



## **Clause 4.6 Variation Request Contingent**



Clause 4.3(2) of the Woollahra  
Local Environment Plan 2014

### **3 Wiston Gardens, Double Bay**

Submitted to Woollahra Council  
On Behalf of The Applicant

June 2021

## REPORT REVISION HISTORY

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## 1. EXECUTIVE SUMMARY

The applicant does not accept this request is legally required as the building height has been calculated in accordance with *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 at [39]-[41] (*Bettar*) and *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (*Stamford*) and complies with the maximum building height control that applies to the site. Nonetheless this request has been prepared on a contingent basis as if a clause 4.6 request is required.

If the consent authority applies the decision in *Bettar*, consent may be granted without considering this request. However, if the consent authority does not consider that *Bettar* is directly relevant to this matter (contrary to the applicant's submission) or is not correct, the consent authority may grant development consent in reliance on this clause 4.6 request. The clause 4.6 request may also be relied upon by the consent authority in the event that it does not wish to rule on the application of *Bettar* in this matter, but still wishes to grant development consent.

On this basis, therefore, this request has been prepared to justify a variation to clause 4.3(2) height of buildings of the *Woollahra Local Environmental Plan 2014* (WLEP) that is proposed in a development application for a new residential flat building at 3 Wiston Gardens, Double Bay (the site).

The objective of the proposed development is to renew the site and provide dwellings that achieve contemporary standards of amenity and comfort in a building which has a better relationship to the street, provides adequate off-street carparking and improves views from surrounding properties.

Clause 4.3(2) of the WLEP prescribes a maximum building height of 10.5 metres. The calculation of the building height for the purposes of this clause 4.6 request, takes into account the existing excavated basement level. To note, this approach is contrary to that adopted by NSW Land and Environment Court (NSWLEC). In this regard, the proposal varies the height standard as follows:

- 0.26m variation at the level 3 northern acoustic screen on the primary balcony (RL13.90)
- 1.50m variation at the eastern edge of the level 4 primary balcony awning (RL19.00)
- 1.57m variation at the south eastern edge of the level 3 primary balcony awning (RL15.65)
- 1.71m variation at the level 3 northern privacy louvre (RL15.35)
- 2.01m variation at the north eastern corner of the level 3 primary balcony awning (RL15.65)

In very brief terms, the requirement to comply with the development standard is unreasonable and unnecessary in the circumstances because:

- The proposal satisfies the objectives of the height of buildings development standard.

There are sufficient environmental planning grounds to justify the variation including:

- The proposal has less impact on the views of adjoining properties than a comparative compliant development as well as the existing building envelope, and improves views from 5A Wiston Gardens;
- The proposed building has a lesser height, bulk and scale than a compliant envelope and a better visual relationship to 5A Wiston Gardens;
- The GFA which sits above the existing ground level is 21% less than that which is permissible under the WLEP and in this regard the proposed buildings bulk is consistent with, if not marginally less than, that of a compliant building envelope;
- The proposal restores sunlight to key open space areas of the adjoining development. The reduced solar access gain with the non-compliant building with the height plane which considers the existing excavated basement levels is marginally different in comparison to the proposal which calculates the existing ground level in accordance with *Bettar* and *Stamford*;
- The development improves privacy, particularly when compared to the existing development; and
- The proposal will not dominate the adjacent heritage items as a consequence of the considered form and materiality of the proposed building.

The variation is in the public interest because the development satisfies the objectives of the R3 Medium Density Residential zone that applies to the land as well as the height of buildings standard.

This request has been prepared under to clause 4.6 of the WLEP and demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposal is consistent with the objectives of the zone for the site and the development standard itself and is, therefore, in the public interest. This request also addresses the requirement for the concurrence of the Secretary.

## 2. INTRODUCTION

The applicant relies the letter of advice provided by Mills Oakley dated 16 December 2020 which was submitted to the Respondent's Application Assessment Panel. A copy of that advice is annexed to this request and forms part of the request.

In summary this advice says:

- The relevant authority in the NSWLEC for the calculation of the 'existing ground level' for the purposes of a height control in the portion of the site occupied by a basement is *Bettar at* [39]-[41].
- This decision says that where there is a basement in an existing building, the 'existing ground level' needs to be inferred from co-ordinates on the edge of a footprint of the basement of the existing building. Where the existing ground level is to be inferred in this way, it can only be inferred where there is no existing ground level due to the existence of the basement. That is, the parts of the site that have an existing ground level must use the actual ground level as a reference for the height control.
- Where the ground level is to be inferred, it is to be shown as a plane drawn from the existing ground level at the key points marking the edge of the portion of the site which is said to have no ground level (ie the portion occupied by a building with a basement).
- In *Bettar* (at [35]-[41]) the NSWLEC expressly rejected an argument that would result in starkly different height limits arising from the same development standard (depending on the degree of existing built form on the site).
- The NSWLEC, in part, relied upon the relevant Standard Instrument provisions (also reproduced in the LEP that basement means the space of a building where the floor level of that space is predominantly below ground level (existing). The NSWLEC said that from this definition, it does not follow that existing ground level becomes the level of the basement floor or the soil beneath the basement following the construction of a basement. A basement is, by definition, below ground level and so the level of the basement floor cannot be taken to be existing ground level.
- The subsurface floor levels that the Council seeks to rely on (as 'existing ground level') are equivalent to the 'basement' that was discarded in *Bettar*. They are actually below the 'level of the site' and therefore are incorrect reference point for measuring the 'height of building' under the LEP.
- In our view, the application documents have been prepared in accordance with the *Bettar* decision and the established practice approved by the NSWLEC. On this basis, no clause 4.6 variation in relation to height is required.

As a result, the applicant does not accept this request is required as the building height has been calculated in accordance with *Bettar at* [39]-[41] and *Stamford*. Nonetheless on a contingent basis and disregarding the accepted practice for the calculation of building height by the NSWLEC this request has been prepared to support the proposed development. If the consent authority applies the decision in *Bettar* consent may be granted without considering this request. However, if the consent authority does not consider that *Bettar* is directly relevant to this matter (contrary to the applicant's submission) or is not correct, the consent authority may grant development consent in reliance on this clause 4.6 request. The clause 4.6 request may also be relied upon by the consent authority in the event that it does not wish to rule on the application of *Bettar* in this matter, but still wishes to grant development consent.

This request has been prepared in accordance with clause 4.6 of the WLEP to justify a variation to the height of buildings development standard proposed in a development application submitted to Woollahra Council (Council) for a new residential flat building at 3 Wiston Gardens, Double Bay. The height of buildings has been calculated from the existing excavated basement level. The development is shown in the architectural drawings and surveyor's drawings that form part of the DA. These plans also form part of this clause 4.6 request.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

### 3. STANDARD TO BE VARIED

The standard proposed to be varied is the height of buildings development standard which is set out in clause 4.3(2) of the WLEP as follows:

