

**Amended Request for Variation to the Development Standard for Height of Buildings,  
pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2015 (WLEP)**

**351-353 New South Head Road, Double Bay**

**NSW Land & Environment Court Proceedings 202/00361848**

This Amended Report has been prepared in accordance with clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP). Clause 4.6 of the WLEP allows for a development standard to be varied. The amended development proposal seeks to vary the development standard for the height of buildings, contained at Clause 4.3 of the WLEP for Height of Buildings.

The permitted building height is 10.5m.

The height of the proposed building, as amended is 14.3m.

The purpose of this Report is to provide sufficient justification to vary the development standard.

### **The Site**

The site is located at 351-353 New South Head Road, Double Bay and is legally described as Strata Plan 2583 and Lot 2 in Deposited Plan 1081202. The site has a total area of 1,233m<sup>2</sup>.

### **The Modified Development Application (As Amended)**

The development application is for demolition of the existing buildings across the site, excavation for basement parking and associated building services and construction of a part four and part five storey residential flat building comprising 15 apartments, as set out in the table below.

Table 1: Apartment Summary

<b>Bed Type</b>	<b>No of Apartments</b>
Studio	0
1-Bedroom	1
2-Bedroom	10
3-Bedroom	4
<b>Total</b>	<b>15 apartments</b>

This amended clause 4.6 is based on the amended drawings prepared by Hill Thalys Architects accompanying the s.34 agreement and is the result of extensive discussions with the Respondent's representatives as part of these proceedings.

## The Development Standards

### Height of Buildings (clause 4.3)

Clause 4.3 of the WLEP states:

- (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](#).*

The height of buildings map stipulates a limit of 10.5m.

Figure 1: Height of Building Map



### Definitions

The Dictionary to the WLEP provides the following in relation to building height:

*building height (or height of building) means:*

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing)<sup>j</sup> to the highest point of the building, or*
- (b) *In relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

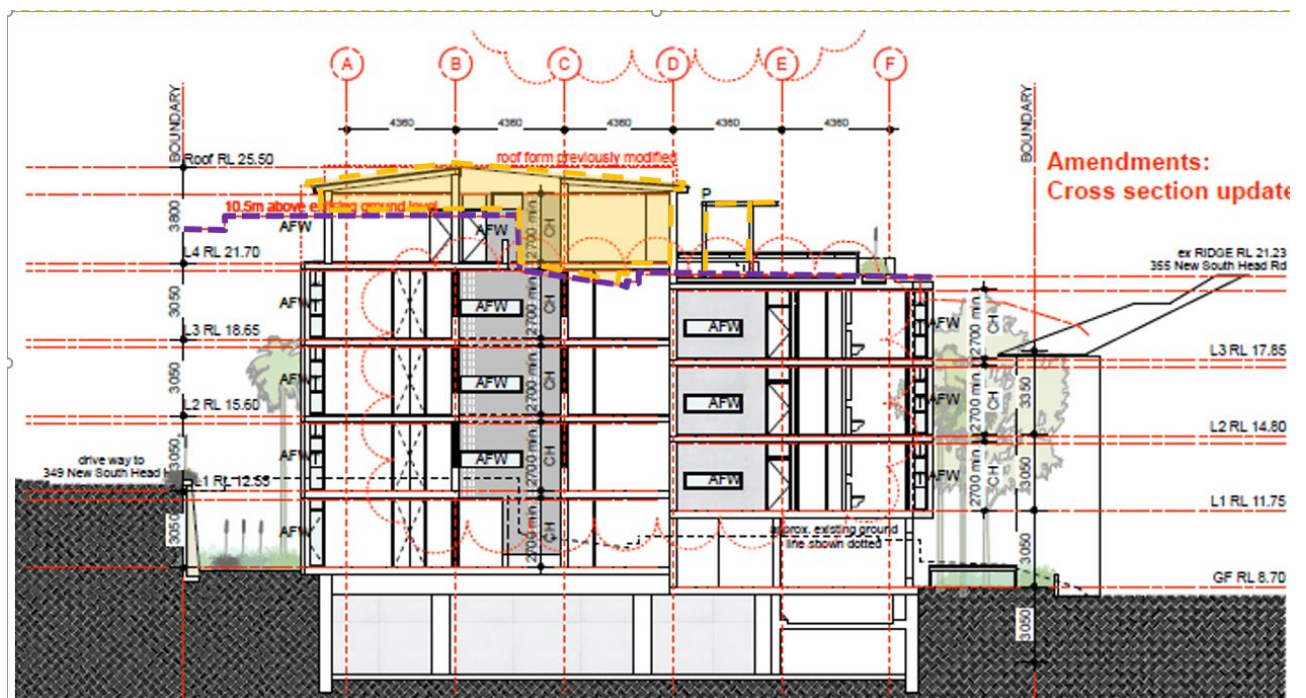
*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

### Non-Compliant Section of the Development

The section below demonstrates that section of the building that is non-compliance with the development standard.

