 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.
Is the zoning of the land unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary?	A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".

Satisfactorily demonstrating that compliance with a development standard is unreasonable or unnecessary in any one of these ways is sufficient for meeting the requirement in Clause 4.6(3)(a) of LEP 2012.

The Wehbe test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out in the sections below.

#### Are the objectives of the development standard achieved notwithstanding the non-compliance?

The objectives of the development standard are outlined below.

CLAUSE	COMMENT
4.4 Floor space ratio	(1) The objectives of this clause are as follows—  (a) to provide an appropriate density of development consistent with the established centres hierarchy,



CLAUSE	COMMENT
	<p>(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.</p> <p>(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.</p> <p>(2A) Despite subclause (2), the maximum floor space ratio for a building on land in any zone in this Plan is to be determined as if the area of the access laneway of a battle-axe lot were not part of the area of the lot.</p>

In response to **objective (a)** of the Floor space ratio development standard, reference is made to the established centres hierarchy as defined by the strategic planning framework and implemented by Newcastle LEP through land use zoning.

The strategic planning framework within which the site operates consists of the Hunter Regional Plan 2041, the Greater Newcastle Metropolitan Plan 2036 and the Newcastle Local Strategic Planning Statement. The Hunter Regional Plan 2041 identifies the site as within the Newcastle City Centre which is described as the Metropolitan capital of economic significance to NSW and a strategic centre that is the heart of the surrounding district. The Greater Newcastle Metropolitan Plan 2036 identifies the City Centre's role in Greater Newcastle as a catalyst area for growth. Catalyst areas are places of metropolitan significance and include Broadmeadow, Callaghan, East Maitland, John Hunter Hospital, Kotara, Newcastle City Centre, Glendale and Cardiff, Beresfield–Black Hill, Tomago, Newcastle Airport at Williamstown and Newcastle Port. These locations are intended to underpin new job opportunities for Greater Newcastle and help to meet the expected demand for diverse housing options close to jobs and services. The Newcastle Local Strategic Planning Statement (LSPS) defines the commercial hierarchy as comprising strategic centres, local centres (major), neighbourhood centres and local centres (minor). The City Centre is identified as a strategic centre, intended to service the Hunter region with higher order administration, education, health services, cultural and recreational facilities with high density commercial and residential uses (*Figure 12*).



**Figure 12:** Centres hierarchy (Source: Newcastle Local Strategic Planning Statement, City of Newcastle)

Newcastle LEP assigns the MU1 Mixed Use Development zone to the site, which allows for the range of commercial, recreational, residential and other uses consistent with those envisaged for higher order centres by the strategic planning framework. The proposed development is characterised as residential, consistent with the types of uses encouraged within a strategic centre and catalyst area.

Objective (a) calls for an appropriate **density** of development commensurate with a strategic centre. Key measures of density include floor space, height, number of storeys and number of units. Each of these measures is addressed below.

DENSITY MEASURE	PROPOSAL
Floor space (GFA)	4,859.2m <sup>2</sup>
Height	21.97m

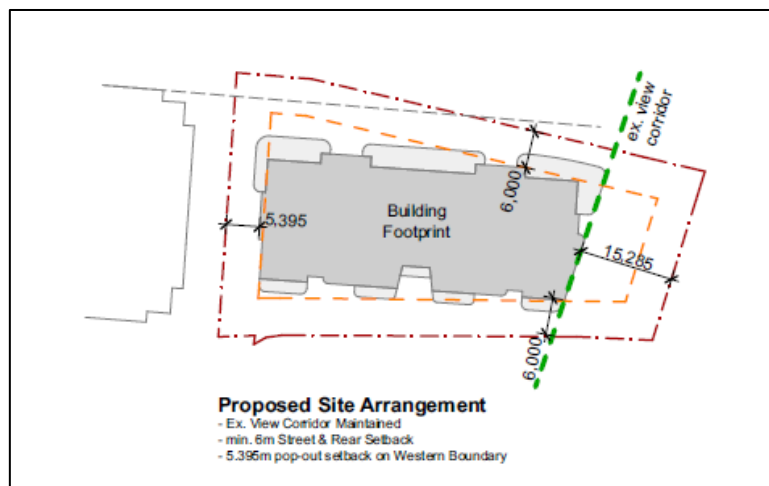
DENSITY MEASURE	PROPOSAL
Number of storeys	6
Number of residential units	20

It is therefore concluded that the proposed development is of a density that is consistent with the established centres hierarchy (in this case, a strategic centre) and is therefore consistent with **objective (a)** of the development standard.