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

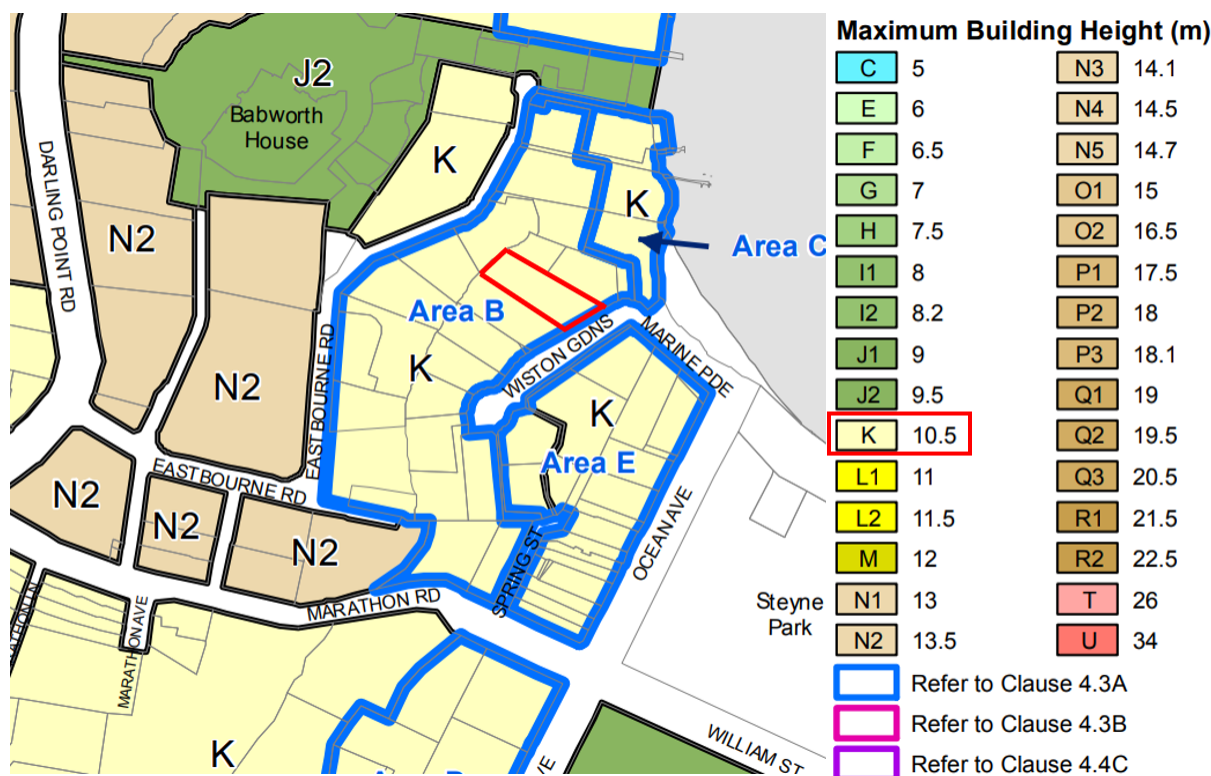


Figure 1: WLEP height of buildings map, outlined in red (Source: NSW Legislation)

The numerical value of the development standard proposed to be varied is 10.5 metres.

The height of buildings development standard is not excluded from the operation of clause 4.6 of the WLEP.

#### 3.1. Calculation of height of buildings

The applicant does not accept this request is required, notwithstanding it has been prepared for abundant caution.

The relevant authority in the NSWLEC of the calculation of the 'existing ground level' for the purpose of a height development standard in the portion of the site occupied by a basement is *Bettar* and *Stamford*.

For clarity, the definition of building height and basement in the WLEP is:

**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) 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.*

**basement** means the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).

This clause 4.6 request takes the subsurface floor level Council seeks to rely on as 'existing ground level' for the purposes of addressing the variation sought by this request.

## 4. EXTENT OF VARIATION

Clause 4.3(2) of the WLEP prescribes a maximum height of buildings for the site of 10.5 metres. Disregarding the calculation of building height set out under *Bettar* and *Stamford*, the proposed building has a maximum building height of 12.51m or RL15.65, being an 19% variation of the development standard.

When calculated in accordance with the Council's preferred existing ground level (the existing excavated basement levels) the proposal involves a variation of the 10.5 metre height of buildings standard as follows:

- 0.26m variation at the level 3 northern acoustic screen on the primary balcony (RL13.90)
- 1.50m variation at the eastern edge of the level 4 primary balcony awning (RL19.00)
- 1.57m variation at the south eastern edge of the level 3 primary balcony awning (RL15.65)
- 1.71m variation at the level 3 northern privacy louvre (RL15.35)
- 2.01m variation at the north eastern corner of the level 3 primary balcony awning (RL15.65)

The maximum proposed variation represents a 19% variation from the 10.5 metre development standard.

The proposed height of buildings is illustrated in the below section and height plane diagram.

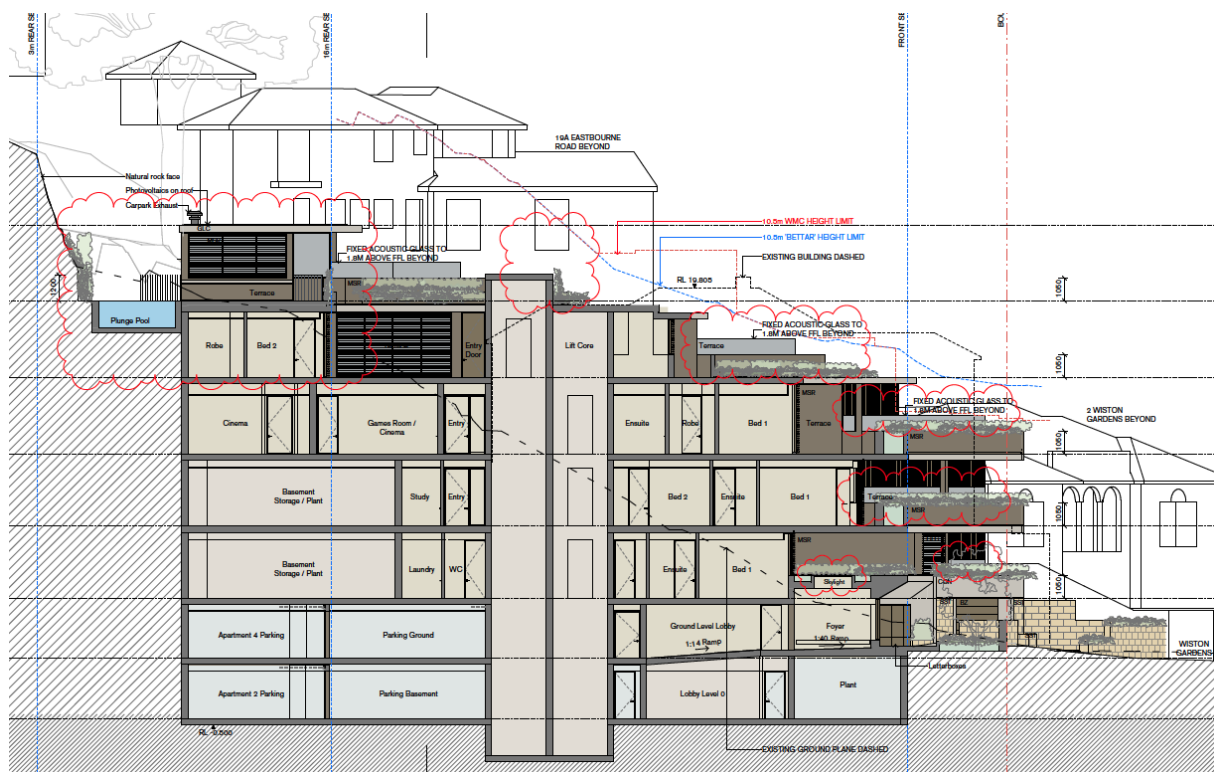
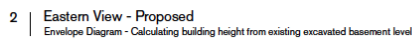
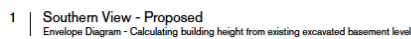


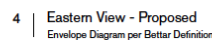
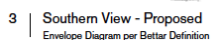
Figure 2: Extract of section 1, height plane accounting for the existing excavated basement levels shown in a red line (Source: Tzannes)



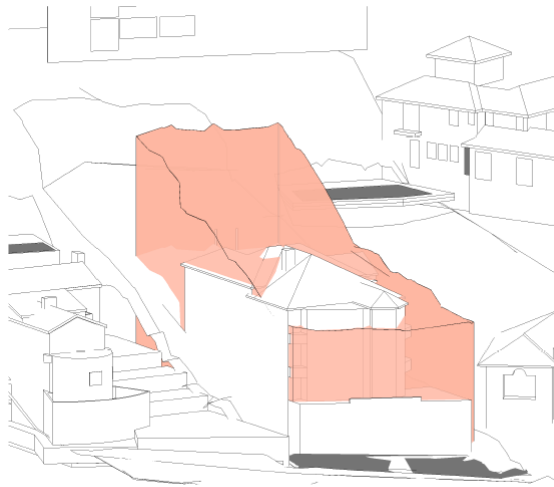


Refer to the architectural plans prepared by Tzannes dated 1 June 2021.

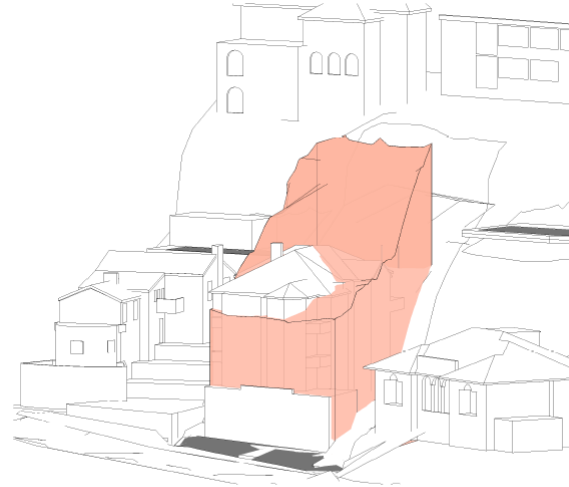
To determine their reasonableness of the variation, this request compares the impacts of the proposed development with comparative compliant building envelope. The form of the proposed development with a compliant envelope and the existing building in a compliant envelope is illustrated in Figure 4. The impact from the three different development scenarios is illustrated in drawings 8201 and 8203.