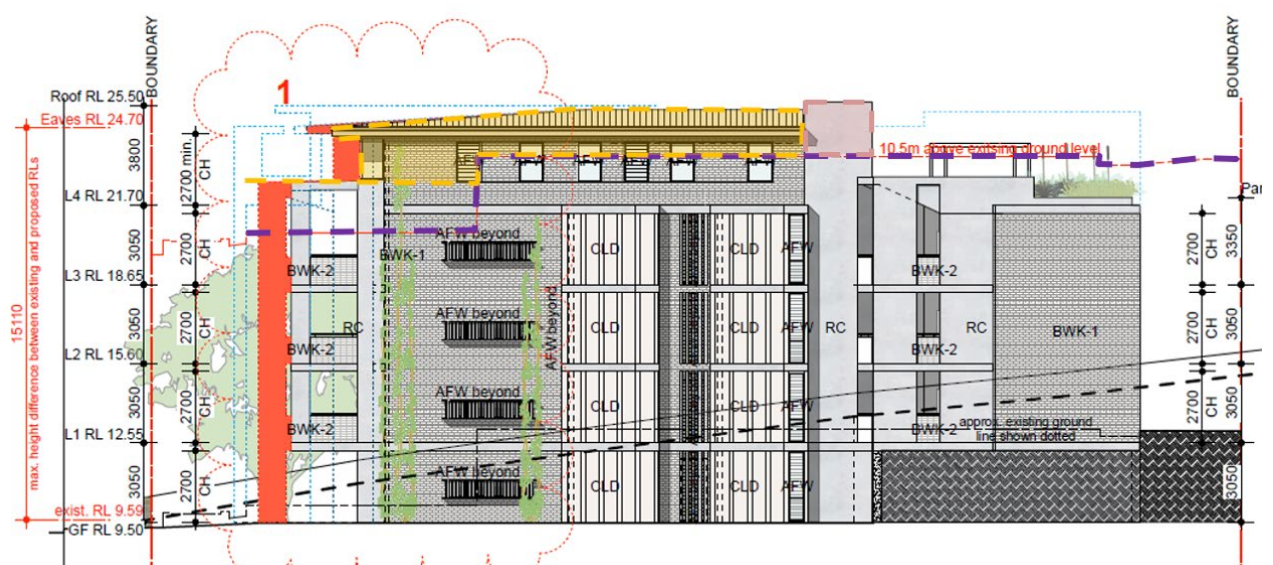


Figure 2: Section of the proposed development, in orange demonstrating that section of the building above the Height of Buildings Development Standard



The western elevation below also shows that section of the proposed works above the development standard (purple) and the height permitted under Condition C.1 of the development consent (orange). The section of the building shown pink is the lift overrun, the non-compliance of which was accepted as part of the development consent.

Figure 3: Western elevation of the proposed development, demonstrating that section of the building which is above the Height of Buildings Development Standard





## Is Clause 4.3 a Development Standard?

Clause 4.6 can only be used to vary a development standard. Development standards are relevantly defined in s 1.4 of the *Environmental Planning & Assessment Act 1979 (EP & A Act)* *inter alia* as follows:

**development standards** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Being a provision of the WLEP in relation to the carrying out of development, under which a requirement is fixed in respect to height of buildings in the relevant zone, clause 4.3(2) of the WLEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation to the standard.

As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development would contravene a development standard set by an environmental planning instrument.

## The Proposal's Non-Compliance with the Development Standards

The table below provides both the development standard and the proposed building height and floor space ratio.

Table 2: Summary of Proposed Development

Standard		Approved	Amended Height
Height of Building	10.5 m	12.4m + Lift Overrun @ 12.6m	14.3m

The amended building height is 3.8m above the development standard, resulting in a non-compliance of 36.2%.

## The Amended Design Scheme

During the s.34 process, a number of amendments have been made to the approved design, based on feedback from the Respondent's representatives. The purpose of these agreed amendments was to soften the architectural presentation of the built form to the street frontage of New South Head Road. This has been achieved with the following design techniques:



- increased front building setbacks from New South Head Road, to enable the fig tree fronting the streetscape to be provided with a greater deep soil area and opportunity for canopy growth
- reduction in column widths from Levels 1-4
- reduction in the depth and increased width of balconies
- introduction of corner windows on Level 4 to soften the visual form of the building at the upper level when approaching from the north-east and north-west.

The amended design scheme results in 0.33:1 of the total floor space proposed being used for affordable housing purposes, with the remaining floor space ratio (0.92:1) for residential purposes, the quantum of which is below that permissible on the site in accordance with clause 4.4.

### Variation to the Development Standards

Clause 4.6(3) of the WLEP states:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

These matters are addressed below.

#### *(a) that compliance with the development standard is unreasonable or unnecessary*

The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.

There are five alternatives set out in *Wehbe*, but only one need be satisfied as provided in the table below.