**Objective (b)** of Clause 4.4 requires the building density, bulk and scale to make a positive contribution towards the desired built form as identified by the centres hierarchy. The LSPS (or another strategic framework document) does not explicitly identify the desired built form for a strategic centre. In the absence of an explicit statement in the strategic framework, the provisions of Newcastle DCP 2012, specifically Section 6.01 Newcastle City Centre are relied upon to guide desired built form. Key built form requirements include those relating to setbacks, character areas and view corridors.

### Setbacks

With regard to setbacks, the development adjoins the Multi-purpose Community Space Precinct and as such requires additional setbacks of 6m to comply with the precinct requirements. It is noted that the north eastern balconies extend into the 6m setback area due to the shape of the lot and the requirement to ensure the view corridor is retained from Brown Street located toward the south. It is considered the minor departure from the control is acceptable on merit as the development achieves the objectives of the control. It is noted that the existing building provides a compliant setback to Wharf Road. Setbacks are depicted in *Figure 13*.



**Figure 13:** Setbacks (Source: EJE Architecture)

### Character Area

The site is located within the Civic Character area, however it is noted to be on the very outskirts of this character area and the land immediately to the east is within the Foreshore Character area and the land immediately to the south is the East End Character area.

The proposed variation to the development standard does not hinder the objectives of the adjoining character areas being met, whilst “Foreshore Area” precinct includes a principle that indicates that *New development promotes and facilitates the continuity of public access to the whole foreshore*, the proposal does not remove any existing public



access, the development enables a continuation of the existing available access to the foreshore. By way of facilitating access to the foreshore, the proposal, regardless of FSR ensures connectivity identified in the DCP's Network Access Map which further compliments potential future connections within the foreshore precinct.

It is noted that the Civic area is characterised as the administrative, cultural and educational centre of Newcastle. The area includes the University of Newcastle city campus, Civic theatre, City Hall, Newcastle Museum as well as the courts. Development for the area is anticipated to support the role of Civic as the primary administrative, cultural, and educational centre of Newcastle. The proposed development will provide twenty 3 bedroom apartments which will help provide residence for people working in the Newcastle CBD area.

Whilst Principle 2 within this section of the DCP suggests that *visual and physical connections through the area and between Civic and the Hunter River Foreshores are opened*, the DCP further illustrates specific locations through its Network Access Map where new or upgraded pedestrian and or vehicle connections are important or to be implemented through future development. It is important to recognise potential through connection across the subject site has not been identified on this Network Access Map. Further to this, the Network Access Map illustrates multiple selected suitable additional pedestrian links which between Hunter Street, Wharf Road and the Foreshore. It could also be considered the indication of improving connection between the civic and foreshore may also relate more centrally to the precinct which too is evident by the identified areas for improvement or connection.

Further to this, the proposed development has provided for pedestrian movement between the future laneway and Wharf Road with its treatment of stairs to-from the terraces ensures future potential future infrastructure i.e. laneway is not hindered, and the proposed outcome can be integrated to achieve the desired outcomes. The proposed design which does not propose additional pedestrian or vehicle connection through is still consistent with intended outcomes of the DCP.

As addressed below, the proposal maintains the view corridor visual connection between the harbour and the city with its careful consideration of setbacks. The proposed side setbacks ensure visual connection is ensured consistent with view corridor identified in the DCPs Views and Vistas map. As demonstrated in View Analysis Sheet 01 of the architectural plans demonstrates the proposals height still provides for stepping down towards the harbour. The height is compliant with the LEP Clause 7.5(6) allowance of 22m and therefore height is not considered to unreasonably impact the visual connection with the foreshore. Further consideration of view sharing is provided in Section 4.2.

The proposed use is permitted with consent in the MU1 Mixed Use and is compatible/consistent with surrounding land uses reflective of the City Centre. In particular it is compatible with more recent residential flat buildings or mixed-use developments such as at neighbouring Honeysuckle. The development is therefore consistent with the intent of the MU1 zone in providing residential dwellings to support the Civic area of Newcastle. It therefore meets community housing needs whilst providing services that meet the daily needs of residents. The objectives of this zone are therefore met.