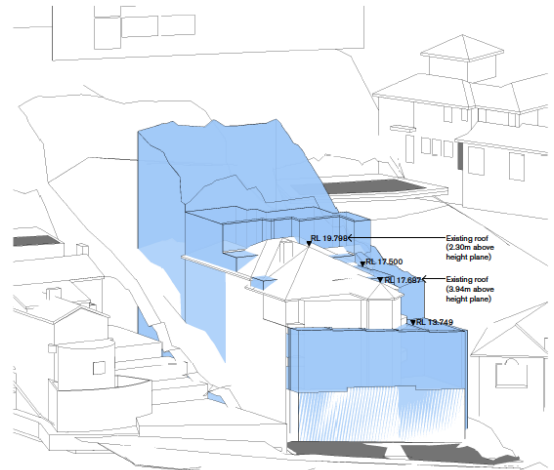




5 | Southern View - Existing  
 Envelope Diagram per Better Definition



6 | Eastern View - Existing  
 Envelope Diagram per Better Definition



7 | Southern View - Existing  
 Envelope Diagram - Calculating building height from existing excavated basement level

Figure 4: Comparative compliant envelope versus proposed envelope (Source: Tzannes)

Key differences between the proposed and compliant envelope are:

- the compliant envelope has greater bulk in the south-eastern corner of the building, in the location of 5A Wiston Gardens primary view corridor
- the compliant envelope has greater bulk in the south-western corner of the building, in the location of 5A Wiston Gardens primary solar access plane
- Compliant envelope has greater bulk and less articulation at the eastern elevation, with two levels of garaging rising above the street.

## 5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the WLEP.

The NSWLEC has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate.

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated below that Test 1 has been satisfied.

### 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In the following section we consider whether the objectives of the development standard in clause 4.3(1) of the WLEP are achieved notwithstanding the proposed contravention (Test 1 under *Wehbe*). The objectives of the development standard for development in zone R3 Medium Density Residential (in which the proposed development is situated) are:

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
- (b) to establish a transition in scale between zones to protect local amenity,
- (c) to minimise the loss of solar access to existing buildings and open space,
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

These are discussed as follows:

#### (a) to establish building heights that are consistent with the desired future character of the neighbourhood.

The strict terms of clause 4.3 of the WLEP does not define the desired future character (*Woollahra Municipal Council v SJD DB2 Pty Ltd* [2020] NSWLEC 115 at [53]).

The desired future character of the neighbourhood establishes the building heights for buildings on land in the neighbourhood and not the other way around (cf *SJD DB2 Pty Ltd* at [56]). This means that the building heights literally set out under clause 4.3 alone do not establish the desired future character.

This necessarily means that the desired future character of the neighbourhood or area can be evaluated by reference to matters other than the strict provisions of clause 4.3 (cf *SJD DB2 Pty Ltd* at [59]).

In this case, the desired future character of the neighbourhood or area can be evaluated by reference to the development control plan **and the context of the locality itself** (cf *SJD DB2 Pty Ltd* (at [59])).

In consistent with the observations of Commissioner O'Neill in *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [44] it is submitted that generic standards in the WLEP and the Woollahra Development Control Plan 2015 (WDCP) do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of clause 4.6 on multiple sites further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (see *SJD DB2* at [62]-[63]). For these reasons, the desired future character of an area is not defined and fixed by the development standards that determine the building envelope for a site. Development standards that determine building envelopes for a locality can only **contribute** to shaping the character of that locality (*SJD DB2* at [53]-[54] and [59]-[60]).

The description of the desired future character of the area in the WDCP does make this contribution. The objectives of the WDCP are described in section A1.1.5 as follows:

- To give effect to the aims of WLEP.
- To facilitate development that is permissible under WLEP with reference to the unique characteristics of the area where the development is proposed.
- To achieve the objectives contained in WLEP.
- To establish controls that provide a balance between flexibility and certainty in the development assessment process.
- To establish a consistent set of definitions for terms used in the WDCP.

As can be seen from the above, the WDCP explicitly supports the WLEP.

The WDCP identifies the site (and the whole of Wiston Gardens) within a precinct referred to as the Darling Point precinct. The Darling Point precinct encompasses the peninsular situated between Rushcutters Bay and Double Bay. Darling Point Road runs along the ridgeline of this peninsula (Figure 5).

## MAP 2 Darling Point Precinct

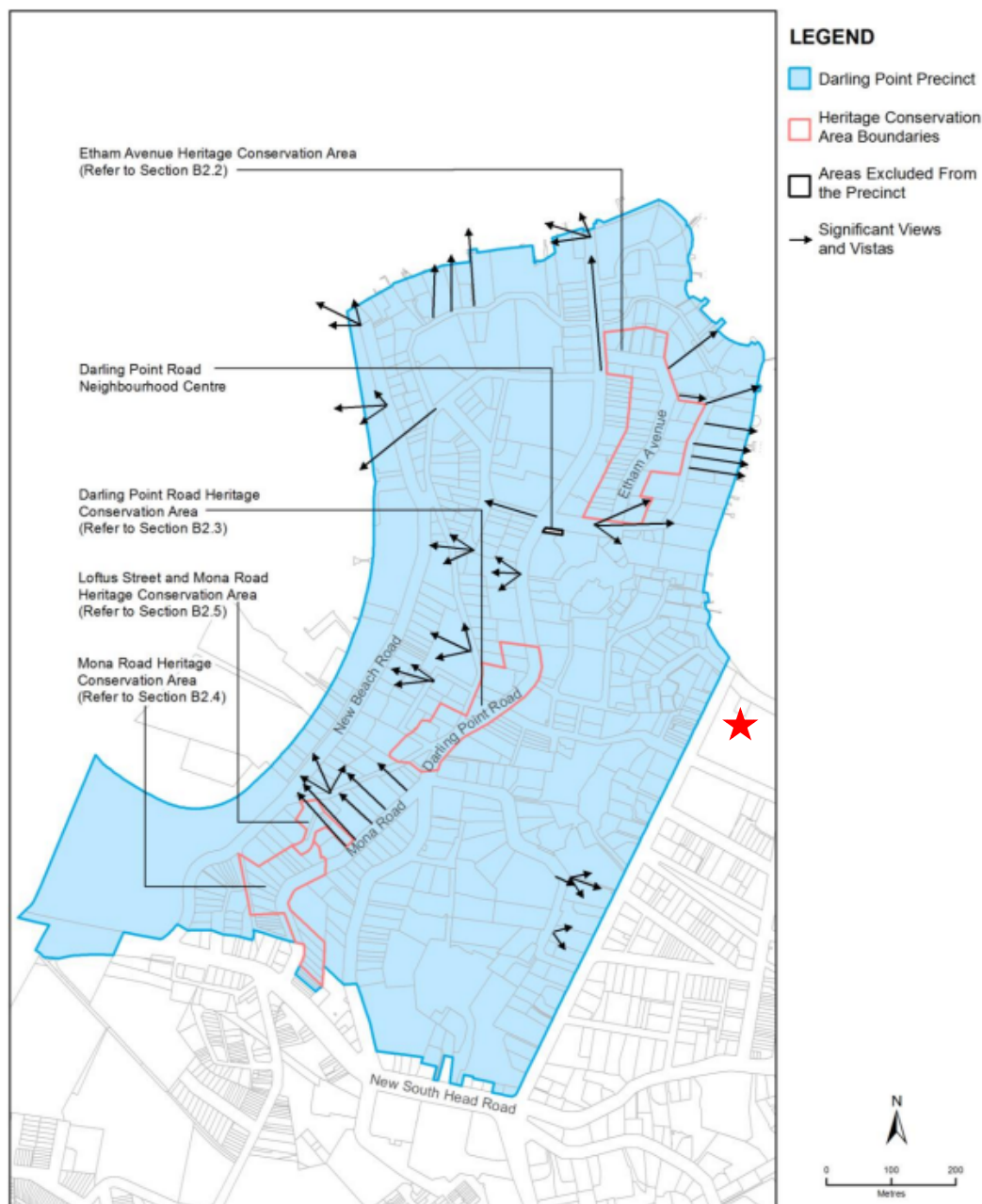


Figure 5: Map showing Darling Point Precinct with approximate location of site indicated by red star (Source: WDCP and City Plan)

To note, the site is not within a heritage conservation area nor in proximity of significant views and vistas.