Table 3: The *Wehbe* Principles

The objective of the development standard is achieved notwithstanding non-compliance with the standard	In this case, the objective of the development standard is achieved, notwithstanding noncompliance with the standard.
The underlying objective or purpose of the development standard is not relevant	Not applicable



The underlying objective or purpose would be defeated or thwarted if compliance was required	Not applicable
The standard has been abandoned or destroyed	Not applicable
The zoning of the land was unreasonable or inappropriate such that the standards for the zoning are unreasonable or unnecessary.	Not applicable

#### Achievement of the objectives of the development standards

The objective for height of buildings is addressed below, as it relates to the noncompliant parts of the building.

to establish building heights that are consistent with the desired future character of the neighbourhood,

The desired future character of the neighbourhood is encapsulated within the zone objectives and the desired future character statement for the Wallaroy Precinct, contained in the Woollahra DCP.

Table 4: Compliance with the zone objectives

1 Objectives of zone	Comment
○ To provide for the housing needs of the community within a medium density residential environment.	The proposed development will provide fifteen (15) apartments within the context of the medium density environment that surrounds the subject site. The diversity in apartment sizes and types ensures that various housing needs will be provided for. This is furthered by the inclusion of affordable housing occupying 0.33:1 of the total floor space ratio within the development which will supply accommodation at a rate below the standard market value for rental accommodation. This is seen as a significant and positive outcome to provide for housing needs in a location where there is a defined shortage of lower cost accommodation.
○ To provide a variety of housing types within a medium density residential environment.	As detailed in the apartment mix, the proposed development provides diversity of apartment types that are suited to the medium density residential environment.
○ To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposed development provides only for residential needs due to the proximity of other services available to the east and west of the site in the Double Bay Village and Edgecliff Centre.



<ul style="list-style-type: none"> <li>○ To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.</li> </ul>	<p>The proposed height and scale of the development is contextually appropriate and consistent with the desired future character of the neighbourhood. It provides a considered design outcome that will allow for a diversity in apartment size that caters to local demand for residential accommodation, whilst fitting within the site constraints and those around the subject site, particularly having regard to the landscape character prevalent within the immediate vicinity.</p> <p>Further, the inclusion of affordable housing within the proposed development, which causes additional building height subsequent upon the additional floor space proposed, does not result in the built form being inconsistent with the desired future character of the neighbourhood.</p>
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### Desired Future Character – Wallaroy Precinct

*Development is to establish a transition from the large subdivisions and residential flat buildings at New South Head Road and Edgecliff Road to the dwelling houses situated on the slopes. There is a mix of old and new buildings within this precinct. Alterations and additions to the period houses should retain key elements of the original buildings, including sense of the spacious grounds, setbacks and traditional roof forms, as viewed from the street. New dwellings may have contemporary designs, but should not detract from adjoining period housing or the predominant character of the streetscape immediately surrounding the site. Particular consideration should be given to establishing consistent front and side setbacks, and providing compatible materials, roof forms and street walls. On sloping sites, development should step down the site to maintain views, protect the privacy and solar access of adjoining and adjacent properties, and minimise cut and fill. Residential flat buildings are permitted in the northern part of the precinct up to a height of six storeys. Where these sites adjoin properties with a lower height limit, development is to establish a sympathetic transition to the boundaries; this may be through a graduation of building bulk and height, increased setbacks, or both. Development adjacent to the Woollahra Heritage Conservation Area must suitably respond to the significance of the HCA.*

The aforementioned statement makes clear that New South Head Road is dominated by apartment buildings. Further, the latter part of this statement is relevant to the proposed development. The subject site is positioned immediately adjacent a series of residential flat buildings of varying scales and proportions, affected by the slope of the land, from west to east and south to north. The Architectural Design Statement provides the following:



*The design is based on a thorough analysis of the existing conditions (see urban analysis drawings DA 2.002-2.004 in DA submission). The scale of neighbouring buildings is diverse, varying between 2 and 13 storeys in height. This is due to the incremental redevelopment over the last 8 decades of the lower buildings around Double Bay, which have been gradually replaced by more intensive forms of development. Frontage widths and setbacks vary greatly throughout the area.*

The part four and part five storey building form proposed establishes a sympathetic transition both to the site boundaries and to the broader context of nearby buildings, where there is a significant differentiation in form, architectural design and building scale. Despite the upper floor of the building, which is the most prevalent section of the building exceeding the development standard, this has been suitably designed to ensure that a sympathetic relationship is achieved, especially to the taller building to the west and south of the site. The amendments to the design at the upper floor of the building, including the reduced roof form to the level below and the introduction of windows to the north-eastern and north-western corners of the building assist to improve articulation, in conjunction with the increased building setback to New South Head Road, thus reducing the scale of this upper building level when viewed from this location.

*to establish a transition in scale between zones to protect local amenity,*

The zoning map below demonstrates that, surrounding the site, there is a consistent desire for medium density housing. As the proposed development is for such purpose, and the adjoining properties benefit from the same zone, there is no apparent need for a transition in scale because of a change in zone.