The Newcastle Local Strategic Planning Statement 2021, Greater Newcastle Metropolitan Plan 2036, and Hunter Regional Plan 2041 all identify the area as within the Urban Renewal Corridor Stage 1. The Honeysuckle precinct is currently undergoing significant redevelopment while increasing density in proximity to infrastructure is increasingly being positioned in planning as vital to meeting housing needs. The precinct

is transforming to one of modern architecture that respects what makes Newcastle desirable. The proposal is intended to act as a gateway and link between the eastern foreshore area and Honeysuckle to the west. The proposed development is therefore in keeping with the emerging and future character of the area.

External 3D Perspectives Sheet 01 within the architectural plans demonstrates that the proposal would not be out of place in its setting and surrounding built form. It is considered the development provides a valuable contribution to the character of the area.

#### **View corridor**

The DCP-protected view corridor along Brown Street to the south of the site faces approximately north-north east towards the harbour beyond. The building has been sited and design to protect the view corridor by increasing the eastern side setback from the required 6m to 15,285m to ensure the views and vistas along Brown Street from King can be established.

A Visual Impact Assessment prepared by Terras Landscape Architects has been undertaken including assessment of this corridor and considered the development appropriate. Further consideration of view sharing impacts in relation to the FSR variation is provided in Section 4.2.

The proposal is therefore able to demonstrate consistency with **objective (b)** of the development standard by proposing building density, bulk, and scale that makes a positive contribution towards the desired built form as identified by the centres hierarchy.

The above demonstrated that the proposal achieves the objectives of the development standard notwithstanding the variation.

#### **Are the underlying objectives or purpose of the development standard not relevant to the development?**

The underlying objective or purpose of the standard is relevant to the development. Therefore, this test is not applicable.

#### **Would the underlying objective or purpose be defeated or thwarted if compliance was required?**

Compliance with the floor space ratio development standard could result in outcomes that are both unsuitable to the locality and of lesser or poor quality. On balance, the proposed development provides a better means to achieve the object of the standard, when compared with a compliant built form. The development provides a housing option of unrivalled quality. The proposal incorporates features such as generously proportioned lobbies, internal circulation spaces and communal recreation spaces (resident lounge and gym). In combination with generously proportioned units befitting the prime location the proposal will fulfil the strategic and statutory objective to serve as a catalyst for growth and help to meet the expected demand for diverse housing options close to jobs and services.

#### **Has the development standard been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard?**

City of Newcastle (CoN) Council has approved various DAs with floor space ratio variations in the City Centre and throughout the Newcastle local government area (LGA). The previous variations indicate CoN has historically applied a suitable level of flexibility to the standards where appropriate. We would argue that the same level of flexibility is being sought here.

The strength of the proposed development's ability to meet the objectives of the standard notwithstanding the variation, the unique site location and strong environmental planning grounds for the variation (discussed later in this written request), warrant a level of flexibility proposed by this particular development.

Is the zoning of the land unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary?

The zoning of the site is appropriate therefore this test is not applicable.

#### 4.2 ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

The environmental planning grounds on which the proposed variation may be supported are outlined in the table below.

ENVIRONMENTAL PLANNING GROUNDS	DISCUSSION
The proposal responds to the unique circumstances of the site	<p>The site is unique in terms of its waterfront and City Centre location. The location is highly visible, not just because of its waterfront position. It can be viewed 'in the round' from Hunter Street, Newcastle harbour and foreshore and from higher topographical view points to the south and south east. This visibility demands a higher quality architectural response than a less prominent site would.</p> <p>This prime location also requires a higher end, boutique style development that meets demand for the highest quality housing.</p> <p>The proposed development successfully meets both challenges whilst also making a significant positive contribution to the built form and desired character. It does this by:</p> <ul style="list-style-type: none"> <li>• Protecting the Brown Street view corridor</li> <li>• Minimising overshadowing of the public domain including Wharf Road, the former railway corridor / future laneway immediately south of the site, and the key development site to the east (refer to further discussion on shadow impacts below) the quality and amenity of surrounding public spaces are retained</li> <li>• Achieving required setbacks (minor encroachment on the western boundary but significantly increased on the eastern boundary)</li> <li>• Improving the biodiversity value of the site through extensive quality landscaping.</li> </ul> <p>On balance, and despite the variation to the development standard, the proposal contributes to, and does not detract from the public domain.</p>
Brown Street view corridor	<p>The proposal provides a considered response to the DCP-facilitated Brown Street view corridor. The images below are taken from the Visual Impact Assessment prepared in relation to the proposal. The visual impact is assessed to be moderate from this location due to the proposed vegetation and integration with existing development, and existing trees external to site providing a screening effect. The assessment concludes:</p> <p><i>"The proposed removal of the mature trees to the east rebalances the loss of vertical light and opens up potential views towards the water within the view corridor."</i></p> <p>Thus, the proposal conserves the built and cultural heritage values of the City Centre, despite the variation.</p>