The Double Bay precinct abuts the Darling Point precinct to the east at Ocean Ave. The character statement within the WDCP notes the precinct is recognised for both the density of its built form and its green landscape character. The type of development within the precinct comprises dwelling houses, terraces (attached dwellings) and residential flat buildings, including a number of interwar buildings that make a valuable contribution to the precinct character. The quality of buildings within the precinct represent an evolution and mix of building styles that often maintain a consistent scale across both sides of the street. While the site is not located within this precinct, it is important to demonstrate consistency with the nearby precinct. The proposal is compatible with the desired future character of the Double Bay precinct as:



- The redevelopment involves the provision of a residential flat building, where Double Bay is an established area comprising many.
- As discussed in detail below, the existing residential flat building is not of heritage or other cultural significance and is not worthy of retention.
- The terraced design of the building seeks to step with the fall in the heavily sloped land and, protect and enhance private views.
- The proposal respects the existing landscape character of the locality and responds to this with deep soil zones at the front and rear, soft landscaping along the side boundaries, extensive planting on structure at each level and retention of natural forming vegetation on the cliff face.
- As viewed from Steyne Park, the development is a significant visual improvement from that existing, blends in with the landscape and is compatible with surrounding development on the escarpment.

The desired future character of the Darling Point Precinct is described shown in bold in the following table. The proposal is consistent with these characteristics as discussed below each characteristic.

Table 1: Consistency with precinct character

**Desired future character - s.1.2.2 of the WDCP**

**The Darling Point precinct is an established residential area with a rich mixture of architectural styles and forms. Development is to retain the visual prominence of the tree canopy, particularly along the ridgeline of Darling Point Road.**

The precinct comprises a variety of residential development in the form of dwelling houses, medium and high-density buildings, of differing ages and architectural styles (Figures 6 to 10).



Figure 6: 12 Wiston Gardens

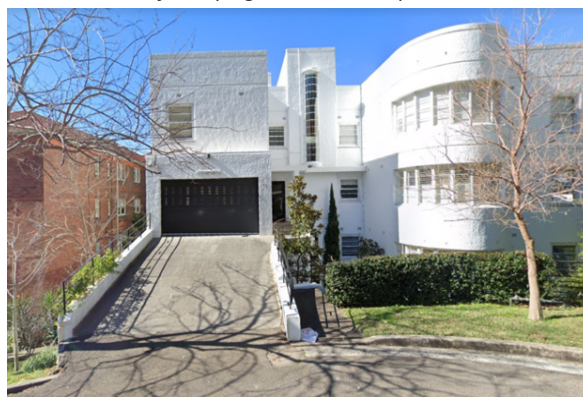


Figure 7: 11 Wiston Gardens (Source: Google Street View)



Figure 8: 6, 7 and 8 Wiston Gardens

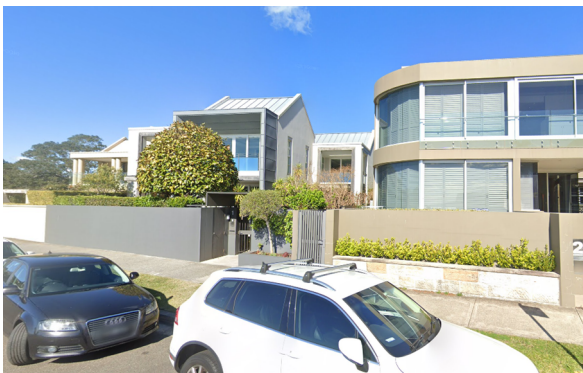


Figure 9: 2 Marine Parade (Source: Google Streetview)

#### Desired future character - s.1.2.2 of the WDCP



Figure 10: Development on the eastern side of Darling Point as viewed from Double Bay wharf, site marked with red dot (Source: City Plan)

The proposal contributes to the rich mixture of architectural styles and forms in providing a contemporary development which is landscape orientated and respects the visual prominence of the tree canopy at the ridgeline and the evident 'green belt' on the rock outcrop at the rear of the site.

#### **Most development is in the form of alterations and additions to the existing housing stock.**

The proposal involves a new residential flat building, as opposed to alterations and additions.

**Where a building comprises historic or aesthetic values, it is important that development reflects the scale of the existing built form and retains the character of the original building particularly in regard to the roof form, massing, details, materials and finishes. For example, the groups of period terraces at New Beach Road, Ocean Avenue and Darling Point Road should be retained and enhanced.**

A Heritage Impact Statement has been prepared by Urbis (dated 11 June 2021) which assesses the significance of the building. The statement concludes that the building does not meet any of the seven requisite criteria required for a heritage listing, and includes the following comments:

- *The subject flat building is associated with the work of Sydney architect Dudley Ward. Ward is noted for his distinctive Art Deco style and many fine examples of his work survive in the Sydney area.*
- *Notwithstanding, while the site is a Ward design, it is a modest expression of both Ward's style and an Inter-war Art Deco flat building. The building's envelope is relatively simplistic with the primary façade incorporating multiple garages and somewhat overwhelms the rest of the façade from the Wiston Gardens streetscape. Additionally, the building techniques and materiality were very common at its time of construction (1940-41). Undeniably, there exists many other buildings of this type in the local area. Considering the above, the site cannot be said to be a significantly rare nor representative example of its type.*

Therefore, the site does not comprise a building with historic or aesthetic values and satisfies this statement of the precinct.

#### **Development adjoining a contributory item or heritage conservation area is to have regard to the architectural values of the building and establish a sympathetic interface.**

The Heritage Impact Statement prepared by Urbis (dated 11 June 2021) assesses the proposal's impact on the adjacent heritage items and makes the following comments:

- *"The proposal is a well-considered response to the surrounding built environment and topography in its terraced form, with the bulk of the development to be concealed underground;*





#### Desired future character - s.1.2.2 of the WDCP

- the five-storey section is limited (up to 2.8m) and is located in the mid-section of the building. The lower storey projects only partially above the proposed ground level and sits below the fence line and as such will not change the perceived height of the building;
- there is variation in the scale of the buildings in the area with four-storey apartment buildings located upon No's 11 and 12 Wiston Gardens; and
- there are numerous buildings of greater height in the surrounding visual catchment. Those buildings will be significantly more prominent than the proposed development when viewed from Steyne Park and Sydney Harbour.

This is a steeply sloping site. The perceived bulk of the building is a function of the GFA that sits above the existing ground level. The proposed building includes 428m<sup>2</sup> of gross floor area above ground level when extrapolated from the existing ground level at the edges of the current building which is 110.4m<sup>2</sup> or 21% less than the permissible GFA. The nature of the site's topography allows for additional GFA below the ground level when calculated in this way. This additional GFA does not contribute to the apparent bulk and scale of the building.

The proposal's perceivable bulk is therefore compatible with that of a compliant building and the desired future character, in particular:

- the building has been carefully massed, having a terraced form that shifts the bulk away from the street to minimise its visual impact. The character statement identifies the stepping of development to minimise visual impact and follow the landform as a desirable element of existing built form in the area;
- the south western corners of levels 4 and roof terrace each step away from the southern boundary, reducing the buildings visibility from the ground floor and lower courtyards of 5A Wiston Gardens;
- the proposed buildings front façade is setback further from the street than the façade of the existing building. The balconies that project forward of the proposed façade are cantilevered, with sightlines available between them;
- the upper levels of the buildings are screened from view by the front terrace on level 3, from the sections of the street adjacent to the site;
- the building includes planting in deep soil and on structures. The planting is integrated within the building and will soften its appearance and emphasize its broken mass; and
- the cliff face on the western boundary of the property is to be retained and enhanced through new landscaping. The cliff line is an important landscape feature and visually separates development on Wiston Gardens from the larger buildings above on Eastbourne Road.

Therefore the proposal provides a height, bulk and scale which is compatible with buildings of two-four storeys and is compatible as viewed from the harbour.