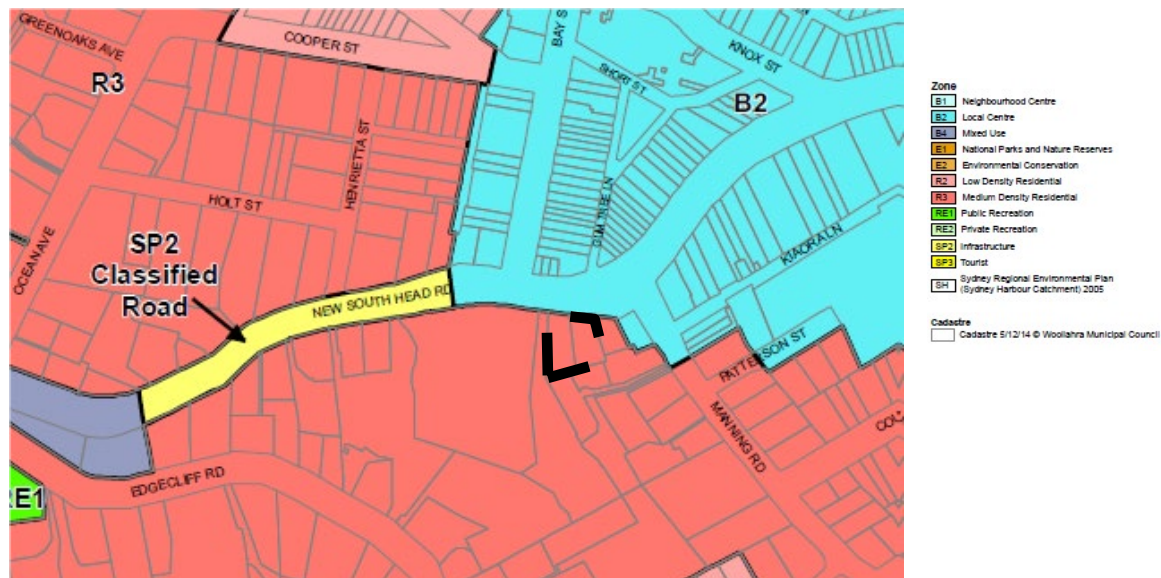
Further, the Architectural Design Statement provides that:

*As is appropriate so close to major centres, both sides of New South Head Road and all the lots behind have long been zoned by Council to enable apartment buildings and shop top housing, and many of the neighbouring residential buildings in the immediate visual catchment well exceed the current height and floor space controls, there are quite a number of taller buildings dotted throughout the areas to the south and west, which all sit on higher ground than the subject site, and so are far more visually prominent.*





Figure 4: Zoning Map



In terms of the height standards for surrounding sites, those in the vicinity of the subject site, generally seek for a taller built form than that proposed on the subject site. This includes 14.5 m (N5) on the corner with Manning Road and on the opposing side of New South Head Road (Figure 1).

Aside, however, from the technical standard, is the as-built context immediately surrounding the site. Most telling is the photomontage provided which shows how the building fits within its immediate context and, in particular, the transitional nature of the form, coming down New South Head Road, towards the Double Bay Village. The demonstration of scale shows the building's context positioned either side of the subject site, with the proposed height of the development fitting comfortably between the two, without appearing obtrusive in the landscape. Specifically, to the site is the following in the Architectural Design Statement:

*The west side boundary is to an ascending driveway which services the residential tower building to the south. Further west on higher ground is a block 5 to 7 storey apartment building set in extensive lush gardens. Due to the dense mature planting, the harbour is hardly visible from the subject site. Therefore, the proposal's mass is concentrated to this frontage, ... Counter to Council's UD comments, the site planning is carefully attuned to the site. The levels are matched to the sloping existing ground, and setbacks to neighbours carefully considered and integrated with the landscape design.*

Further, as stated in the Architectural Design Statement, the other pertinent aspect is that:

*Outside the commercial centre, which is directly opposite the site and only just to the east, landscape setbacks are common, particularly the major landscape frontage to the immediate west. The design forms an appropriate transition between these conditions, retaining and extending the existing sandstone street wall and setting back the building to retain in a planted foreground a semi-mature Moreton Bay fig tree that is close to the wall.*



to minimise the loss of solar access to existing buildings and open space,

Behind the subject site are a series of gardens, known as Overthorpe. The proposed development will have some degree of impact on the solar access enjoyed by these at mid-winter. However, this is modest and enables sunlight over this area during the morning period and therefore complies with the relevant control for the amount of solar access received. Further, despite the building height, the viability of the existing vegetation to the south will not be compromised. The Flora and Fauna Assessment provides the following:

*Presently, the understorey and ground cover within the Overthorpe Gardens receive sunlight during the late afternoon. However, the Gardens are in shade for the majority of the day due to the dense canopy of mature trees. It is evident that the Gardens are tolerant of dense shade and have persisted due to the current low light conditions.*

*The shadow diagrams prepared by Hill Thalys (Appendix E) indicate minimal shade will be cast over the east frontage of the Gardens. Thus, any future development within the study area is unlikely to result in any adverse impact on the vegetation within the Overthorpe Gardens*

To the existing building to the south, the shadow diagrams demonstrate that there is no material change to the solar access enjoyed to that building arising from the non-compliant component of the proposal. This has arisen from a skilful design approach that has a separation distance of 12 m to that portion of the building on the subject site from the boundary, along with limited form at the rear, on the western side of the proposed building that would cause adverse impact. This space is configured as a communal garden and will improve the outlook and amenity of the immediate neighbours.