View sharing

View sharing has been considered and documented in the Visual Impact Assessment prepared by Terras and issued to Council via the Planning Portal in 2024, and subsequent additional information prepared by de Witt Consulting including responses to Council requests for information and responses to submissions. Most recently, in response to representations made by nearby residents to the regional planning panel, additional view analysis was undertaken in relation to units 503, 603 and 703 at the Acculon Apartments to the southeast. The view sharing analysis followed the for NSW Land and Environment Court (LEC) established planning principles within *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140. The analysis is provided below.

The views in question are from “private property” being generally from the Acculon Apartments 503, 603 and 703. In accordance with the planning principles established under *Tenacity Consulting v Warringah Council*, view sharing from private property is considered using the following criteria:

- 1) **Type of views to be affected.** Water views are valued more highly than land views. Whole views are valued more highly than partial / interrupted / obscured views.
- 2) **Area of the property the views are obtained.** Protecting views across side boundaries is more difficult than front to rear boundaries (in the direction of the view). Views from sitting positions are more difficult to protect than from standing.
- 3) **Extent of the impact.** Impact on views from living areas is more significant than bedrooms or service areas. Should be a qualitative assessment (negligible, minor, moderate, severe, etc).
- 4) **Reasonableness of the proposal that is causing the impact.** A development that complies with the planning controls is more reasonable than one that breaches them.

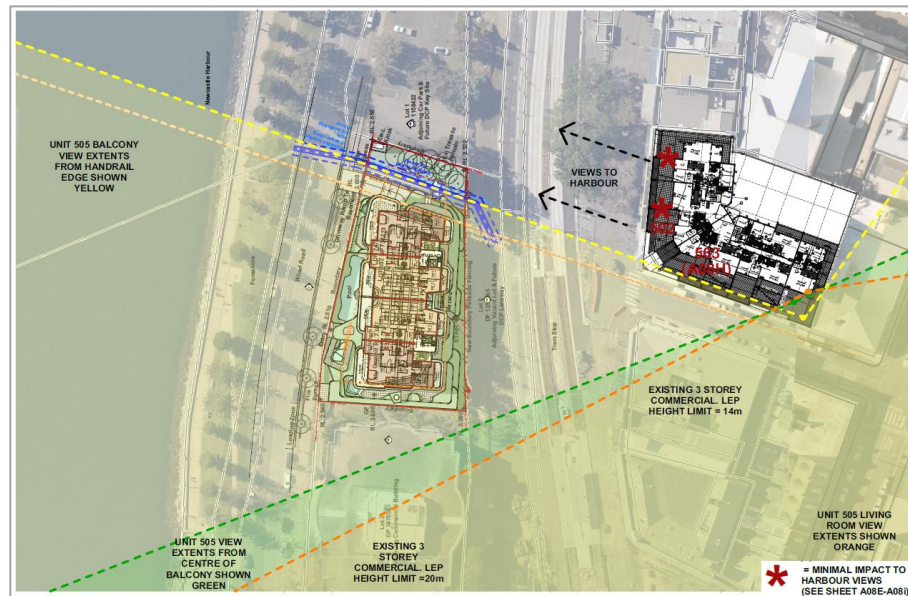
Whilst prior supporting documents considered view sharing from these three units, additional view analysis has occurred in response to the Regional Planning panel Public Briefing and photographs provided to the applicant via Council of the affected views from units 503 and 703. In the absence of photographs from unit 603, relative analysis was undertaken using known RLs from the Acculon Apartments and the proposed development.