#### Existing intrusive high rise and tower developments are not to be reproduced

The development does not reproduce the 'intrusive buildings' 20+ storeys in height.

**On the low side of streets where existing development predominantly presents as single or two storey, the height and scale of this built form to the street should be retained and the development designed to step down and follow the slope of the land. This will minimise cut and fill and also limit overshadowing and privacy impacts to neighbouring properties.**

The site is situated on the high side of Wiston Gardens.

**Attention must also be given to retaining views from the public domain and providing for view sharing from private properties; these can be achieved by providing suitable side boundary setbacks, roof forms and thoughtful distribution of building form across the site.**

The site does not affect views attained from the public domain and overall improves view sharing from private properties. The terraced built form, thoughtful distribution of bulk, extensive articulation, proposed materials and openness at roof terrace provides view sharing. In fact, the easterly views of the water, sky and land from the first floor master bedroom balcony and ground level terrace are improved due to the recessed building and staggered balconies. Views of Vacluse ridgeline are



#### Desired future character - s.1.2.2 of the WDCP

extended in width, giving greater context and adding an additional element of visual interest. Further, water views from the elevated pool deck at the rear of the site will be increased.

The WDCP also includes desired future character objectives for the Darling Point Precinct which we have also considered below.

Table 2: Consistency with Desired Future Character objectives

#### Desired Future character objectives - s1.2.2 WDCP

##### **O1 To respect and enhance the streetscape character and key elements of the precinct**

- the proposal will enhance the streetscape character by reducing the building mass adjacent to Wiston Gardens and creating a landscaped front setback which is currently absent. The resulting building will be a less intrusive element in the streetscape.
- the proposed building steps with the topography, breaking up the building mass and minimising its visual impact
- the proposed building sympathetically relates to the adjoining heritage items. This matter is discussed further in O4 (below)
- the proposed development will significantly improve the site's landscape character. This matter is discussed further in O10 and O11 (below)
- the site does not contain remnants of any estate gardens
- the site does not contain any significant sandstone walls. The proposed building includes a sandstone fence and façade (level 1) to complement the sandstones walls on the adjoining properties
- the stairway on the properties northern boundary is proposed to be removed. It is not a significant streetscape feature and its removal will be of minimal effect
- the removal of the existing street front garages and driveway crossings, and the provision of a proper pedestrian footpath, will improve pedestrian accessibility in the area
- there are no street trees affected by the development
- the site does not contain any trees which make a significant contribution to the green canopy of Darling Point. The cliff line on the sites western boundary is a prominent landscape feature. The cliff is to be retained and the landscaping attached to it enhanced, strengthening this feature
- the proposed development will not impact on any public view corridors
- the site is sufficiently separated from the foreshore reserve, to prevent any adverse impact on its amenity or functionality.

##### **O2 To maintain the sense of the historic grand estates**

The proposed development is not located near any of the grand estates of Darling Point.

##### **O3 To maintain the evolution of residential building styles through the introduction of well-designed contemporary buildings incorporating modulation and a varied palette of materials**

The proposed building is well-designed contemporary architecture. It has a highly modulated form which steps with the fall of the topography. The façade line at each level contain indents and projections creating variation and visual interest. The materials are natural in colour and finish, to allow the landscape elements to be the most prominent visual feature. The proposed building will renew the site and provide apartments that have a high amenity and achieve contemporary standards of amenity and comfort.

##### **O4 To maintain the heritage significance of heritage items and buildings in adjacent heritage conservation areas**

The Heritage Impact Statement dated 11 June 2021 (Urbis) assesses the proposed developments impact on the adjacent heritage items and makes the following comments:

#### Desired Future character objectives - s1.2.2 WDCP

- *"The proposal is a well-considered response to the surrounding built environment and topography in its terraced form, with the bulk of the development to be concealed underground;*
- *The proposed materiality and neutral colour scheme would be sympathetic to the existing fabric and colours in the streetscape and adjacent heritage items*
- *The proposed landscaping is reminiscent of the historical usage of the site as a manicured garden designed by significant colonial landscaper, Thomas Shepherd"*
- *The aforementioned considered form and materiality would not visually dominate the adjacent heritage items."*

#### **O5 To ensure that development does not reproduce or match existing intrusive buildings.**

The development does not reproduce the 'intrusive buildings' 20+ storeys in height.

#### **O6 To ensure that alterations and additions to period buildings, such as semi-detached dwellings and attached dwellings, do not detract from the character of these buildings and their presentation to the street**

The proposed development is a new building.

#### **O7 To ensure roof forms are articulated to provide attractive roofscapes and designed to minimise view loss.**

The roof form consists of a series of flat terraces. The terraces include planters in key locations to soften their appearance from above and below and create an attractive roofscape. View lines from the properties above are generally over the roofline. The roof steps away from the southern boundary in the south-eastern corner of the building, to improve or maintain views from 5A Wiston Gardens.

#### **O8 To design and site buildings to respond to the topography and minimise cut and fill**

The replacement on an inferior existing building with a superior building is a legitimate matter to be considered in application of the unreasonable or unnecessary test (cf *Citrus Pty Ltd v Inner West Council* [2019] NSWLEC 1558 at [46] and [51]).

The existing building has a poor interface with the street having five garages with a high parapet, five hard stand spaces which conflict with pedestrian movement, and a gutter crossing which extends the width of the site removing on-street parking. The proposed development seeks to eliminate those adverse effects by providing parking within a basement accessed by a single driveway. The site has a variable width, being wider at the street and tapering towards its rear. This shape creates significant challenges in designing the car parking, with the site unable to accommodate a centre aisle with parking either side. The proposed car park was developed through an iterative design process and is the most efficient layout. The option of providing all parking above ground to reduce excavation was considered, but resulted in a higher parking structure which dominated the streetscape in a manner similar to the existing.

The proposed excavation is a consequence of the topography and the need to provide basement parking. The proposed excavation responds to the topography and minimises cut and fill by providing parking from the available street level and in the most efficient layout.

#### **O9 To ensure that development is subservient to the tree line along the ridge of Darling Point Road when viewed from the harbour.**

The proposed building sits below and is subservient to the tree line on the ridge of Darling Point Road.

#### **O10 To retain and reinforce the setting of mature street trees and garden plantings especially along the ridgeline by retaining existing trees and providing appropriate replacement planting.**

The large Port Jackson Fig in 19A Eastbourne Road overhangs the rear setback zone of the site and will be retained and preserved with the redevelopment. All other trees on the neighbouring properties are also to be retained. The proposed landscape scheme enhances the landscape amenity of the site. Deep soil planting is supported by a number of street trees within the front

#### Desired Future character objectives - s1.2.2 WDCP

setback. This provision will greatly improve the presentation of the ground floor level to the street and introduce a landscape buffer which is currently absent at the site.

#### **O11 To retain the landscape setting of the locality by maintaining landscaped areas around buildings and minimising hard stand areas.**

The site does not contain an established garden with trees. The existing landscaped area is consolidated into a single parcel at the rear of the site, which is untended, difficult to access, not readily usable, and not visible from the public domain. There is no landscaping on the street.

The proposed building includes a four-metre-wide deep soil landscaped strip on the street which will significantly contribute to the streetscape. The southern and northern side setbacks each include soft landscaped areas capable of accommodating medium size plantings.

#### **O12 To retain and reinforce the stone and brick retaining walls that characterise the sloping streets of the precinct**

The site does not contain any significant stone or brick retaining walls. The front fence and street level façade are proposed to be made of sandstone, to complement the sandstone walls on the adjoining properties.

#### **O13 To protect important iconic and harbour views from public spaces and to provide additional important views from public spaces when possible**

The proposal protects and rather increases the views from private properties.

As demonstrated above, the proposed building height is consistent with the desired future character of the Darling Point Precinct and therefore the first objective of the control is achieved.

#### **(b) to establish a transition in scale between zones to protect local amenity.**

Clause 4.3(1)(b) is irrelevant to the site and proposal as all surrounding properties are zoned R3 Medium Density Residential, refer to the following figure.