As such the objective to retain solar access, despite the additional height of the building above the development standard, is achieved.

to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

## Views

The non-compliant part of the development relates to a minor part of Level 3 and the whole of Level 4 of the proposed development.

In terms of the effect of the non-compliant portion of the development, this was inspected as part of the section 34 conferencing process in apartments of Levels, 1 2 and 3 of the building. It was evident of those inspections that there is no loss of view as a result of the non-compliant section of the building.

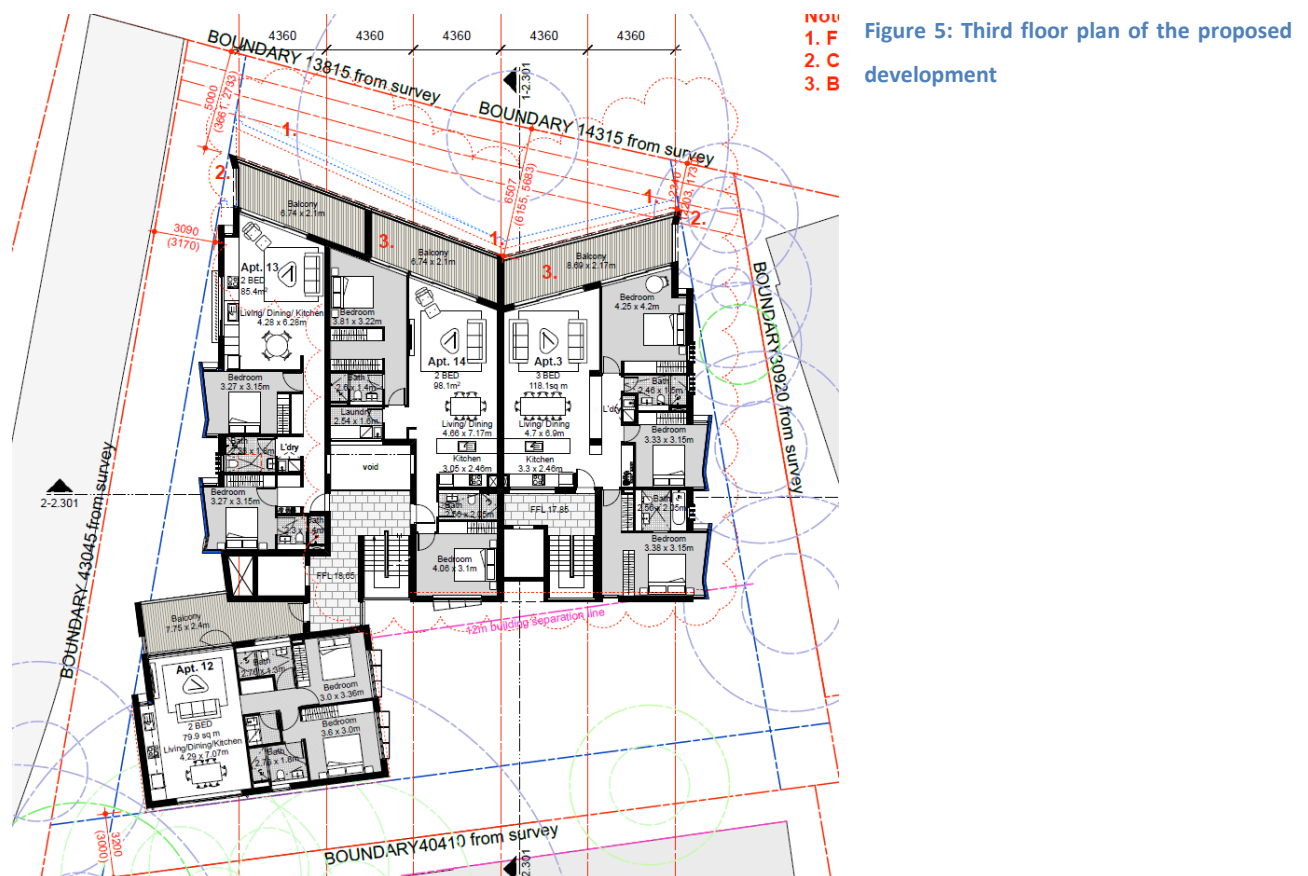
In addition, 3A Manning Road was also inspected as part of the section 34 conferencing process. Again, the height of the proposed development does not impose on any views from that property.



Therefore, there is no impact on existing views enjoyed from neighbouring properties as a result of the additional height proposed, over and above the development standard.