Per *Tenacity Consulting v Warringah Council*,

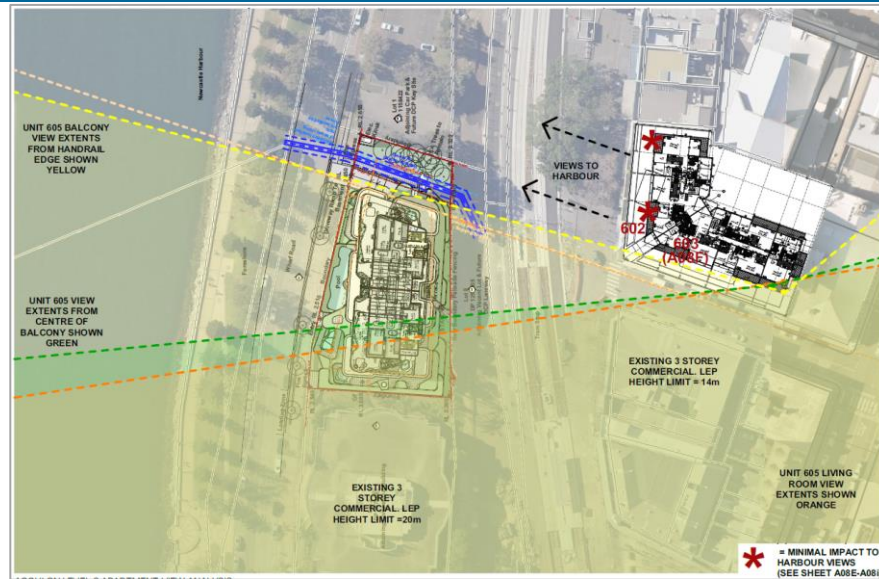
*“The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour*

*Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured."*

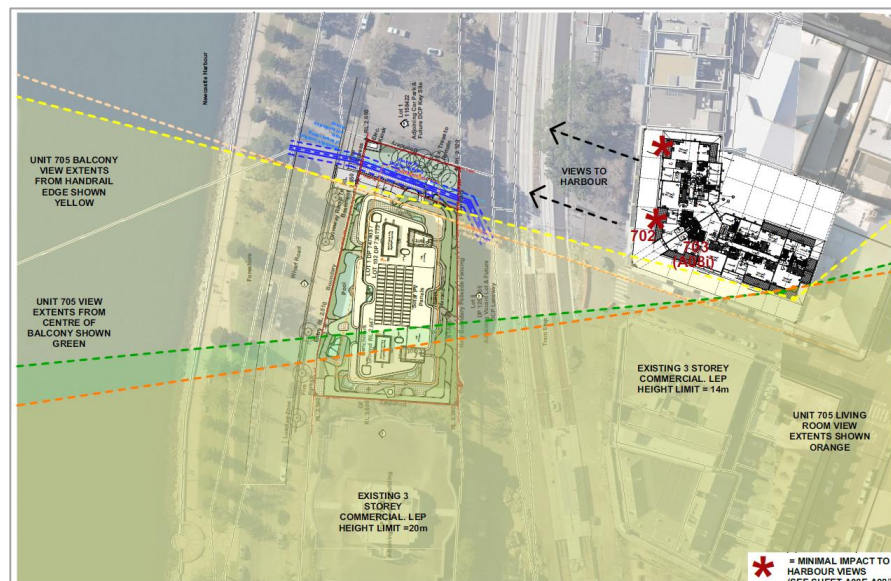
The views in question are from Units 503, 603 and 703 of the Acculon Apartments where there are existing views to the northwest towards the harbour and the west towards Newcastle West. It could be considered views to the northwest towards the harbour are 'more valuable' when considering description provided in *Tenacity Consulting v Warringah Council*, being water views with a clearly visible interface between water and land. As is typical of these matters, the extent water views and / or interface between land and water depends on the apartments' location whereby the higher the apartment, the greater the opportunity for views to the harbour. However it is also relevant to note that Unit 503 has a wider range of view from the balcony than the higher units, due to the larger depth of the Unit 503 balcony.



Visual analysis – unit 503



Visual analysis – unit 603



Visual analysis – unit 703

Photographs provided to the applicant demonstrate the extent of water / interface views (refer to architectural plan set). It is noted that photographs from unit 603 were not provided to the applicant.