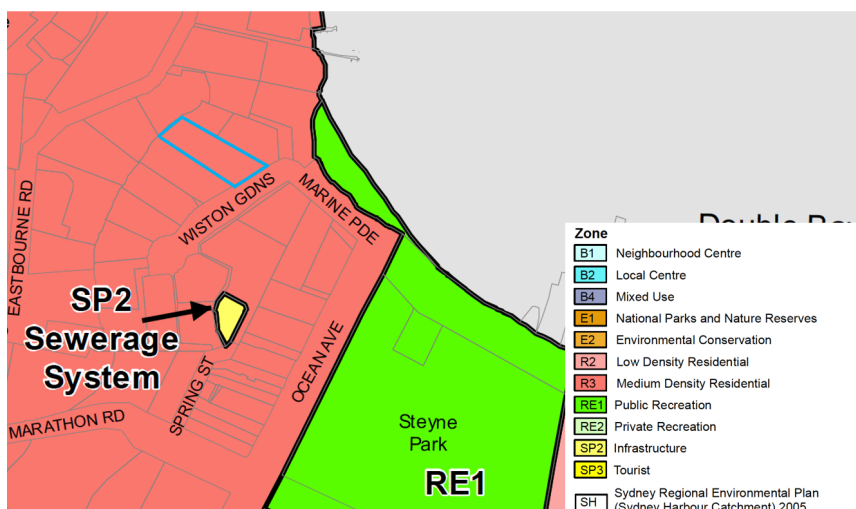


Figure 12: Extract of the land use zoning map, site outlined blue (Source: NSW Legislation)

#### **(c) to minimise the loss of solar access to existing buildings and open space.**

The WDCP requires north facing windows to upper habitable rooms of adjacent dwellings (5A Wiston Gardens) to receive at least 3 hours of sunlight between 9am and 3pm on 21 June, over a portion of their surface.

The proposal has been appropriately designed to protect and enhance, where possible, solar access to 5A Wiston Gardens. Due to the topography, and design of 5A Wiston Garden it is vulnerable to overshadowing. Currently the adjoining site experiences limited access to sunlight at mid-winter.

The proposal will create additional overshadowing (as illustrated in drawings 8100, 8101, 8102, 8103, 8110, 8111, 8112 and 8113).

Drawings 8104 and 8114 illustrate the reduced solar gain as a result of the exceedance of the height plane (when measured from the existing excavated basement levels, as preferred by the Council). The awnings over the level 3 and 4 front terraces cause minor reduced solar gain at the 5A Wiston Gardens ground floor front terrace at 9.00am and the road and footpath to the east of the site from 10.00am to 2.00pm. There is no change at 3.00pm mid-winter.

The main ground level POS of 5A Wiston Gardens currently receives negligible sunlight between 9am and 3pm mid-winter and no sunlight by the proposed scheme. This area currently has a pergola over a portion of it. A comparative compliant scheme also overshadows this area due to its vulnerable location.

However, the proposal will restore sunlight to the bedroom 1 front balcony. This balcony benefits from views and is considered valuable secondary POS for the adjoining property to the south.

As illustrated in drawings 8100, 8101, 8102, 8103, 8110, 8111, 8112 and 8113, the proposed building does not diminish sunlight to:

- Bedroom 1 front balcony at 10.00am, 11.00am, 12.00pm and 1.00pm mid-winter;
- Pool, pool deck and cabana at 11.00am and 12.00pm mid-winter; and
- There is no affect to 5A Wiston Gardens at 2pm or 3pm mid-winter.

Therefore, the proposal will not diminish sunlight to usable areas of POS in mid-winter and will restore sunlight to bedroom 1 front balcony at 9am mid-winter, which benefits from views of Double Bay. Thereby improving the direct access to sunlight from the main dwelling. On balance, therefore, the proposal improves sunlight access from an amenity perspective.

Therefore, objective (c) is achieved.

**(d) 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 proposal minimises view impacts and, in fact, improves view sharing from adjoining properties, notably 5A Wiston Gardens.

Richard Lamb and Associates have prepared a Visual Impact Assessment dated August 2020. This assessment determines that the proposed development will result in some improvement and a negligible loss in views from adjoining properties. In our opinion the view sharing principles in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 are not relevant, as the extent of the impacts are minor and the adversely impacted property retain panoramic views. Irrespective, this assessment applies the Tenacity principles to avoid any disagreement over its applicability.

Tenacity is specific to view loss and provides a method of assessment, applying a four-step view sharing analysis. Tzannes have prepared detailed view drawings (8000 to 8007 and 9000 to 9007 dated 1 June and 26 May 2021, respectively).

### Step 1: The view to be affected

The view to be affected is the water of Double Bay at the south end, land in the foreground of the site comprising a mix of residential development, the grass foreshore, Steyne Park and Double Bay wharf and land in the background of Double Bay, orientated south-east and south, and Rose Bay toward the north-east.

### Step 2: The part of the property from which views are obtained

The following table details the parts of the property from which views are obtained.

Table 3: Views from adjoining properties

Property	Location of views
5A Wiston Gardens	<ul style="list-style-type: none"> <li>Main bedroom balcony - water views of the south of Double Bay and land views including parts of Steyne Park and the grass promenade.</li> <li>Front terrace ground floor - water views of the south of Double Bay and land views including parts of Steyne Park and the grass promenade.</li> <li>Pool deck - partially obstructed water views of the south of Double Bay (due to vegetation) and land views of Double Bay below.</li> <li>Dining and formal dining rooms at ground level - obstructed views of the south of Double Bay and the grass promenade.</li> </ul>
17 Eastbourne Road	<ul style="list-style-type: none"> <li>Media room at lower ground floor, views of the south of Double Bay, the wharf and grass promenade, partially obstructed by the Port Jackson Fig tree to the north.</li> <li>Dining, living room and balcony at the ground floor - views of the south of Double Bay, the wharf and Steyne Park partially obstructed by vegetation and fencing.</li> <li>Rear garden at ground floor - views of the south of Double Bay, the wharf and grass promenade, partially obstructed by the Port Jackson Fig tree to the north.</li> <li>Study and master bedroom - views of the south of Double Bay, grass promenade and views of Rose Bay in the background, water views obstructed to the north by the Port Jackson Fig tree.</li> <li>Terrace adjoining bedroom 2 and 3 on level 1 - views of the south of Double Bay, the wharf, Steyne Park and land of Rose Bay in the background.</li> </ul>
19A Eastbourne Road	<ul style="list-style-type: none"> <li>Alfresco outdoor dining area and family room at the main level- expansive views of Double Bay and Sydney Harbour to the north from the family room.</li> <li>Living and dining room and library/tv room at the main level - views of the south of Double Bay, grass promenade and Steyne Park.</li> <li>Master bedroom balcony at the entry level - views of the south of Double Bay, grass promenade and Steyne Park.</li> <li>Pool terrace - obstructed water views due to existing vegetation.</li> </ul>
19 Eastbourne Road	<ul style="list-style-type: none"> <li>Water views of the south of Double Bay and land views of Double Bay and Rose Bay from several of the apartments within the block.</li> </ul>
13A Eastbourne Road	<ul style="list-style-type: none"> <li>Views from upper and lower levels and the rear garden including the southern shoreline of Double Bay, Seven Shillings Beach, foreshore of Double Bay including the wharf and district views of Vacluse, Woollahra, Bellevue Hill, Bondi Junction and Edgecliff.</li> </ul>

### Step 3: Extent of the impact

The following table details the extent of the view impact, noting views from habitable spaces are considered valuable.

Table 4: Extent of impact

Property	Extent of impact
5A Wiston Gardens	<ul style="list-style-type: none"> <li>Easterly views of the water, sky and land from the first-floor master bedroom balcony and ground level terrace are improved due to the recessed building and staggered balconies. Views of the Vacluse ridgeline are extended in width, giving greater context and adding an additional element of visual interest.</li> <li>The proposal results in increased availability for views of the sky, water and land attained long the north side boundary from the dining and formal dining rooms. At</li> </ul>