## Loss of Privacy

On Level 3, the floor plan below demonstrates that the outlook from windows that are proximate to the site boundaries are angled in their design, vertical and enclosed on their outer walls to ensure that there are no direct opportunities for overlooking to the east, nor west of the site. Aside from this, the boundary interface is enclosed with solid walls. To the west, there is also the additional separation that is afforded by the driveway separating the two properties, along with an extensive front garden at 357 New South Head Road.



At the fourth floor, the same window conditions apply to the western side of the site, aside from the introduction of a new window opening at the north-western corner to increase the articulation of this frontage and enable additional light into the adjoining bedroom. This also assists to soften the corner of the building form in that part of the site where the building is non-compliant towards the street frontage, thus reducing the dominance of the previously proposed built form.

This has no impact on the adjoining properties to the west, as the window opening looks towards the landscape gardens within the front setback of this property and does not, in any way impede the internal privacy of adjoining apartments, which are set well back from this location. The separation distance is also further enhanced as a result of the driveway aligning the western property boundary.



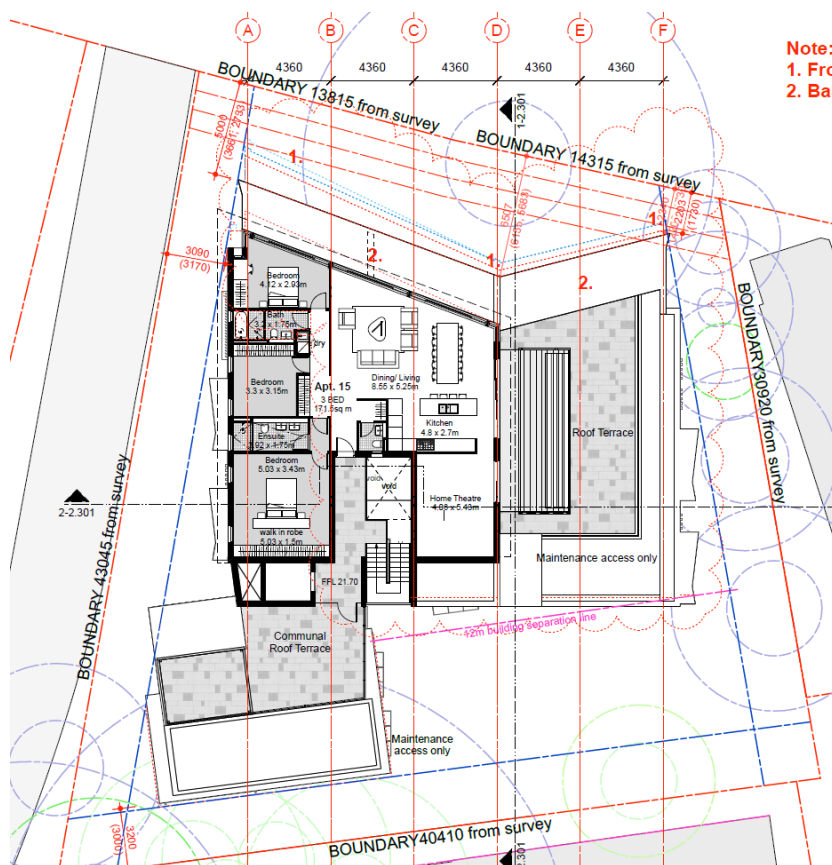


Figure 6: Fourth floor of proposed

Note:  
1. Fro  
2. Bal

development

To the south, the communal roof terrace that is positioned on the eastern side of Apartment 15 is set back a sufficient distance to the southern property boundary to ensure that direct overlooking to the adjoining property does not occur, much of which is screened through the dense landscape planting.

For the roof terrace of Apartment 15, the terrace is set back 15.2m from the southern site boundary. Screen planting is provided from a depth of 12m to enhance adequate visual protection to, and separation from, the adjoining property.

Therefore, the proposed height, above that permitted, will have no adverse impact in terms of the privacy enjoyed to properties immediately surrounding the site.

Further, the Architectural Design Statement provides the following:

*Due to the restricted width of the site, the proposal departs somewhat from the numeric setback controls, however the design compensates for this by having predominantly screened or solid side elevations, the project gains daylight from all orientations, and the communal gardens that occupy the setbacks benefit from sunlight and visual connections.*

## Overshadowing

Matters of overshadowing relating to the non-compliant components of the building have been addressed above.



## Visual Intrusion

The visual aspect surrounding the site is evidenced by the view below taken of the broader Double Bay precinct. While the subject site forms part of the Wallaroy Precinct, its primary vantage is at the interface with New South Head Road and correlates with the degree of activity and scale that forms this precinct, right through from the Double Bay Centre to Edgecliff. This is what one derives as the character of the site, in its context.