Photographs from the balcony – unit 503





UNIT 703 EXISTING HARBOUR VIEW - NW



UNIT 703 EXISTING HARBOUR VIEW - NNW



UNIT 703 HARBOUR / CITY VIEW - W (NO IMPACT)

#### Photographs from the balcony – unit 703

Per *Tenacity Consulting v Warringah Council*,

*“The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.”*

The nature of the building results in various quantum and quality of views from the balconies (presumed to be accessible from the primary living space) of the water, the land and water interface and of urban views.

The potential impacts are modelled in the architectural plan set and replicated below. Note: for unit 603, the modelling is based on RLs and known balcony locations / extents.



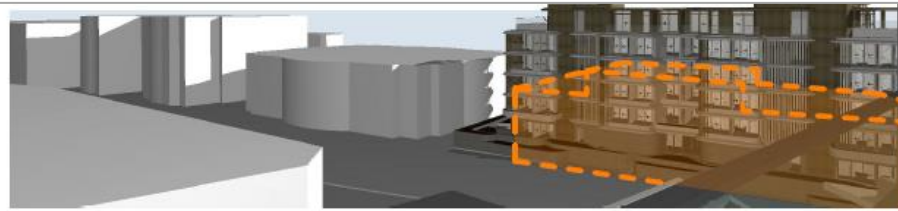
UNIT 503 PROPOSED HARBOUR / CITY VIEW - NNW



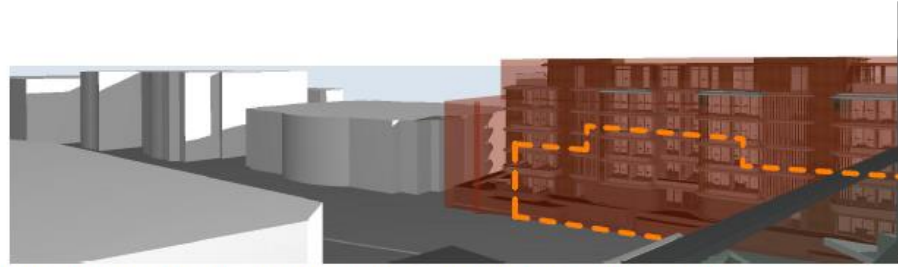
UNIT 503 PROPOSED HARBOUR VIEW - NW

#### View impacts modelled for unit 503





UNIT 603 NW BALCONY HARBOUR VIEW - EXISTING BUILDING SHOWN ORANGE



UNIT 603 NW BALCONY HARBOUR VIEW - SHOWING HEIGHT LIMIT EXTENTS

#### View impacts modelled for unit 603



UNIT 703 PROPOSED HARBOUR VIEW- NW



UNIT 703 PROPOSED HARBOUR VIEW - NNW

#### View impacts modelled for unit 703

Per *Tenacity Consulting v Warringah Council*,

*“The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas. The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.”*

The extent of the impact in this instance, as depicted in the images above are considered moderate having consideration for the type of view obstructed by the proposed development and the extent of the impact.

However, it is also important that the view analysis considers the impact of the available and proposed building envelope. Per *Tenacity Consulting v Warringah Council*,

*“The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying*

*proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.”*

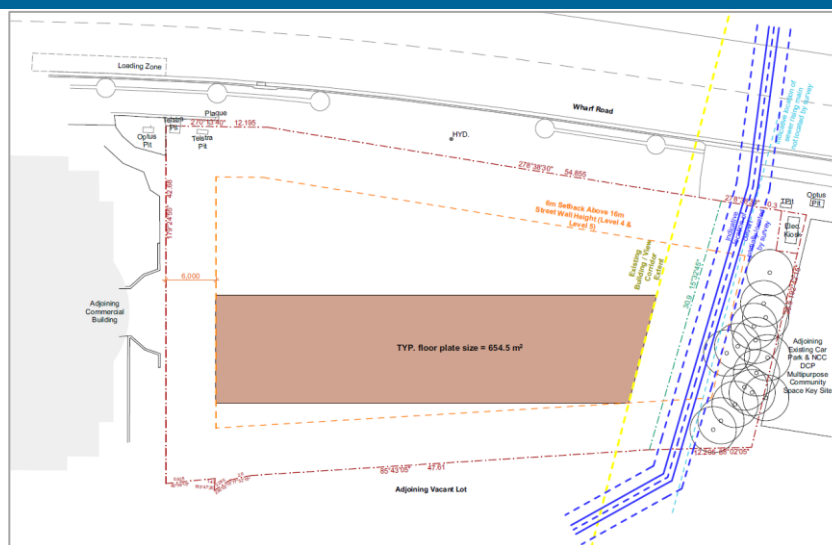
The view impacts are attributable to the height, with which the proposed development complies, and FSR. Given that a variation to the maximum FSR is proposed, additional analysis of FSR impacts is warranted in this case. FSR variations can result in non-compliances with front, side and rear setbacks, excessive building bulk and perceived massing and siting issues, manifesting in reduced opportunities for views around and between buildings.