Property	Extent of impact
	<p>present dense vegetation on the north boundary at 5A Wiston Gardens covers this potential view.</p> <ul style="list-style-type: none"> <li>Water views from the elevated pool deck at the rear of the site will be marginally increased.</li> </ul> <div data-bbox="395 495 855 853" data-label="Image"> </div> <div data-bbox="924 506 1362 853" data-label="Image"> </div> <p>Figure 13: View from 5A main bedroom balcony (Source: Tzannes)</p>
17 Eastbourne Road	<ul style="list-style-type: none"> <li>Minor view loss to the water and land will occur from the rear garden and media room window at the lower ground floor level, as a result of the roof terrace and cabana. It is noted that the terrace does not constitute gross floor area.</li> <li>No. 17 Eastbourne has two additional habitable levels, which are oriented in a north-easterly direction looking across Double Bay. Impact on views from those upper levels are minor and, in some cases, negligible due to the increased height of the viewing point.</li> </ul>
19A Eastbourne Road	<ul style="list-style-type: none"> <li>The development results in minor gain and loss of views of Steyne Park. This view is generally obstructed at present by vegetation. The 2 metre setback improves views of land to the south-east of the site. Minor view loss occurs due to the level 4 balustrades.</li> </ul> <div data-bbox="395 1339 855 1697" data-label="Image"> </div> <div data-bbox="924 1350 1362 1697" data-label="Image"> </div> <p>Figure 14: View from 19A pool deck (Source: Tzannes)</p> <ul style="list-style-type: none"> <li>Impact on views from the upper levels of the dwelling is negligible due to the increased height of the viewpoint.</li> </ul>
19 Eastbourne Road	<ul style="list-style-type: none"> <li>The proposal results in very minor view gain and loss of the grass promenade to the west of Steyne Park. The site continues to receive almost unobstructed views of Double Bay.</li> </ul>
13A Eastbourne Road	<ul style="list-style-type: none"> <li>Analysis of the photomontages prepared for the views from 13A Wiston Gardens by Tzannes show there would be no significant view loss and a marginal view gain.</li> </ul>

#### Step 4: The reasonableness of the proposal

The proposed building has been skilfully designed with specific consideration given to generating view impacts less than that caused by the existing building or a comparative compliant scheme.

The primary view feature in this visual catchment is that of the water and foreshore of Double Bay. The proposed development results in improved views of that feature from 5A Wiston Garden, being the property, whose views are under greatest threat from redevelopment of the site.

The minor loss of view to the lower ground floor window of 17 Eastbourne Road is reasonable as:

- panoramic views of Double Bay and its foreshore will still be available from the lower ground floor level and garden
- the dwelling has two other habitable floor levels above, which will retain their views
- Double Bay/Darling Point are high density urban environments.

A comparative compliant scheme would cause worse view loss than the proposal (refer to drawing 8004 and 8005).

Richard Lamb and Associates similarly conclude that the non-compliant rear setback of the proposal does not cause view sharing impacts in excess of a compliant building and in that regard would be assessed as reasonable.

Therefore, the proposal minimises view impact to adjoining and nearby properties.

#### **Privacy**

The proposal causes less privacy impacts than the existing building. The existing building is orientated to the north, contains large picture window on the north elevation with no screening or privacy devices. The proposed development incorporates bronze aluminium solar shading devices and external blinds along the entire north elevation and covers all windows on the south elevation. The proposed primary POS for each apartment is orientated to the street, with secondary POS off bedrooms. The level 4 south facing terrace off the bedroom and study is sufficiently separated from 5A Wiston Gardens being 7.8m away. The roof terrace south facing terrace is 9.1m from 5A Wiston Gardens and the north facing terrace is 14.9m and 15.6m from the residences to the north.

The proposal comprises acoustic rated glass windows and barriers to the northern windows and terraces as illustrated in the architectural plans dated 1 June 2021.

The proposal therefore minimises the privacy impacts on adjoining and nearby properties.

#### **Overshadowing**

The proposal minimises overshadowing impacts on adjoining and nearby properties. As discussed in detail above in demonstrating consistency with clause 4.3(1)(c), the topography and design of 5A Wiston Gardens places it in a vulnerable location to overshadowing. Currently 5A Wiston Gardens experiences limited access to sunlight at mid-winter. The proposal will restore sunlight to 100% of bedroom 1 front balcony, at mid-winter, which benefits from views of Double Bay. The main ground level POS of 5A Wiston Gardens currently receives negligible sunlight between 9am and 3pm mid-winter and no sunlight by the proposed scheme. This area currently has a pergola over a portion of it. A comparative compliant scheme also overshadows this area due to its vulnerable location. The WDCP requires north facing windows at upper habitable rooms of adjacent dwellings (5A Wiston Gardens) to receive at least 3 hours of sunlight between 9am and 3pm on 21 June, over a portion of their surface.

The proposal has been appropriately designed to protect and enhance, where possible, solar access to 5A Wiston Gardens. Due to the topography, and design of 5A Wiston Gardens it is vulnerable to overshadowing. Currently the adjoining site experiences limited access to sunlight at mid-winter.

The proposal will create additional overshadowing (as illustrated in drawings 8100, 8101, 8102, 8103, 8110, 8111, 8112 and 8113).

Drawings 8104 and 8114 illustrate the reduced solar gain as a result of the exceedance of the height plane (when measured from the existing excavated basement levels, as preferred by the Council). The

awnings over level 3 and 4 front terraces cause minor reduced solar gain at 5A Wiston Gardens front terrace at 9.00am and the road and footpath to the east of the site from 10.00am to 2.00pm. There is no change at 3.00pm mid-winter.

The proposal therefore on balance minimises overshadowing impacts to 5A Wiston Gardens.

### **Visual Intrusion**

The proposal minimises visual intrusion impact on the adjoining and surrounding dwellings, particularly when compared to the existing intrusive RFB and comparative compliant scheme. The proposal removes a visually dominating building.

The scale of the proposed building at street level is consistent with neighbouring dwellings and an improvement from the existing apartment building. The bulk and scale of the visible building is in fact 21% less than is permitted by the FSR control, with the gross floor area (GFA) that exceeds the FSR being located in basement levels. The GFA located within the basement levels is a sensible use of space created by the steep slope of the land and, ground and basement level on-site car parking.

The design of the building improves the setting of the adjacent heritage items, as well as the streetscape by removing the five garages and five driveway spaces, proposing materials and façade treatments that are sympathetic to the existing fabric and adjacent heritage items and improve the appearance of the site by reducing the bulk associated with the existing dwelling. Refer to the Heritage Impact Statement dated 11 June 2021.



Figure 15: Existing garages and tandem parkin arrangement (Source: The applicant)

The terraced proposal recedes comfortably into the landscape and is not visually intrusive, as illustrated in the below image.





Figure 16: Photomontage of proposed building form (indicated by yellow arrow) viewed from foreshore reserve.

Therefore, objective (d) is achieved.

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

The portions of the building which exceed the height standard will have no impact on the amenity of the public domain in respect to public views of the harbour and surrounding areas, noting private views are addressed above. Thus, this objective is achieved.

As demonstrated, the objectives of the height of buildings development standard (in clause 4.3(1) of the WLEP) are achieved notwithstanding the proposed contravention.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

**5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

**5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.**

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

**5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or**

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon.

**5.5. The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

**5.6. Other grounds**

For completeness, this request also seeks to demonstrate that the "unreasonable and unnecessary" requirement is met because the burden placed on the community by not permitting the contravention (and allowing for the building height and mass to be distributed as anticipated under the strict numerical controls) would be disproportionate to the consequence attributable to the proposed non-compliant development.

A compliant scheme would result in a greater height and mass at the front of the site and the achievement of the development standard objectives would be suboptimal. This creates greater perceived bulk from the street and neighbouring properties. Allowing the non-compliant scheme will reduce overall adverse impacts on third parties and provide better amenity for the future occupiers of the subject development. Any adverse impacts from allowing the variation are very modest and are dwarfed by the significant benefits of allowing the variation.

This disproportion (between the adverse impacts of the variation, versus the benefits of requiring strict compliance) is, in itself, sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

In this regard, all of the earlier discussion is adopted and advanced.

Compliance with the development standard(s) is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the contravention of the height of buildings development standard as set out in the preceding sections in detail. As discussed above, the non-compliant development does not result in any meaningful additional adverse environmental impact and instead provides a built form that achieves the desired future character for the area for the area and is consistent with the objectives of clause 4.3.

Additionally, the proposed development, notwithstanding the non-compliance with the height standard, better achieves important statutory goals (when compared with a compliant development). The superior outcome, in terms of statutory planning goals, combined with the absence of meaningful additional adverse environmental impacts are environmental planning grounds that justify the contravention.

The relevant environmental grounds and the statutory planning goals achieved are as follows.