Taking the recent judgement in *SJD DB2 Pty Ltd v Woollahra Municipal Council NSWLEC 1112*, (SJD) Commissioner Clay made the following remarks at Paragraph 72, on how character should be addressed:

*The design of the proposed development should sit comfortably with its neighbours to the east, and its neighbour to the west in order to meet the objective of the standard to be consistent with, and compatible with, the desired future character. The development on the site is only perceived in that context. It is not readily visible from any location other than within this block of Cross Street. Although one should not exclude from consideration in a more general sense the broader locality, it is here the immediate locality of this defined block on the southern side of Cross Street which is determinate of the preferred form of development for the site.*

In this case, the site, similarly has a very immediate context, that being how it presents to New South Head Road and the immediate buildings and landscaping. While there is a view of buildings behind the subject site having a dominant role, there is a degree of separation caused by extensive landscaping that, to some extent, erodes the visual character of the immediate locality, behind (to the south of) the site.

Travelling west to east, the site has visibility coming down New South Head Road and heading west, has some degree of visibility coming through the Double Bay Town Centre, with the most prevalent view as one approaches the traffic lights at the corner of Manning Road. This sets the immediate locality parameters for development on the site.

The SJD judgement goes on to address the matter of intrusion, at Paragraph 79, as follows:

*The Macquarie Dictionary defines 'intrusion' as the act of intruding and intrude as to thrust or bring in without reason, permission or welcome. A visual intrusion must be an unwelcome form which intrudes into the available outlook. It would appear to me that a new building itself will not necessarily be a visual intrusion. There must be something unwelcome about it. It could be the form of the building itself, or it could be its relationship to the viewer and what lies beyond.*

In this instance, a number of amendments have been made to the design to reduce the concerns raised by the Respondent, with regards to visual intrusion. While not all changes were made to the non-compliant section of the building to aid the Respondent's concern, the changes made at the upper floor enabled a reduced presence of roof form overhanging the balconies at Level 3, as well as a greater degree of





articulation to the north-eastern and north-western corners of the fourth floor of the building which were the perceived elements of visual intrusiveness on approach. The use of window openings provides a softer corner composition than solid concrete elements previously proposed that provide a more visually articulated aspect and enhance the attractiveness of the building design that is well-designed and coherent in its form and scale.

This was coupled with the increased front setback distance of the building to New South Head Road, thus providing a further separation away from the property boundary and thus, less dominant to the visual corridor when considered in the immediate context of New South Head Road. This increased setback has allowed for the retention of the existing Fig, which has an important role to play in its interaction with the upper building level and providing visual connectivity with the landscape surrounds of the site.

*to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

There are no such views from the public domain that are relevant to this application.

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

There are sufficient environmental planning grounds, despite non-compliance with the development standards for height, as proposed on part of Level 3 and Level 4 of the building as:

- There is no additional adverse solar impact on the adjoining properties as a result of the non-compliant form to the south of the subject site; it is the compliant component of the building that causes effect before the non-compliant component does, such that reducing the scale of this provides no material benefit to adjoining properties.
- The proposed development provides deep soil planting areas in excess of the controls, to be enjoyed in association with the development and is not compromised as a result of the height of the building.
- The affected part of the building at Levels 3 and 4 provides a reasonable setback to the eastern boundary, having regard to the site constraints.
- The setback distance in the south-western corner of the site is sufficient having regard to the limited use of this area on the adjoining property, which is dominated by landscaping, but does not necessarily form part of a meaningful open space area, nor part of the habitable area of a dwelling.
- From the public domain, the non-compliant part of the building, which has been amended to address the Respondent's concerns, does not compromise the overall streetscape, being in context with the built form as it extends down the hill from the Edgecliff Centre and suitably transitions into the Double Bay Village, without compromising the visual landscaping, in particular, which is dominated by Overthorpe's gardens to its rear. The non-compliant form has an increased setback to the street frontage, reduced



roof form at Level 3 and additional openings, which allows the building to blend in with the broader form. The increased building setback to the street frontage also enables the landscape connectivity of the site to be connected between the front and rear, thus enhancing the landscape presentation that is desired as part of this visual catchment.

- The non-compliant height does not compromise views from the public domain surrounding the site.
- The additional height does not take away from the visual presence of the landscape setting that is provided by Overthorpe and the enjoyment of this is retained and can continue to be appreciated from New South Head Road and other vantage points in proximity to the site, despite the non-compliant height of the building. The overall presence of landscaped form remains clear and evident when the property is viewed in the surrounding context and is further enhanced by the increased setback to the street frontage, which enables a landscape connection with the rear of the site.
- The quantum of height that is afforded by non-compliance with the development standard allows for the provision of additional residential accommodation of an affordable nature, in a location that is well serviced in terms of facilities, services and transport. As stated in the Architectural Design Statement:

*The site is located adjacent to the important regional centres of Double Bay and Edgecliff. Within a 5 minute/500 metres are Edgecliff train station and bus interchange, the main Double Bay shopping areas and Edgecliff commercial centre. Both centres contain many services for the benefit of residents and workers. Over 170 years of urban development, the area is evolving as a heterogeneous mix of major retail and entertainment, apartment buildings of all types and sizes, terraces and remnant individual houses.*

*The site has convenient access to Sydney's city centre, to multiple transport modes, shops, many public facilities and open spaces, and thus is well suited to this proposal as it provides high levels of amenity in an established and diverse neighbourhood.*

The Design Statement also states that:

*The site is well located close to excellent public transport, shopping and a wide range of public facilities including Council's new Library and schools, which are all within a 10 minute or less walk. There are a number of new buildings either newly built, under construction or proposed in the vicinity that accord to the proposed floor space ratios and heights.*

Given the extent of such facilities in immediate proximity, it makes strategic planning sense to utilise the location of this site to accommodate an *in situ* residential population, including in a circumstance of increased affordability, where there are sound opportunities for employment and a reduced reliance on private transport. This has positive environmental outcomes, such as reduced traffic movements and utilisation of infrastructure.