In the case of the proposed development, the development is not only compliant with front, side and rear setbacks, additional eastern side setback has been provided to protect the Brown Street view corridor. Furthermore, the potential for views obtained from units 503, 603 and 703 between the proposed building and neighbouring development are limited by the angle from which the views are obtained, and would only marginally improve if larger side setbacks were proposed. Given that side setbacks are already compliant, and the view impacts are the result of the angle from which the views are obtained, it can be considered that the proposed development does not result in unreasonable impacts with respect to setbacks.

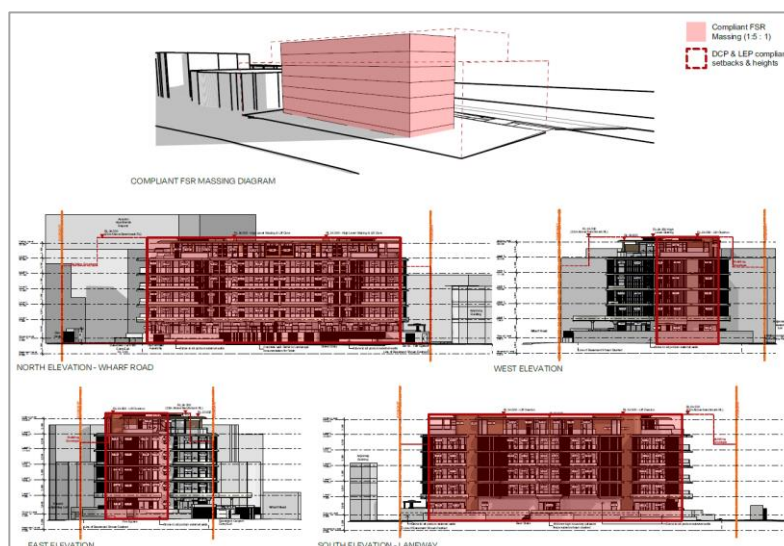
Excessive building bulk associated with FSR variations can impact view sharing. The proposed development has been reviewed by the Urban Design Review panel as having design excellence which would not be the outcome if the building was considered excessively bulky. Therefore the proposed building is considered reasonable in that bulk is not considered to be a contributing factor with respect of view sharing.

View sharing can also be adversely impacted by inappropriate siting. In respect of the proposed development, the design responds appropriately to the site's key characteristics being its rectangular shape and large frontage to Wharf Road. These elements naturally dictates the building orientation and siting. Further to this are design considerations such as building depth. The images below demonstrate a typical floor plate plan (654.5m<sup>2</sup> per floor with building depth 12.845m) across 6 floors which would result in a gross floor area of FSR 3937.8m<sup>2</sup> and a compliant FSR of 1:5:1. The analysis demonstrates that even a building with compliant FSR would typically be sited and massed as per the proposed development, and would have the same or similar impacts, indicating that the proposed development is reasonable in the circumstances.

# ENVIRONMENTAL PLANNING DISCUSSION FOUNDATIONS



Typical floor plate for a compliant building



Siting / massing analysis based on typical floor plate of a compliant building

To summarise, the proposed development has designed to consider visual impact on nearby residential development, including view sharing as well as form and visual impact from public spaces further assessed in the VIA provided. In this instance, when considering the relevant analysis and supporting information an alternate, reduced design is not required in this instance.

Applying the planning principles established under *Tenacity Consulting v Warringah Council*, we find that the proposed development will result in limited additional impact to the view from the southeast, considering the existing built form, the allowable building envelope and site characteristics that have influenced the proposed design. With available views in alternate directions the proposed impact is considered reasonable.