- The proposed development has re-distributed the mass away from the eastern boundary which fronts Wiston Gardens. This has been done to respond to the adjoining/adjacent properties which benefit from views of Double Bay across their side boundaries and maintain amenity between these properties. The contravention arises as a result of this re-distribution of mass which allows for improved view corridors when compared to a compliant development. This promotes the orderly and economic use and development of the land. This achieves key objectives below:
  - in the *Environmental Planning and Assessment Act 1979* (EP&A Act) - the objective in section 1.3(c) to 'promote the orderly and economic use and development of land'; and
  - in the WLEP - the aim in clause 1.2(2)(b) to 'promote the management, development, conservation and economic use of property'.
- The built form of a compliant scheme would result in an inferior outcome including poor amenity of the subject proposal, increased view loss for adjoining site, poor deep soil planting and private open space provision and greater bulk at the streetscape. The building bulk would be located in an insensible location and adversely impact adjoining heritage items and be inconsistent with the desired future character of the locality. The proposed development, notwithstanding non-compliance with the height development standard, thereby not only is an orderly and economic use and development of the land but also promotes good design and amenity of the built environment. This achieves key objectives below:
  - in the EP&A Act - the objective in section 1.3(c) as quoted above, and section 1.3(g) to 'promote good design and amenity of the built environment'; and
  - in the WLEP - the aim in clause 1.2(2)(b) as quoted above and in clauses 1.2(2)(j) to 'promote a high standard of design in the private and public domain' and 1.2(2)(l) to 'ensure development achieves the desired future character of the area'.
- The contravention of the standard does not result in any material adverse environmental impacts to adjoining properties, including the heritage items, and the proposal has been designed to respond to the existing and future built form character of the area. This promotes the sustainable management of built form and cultural heritage present in the immediate vicinity of the site. This achieves key objectives below:
  - in the EP&A Act - the objective in section 1.3(e) to 'protect the environment' and (f) to 'promote the sustainable management of built and cultural heritage'; and
  - in the WLEP - the aim in clauses 1.2(2)(g) to 'protect amenity and the natural environment' and (f) to 'conserve built and natural environmental heritage'.
- The proposal promotes good design and amenity of the built environment, resulting in improved urban design and amenity considerations for both the local community and future occupants of

the building, particularly when compared to the existing development and a comparative compliant scheme. It provides improved views of the harbour, restores sunlight to the open space of adjoining dwellings, redistributes the mass away from the street and reduces the impacts of bulk on the properties to the south. This achieves key objectives below:

- in the EP&A Act - the objective in section 1.3(g) as quoted above; and
- in the WLEP - the aim in clauses 1.2(2)(j) and (l) as quoted above.
- The building seeks to achieve compliance with the height of buildings development standard in accordance with *Bettar* and *Stamford*. The contravention of the height standard occurs as a result of taking into account the existing excavated basement level. Notwithstanding, the design carefully steps the building mass with the steep topography toward the rear property boundary. The proposed mass on each level is separated by cantilevered balconies comprising extensive planting, compliant side setbacks and acoustic treatments. This achieves key objectives below:
  - in the EP&A Act - the objective in section 1.3(g) as quoted above; and
  - in the WLEP - the aim in clauses 1.2(2)(j) and (l) as quoted above. The site's topography and unusual characteristics distinguish this case from the more generic development for which a numeric control of this kind inevitably must anticipate.
- The contravention does not detract from the development's achievement of the objectives of the height development standard and the objectives of the zone (discussed further below).

For completeness we note that the size of the variation (19%) is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for large variations to be approved in the right circumstances.



## 7. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. This is required by clause 4.6(4)(a)(ii) of the WLEP.

In Section 6 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the contravention of the development standard. This must also mean that the development is consistent with those standards.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 5: Consistency with zone objectives

Objectives of the R3 Medium Density Residential Zone	Discussion
To provide for the housing needs of the community within a medium density residential environment.	The proposal involves the redevelopment of the site to provide a modern residential flat building which is compatible with land uses in the locality and responds to a particular housing need. The contravention to the standard does not affect consistency with this objective.
To provide a variety of housing types within a medium density residential environment.	The locality comprises a mix of large-scale dwelling houses, medium and high density residential flat buildings. The proposal contributes to the variety of housing types in the area and improves the housing quality and stock. The contravention to the standard does not affect consistency with this objective.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal does not limit the provision of other land uses on other nearby sites. The development is in proximity to the Double Bay town centre and transport facilities at Edgecliff and Double Bay wharf. The contravention to the standard does not affect consistency with this objective.
To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.	The proposal achieves compliance with the height standard and is of a scale that is consistent with the desired future character of the locality, as discussed in detail in section 6 of this request. The contravention to the standard does not affect consistency with this objective.

As demonstrated in Table 5, the proposal is consistent with the objectives of the zone and in Section 6 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## 8. STATE OR REGIONAL ENVIRONMENTAL PLANNING AND ASSUMED CONCURRENCE

This section considers whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of State or regional significance that would result as a consequence of contravening the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

The Secretary (of Department of Planning, Industry and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation, provided that the determination is not made by a delegate of the Council. (It should be noted that a panel and the Land and Environment Court are not delegates of the Council).

## 9. CONCLUSION

This submission requests a variation, under clause 4.6 of the WLEP, to the height of buildings development standard having regard to the existing excavated basement level and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case;
- The development achieves the objectives of the development standard and, in fact, requiring a complaint development would undermine one of these objectives (relying on Webhe Test 1) and is consistent with the objectives of the R3 Medium Density Residential zone; and
- There are sufficient environmental planning grounds to justify the contravention.

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of R3 Medium Density Residential zone notwithstanding non-compliance with the height of buildings development standard and is therefore in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 20-002.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.



16 December 2020

**Mills Oakley**  
ABN: 51 493 069 734

**Privileged and confidential**

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**Attention:** Stephen Kerr

**By email:** stephenk@cityplan.com.au

Dear Stephen

**DA325/2020/1 - 3 Wiston Gardens, Double Bay - 20/230102**

We refer to your request for legal advice (on behalf of our mutual client, Merman Investments Pty Ltd) in relation to pages 256-261 in the development assessment report. These concern the application of clause 4.3 (height) of the *Woollahra Local Environmental Plan 2014 (the LEP)*.

The relevant authority in the Land and Environment Court for the calculation of the 'existing ground level' for the purposes of a height control in the portion of the site occupied by a basement is *Bettar v Council of City of Sydney* [2014] NSWLEC 1070 at [39]-[41].

This decision says that where there is a basement in an existing building, the 'existing ground level' needs to be inferred from co-ordinates on the edge of a footprint of the basement of the existing building. Where the existing ground level is to be inferred in this way, it can only be inferred where there is no existing ground level due to the existence of the basement. That is, the parts of the site that have an existing ground level must use the actual ground level as a reference for the height control.

Where the ground level is to be inferred, it is to be shown as a plane drawn from the existing ground level at the key points marking the edge of the portion of the site which is said to have no ground level (ie the portion occupied by a building with a basement).

In *Bettar* (at [35]-[41]) the Court expressly **rejected** an argument that would result in starkly different height limits arising from the same development standard (depending on the degree of existing built form on the site).

The Court, in part, relied upon the relevant Standard Instrument provisions (also reproduced in the LEP):

**basement** means the space of a building where **the floor level of that space is predominantly below ground level (existing)** and where the floor level of the storey immediately above is less than 1 metre above ground level (existing) ...

**ground level (existing)** means the existing level of a site at any point (some bold added).

The Court said at [39]-[41]:

[T]he definition of basement in LEP 2012 is the space of a building where the floor level of that space is *predominantly below existing ground level* and where the floor level of the storey immediately above is less than 1 metre above existing ground level [italics added]. From this definition, it does not follow that existing ground level becomes the level of the basement floor or the soil beneath the basement following the construction of a basement. **A basement is, by definition, below ground level and so the level of the basement floor cannot be taken to be existing ground level.** ...

For these reasons, I do not accept ...[the] approach of defining existing ground level as the ground floor level of the existing building and then dropping it down to the basement level in the north-eastern corner of the site where

the existing basement is located. This results in an absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be demolished and has no relationship to the context of the site (bold added). ...

The assessment report is simply ignoring the *Bettar* decision. This decision is routinely applied in the Court process. In our view, the subsurface floor levels that the Council seeks to rely on (as 'existing ground level') are equivalent to the 'basement' that was discarded in *Bettar*. They are actually below the 'level of the site' and therefore are incorrect reference point for measuring the 'height of building' under the LEP.

In our view, the application documents have been prepared in accordance with the *Bettar* decision and the established practice approved by the Land and Environment Court. On this basis, no clause 4.6 variation in relation to height is required.

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely



**Aaron Gadiel**  
**Partner**

Accredited Specialist — Planning and Environment Law