- By utilising additional building height provides a significant opportunity for meaningful communal open space as part of the proposal. An alternative scenario would see this area hemmed in by the natural topography, with limited solar access. The additional height proposed allows for this space to benefit from solar access and natural light, despite its positioning on the southern side of the building. That said, given the quantum of traffic along New South Head Road on a daily basis, communal space on the northern orientation would be a poor environmental planning outcome from an amenity perspective. The Design Statement provides that:

*To supplement the extensive though more shaded communal gardens to the rear at the ground floor, a generous communal roof terrace has been provided. This area, more than 6 metres in width, is open to the sky and mature vegetation to the rear, and so receives excellent sun – satisfying the ADG requirement. It allows all residents to enjoy the available district views. There are planters to the rear and concrete ledges and balustrades to minimise overlooking of neighbours.*

Therefore, the opportunity to elevate this space and ensure that it is afforded positive aspect in terms of privacy, view and solar access will ensure a meaningful space in association with the development. This represents a sound environmental planning response.

- Despite certain apartments being above the development standards, from an amenity perspective, the Architectural Design Statement provides the following, having regard to the non-compliant component of the development, as well as the development as a whole:

*All apartments receive controlled solar access to living areas and their various balconies and terraces. All windows and sliding doors have projecting slabs and wide balcony overhangs. Winter sun will penetrate deep into all apartments as the apartment plans have a slender depth ratio. The setbacks and screen planning provide privacy to the neighbours to the south, west and east.*

*The site planning and building design maximise the benefits of passive solar design to all dwellings:*

- *15 out of 15 dwellings (100%) have windows facing north to their primary habitable rooms*
- *15 out of 15 dwellings (100%) receive more than the minimum 2 hours mid-winter sun between 9am and 3pm – with many units receiving sun extended sunlight between 9am and 3pm*
- *All dwellings have private outdoor space that is open to sun and outlook*
- *All communal areas have fresh air and daylight.*

Therefore, the proportion of the development above the development standard in fact improves the amenity of the building such that an equal, if not, better outcome is achieved.

Therefore, having regard to the above, there are sufficient environmental planning grounds to permit variation to the development standards for height and floor space ratio.



## The Public Interest

Clause 4.6(4) states as follows:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

The fourth element that the Court needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standard's and zone's objectives.

Preston CJ in *Initial Action* (para 27) described the relevant test for this requirement as follows:

*"The matter in cl 4.6(a)(ii) with which the consent authority or the Court on appeal must be satisfied is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purpose of clause 4.6(4)(a)(ii)."*

As demonstrated, the proposed development will comprehensively meet the objectives of the development standards for height of buildings and the zone objectives for the R3 Medium Density Residential zone.

Accordingly, the Court can be satisfied that it is in the public interest to vary the standard for the purpose of this development application. The implementation of the development, despite non-compliance, will ensure that existing resources are utilized without placing undue pressure on the surrounding environment, both natural and built, while comply with the relevant objectives and producing a better outcome for the development, due to its own site constraints.



Further, the provision of affordable housing within the development, will provide a significant contribution in a market place where there is extremely limited affordable housing stock. The provision of integrated stock, that is not provided independently or separately, ensures that holistic communities are created, despite the socio-economic status of residents. This is a far more effective and socially integrated outcome, from a public interest perspective.

The flexibility enabled by clause 4.6 will, in this case, produce a better environmental planning outcome than would result from strict compliance, which would not result in the provision of affordable housing in association with the development proposal.

### Secretary's concurrence

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests except in the circumstances set out below:

- Lot size standards for rural dwellings
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The Circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

### Conclusion

The development application for the site at 351-353 New South Head Road, Edgecliff does not comply with the development standard contained at clause 4.3 of the WLEP. However, the proposal achieves the requirements pertaining to clause 4.6 of the WLEP, which allows for development standards to be varied.

Accepting the control for height of buildings as a development standard, the component of the building that exceeds the height control provides a superior outcome for the site that is enunciated through a skilful and quality design that is consistent with the objectives of the standards and the zone objectives. Further, it enables affordable housing stock to be provided for a ten-year period that would not otherwise be incorporated into the development. The site, given its proximity to retail, commercial and service facilities, as well as public transport, makes it highly accessible and attractive for the integrated development, as proposed. As such, it satisfies the public interest by deviating from the development standards.





The variation to the development standards should therefore be supported by the consent authority in the circumstances of the case.

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<sup>i</sup> *ground level (existing) means the existing level of a site at any point*