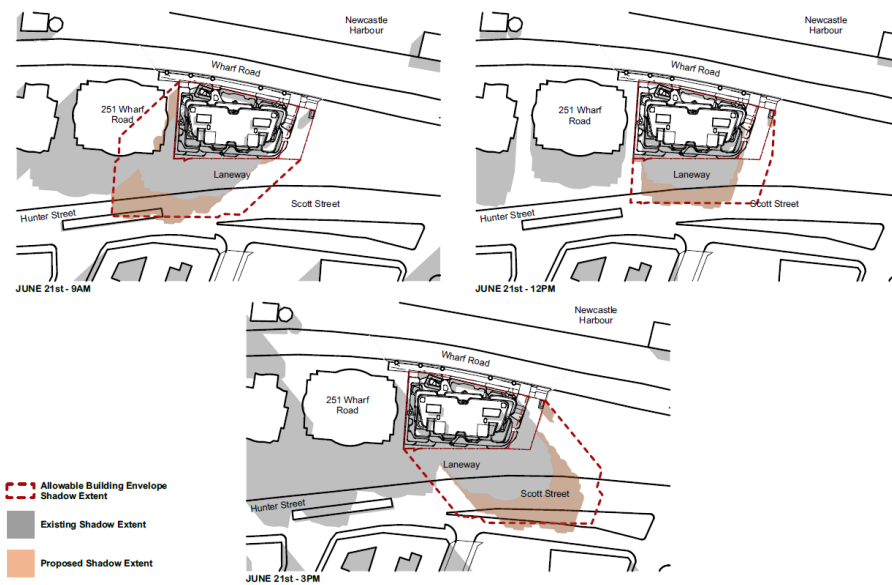
## Shadow impacts

The proposal does not unreasonably overshadow the surrounding public domain. Due to the site's orientation, the majority of shadowing occurs to the laneway south of the proposal, however when compared to the existing building, the proposal does not result in a significant increase. At present, the laneway is an unformed, inaccessible strip of land, residual to the closure and divestment of the former

## ENVIRONMENTAL PLANNING GROUNDS

### DISCUSSION

heavy rail line. The future use is indicated in Newcastle DCP as an access road. The land does not provide a current or future function as a public gathering or recreation space, instead will serve as a transit route once extended and made accessible by Council. In this respect the shadow impacts are not considered to have a negative impact on this aspect of the public domain. Land to the east earmarked as a key site, Wharf Road and the Harbour foreshore to the north are not impacted by shadows generated by the development. Likewise, a small portion of the privately owned site to the west will experience minor overshadowing. In summary, the proposed variation will not adversely impact the amenity of the area by way of shadow impacts.



#### Privacy

The development footprint is sited well within the site's boundaries. The design of the development limits current and future visual privacy impacts on adjoining sites through generous boundary setbacks and through the design and orientation of balconies to take advantage of the harbour views.

#### Compliance with design requirements

The exceedance is not a direct result of any breach of other DCP planning controls for the site (such as site coverage, landscaping, building separation). In this regard, it does not result in any adverse environmental impacts

#### Compatibility with surrounding land uses

The proposed development is compatible with the desired future character of the Newcastle City Centre (Civic Precinct) which has an administrative, cultural and educational centre of Newcastle with the proposed development facilitating the aims of the precinct by providing high quality residential accommodation within the precinct.

### 4.3 OTHER RELEVANT INFORMATION

This written request should be read in conjunction with the Statement of Environmental Effects and supporting documents including:

- Detail and Contour Survey
- Architectural Plans
- Civil Engineering Plans and Report
- Landscape Plans



- Flood Information Certificate
- Flood Assessment
- Acid Sulfate Soils Management Plan
- Noise Impact Assessment
- Traffic Impact Assessment
- Statement of Heritage Impact
- Tree Assessment Report
- Visual Impact Assessment
- Aboriginal Heritage Information Management System Search
- Waste Minimisation and Management Plan
- Demolition and Construction Waste Management Plan
- BASIX Assessment
- Cost Summary Report.

The proposal was found to be in the public interest having regard to the environmental assessment matters for consideration in Section 4.15 of the *Environmental Planning and Assessment Act 1979* and worthy of favourable determination.