

The background of the page features a dark blue diagonal band across the middle. Behind this band and the rest of the page is a light gray background with a pattern of white-outlined geometric shapes, including cubes and rectangles, some of which are slightly offset to create a 3D effect. In the upper right, a blurred image of a city skyline with tall buildings is visible.

Clause 4.6 Variation Request

Clause 4.4 Floor Space Ratio
Woollahra Local
Environmental Plan 2014





3 Wiston Gardens, Double Bay

Submitted to Woollahra Council

On Behalf of Pier Property Corporation Pty Ltd

August 2021

REPORT REVISION HISTORY

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1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.4 Floor Space Ratio (FSR) 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. A key design principle has been to create a building which has less environmental impact than the existing residential flat building, or an otherwise complying development, and which positively contributes to the streetscape and desired future character of the locality. The existing building relates poorly to the street presenting with five garages and a high parapet wall.

Clause 4.4 of the WLEP prescribes a maximum FSR for the site of 0.65:1, which equates to a gross floor area (GFA) of 538.4m². The proposed building has 932.07m² of GFA which equates to an FSR of 1.12:1, being an 73% variation. 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]. As Commissioner Clay explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, that the application of clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied (this decision was upheld by the Chief Judge of the Land and Environment Court on appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115).

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

- 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 bulk and scale than a compliant envelope and a better visual relationship to 5A Wiston Gardens
- the GFA which sits above ground level when extrapolated from the existing ground level at the edges of the current building 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.
- provides deep soil landscaped areas that satisfies the requirements of the Woollahra Development Control Plan 2015, and importantly provides 40.25m² of deep soil landscape area at the street, where is currently no landscaping
- will not dominate the adjacent heritage items as a consequence of the considered form and materiality of the proposed building.

This request demonstrates that compliance with the FSR 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.

2. INTRODUCTION

This request has been prepared in accordance with clause 4.6 of the WLEP to justify a variation to the FSR 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 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 FSR development standard which is set out in clause 4.4 of the WLEP as follows:

4.4 Floor Space Ratio

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio map.

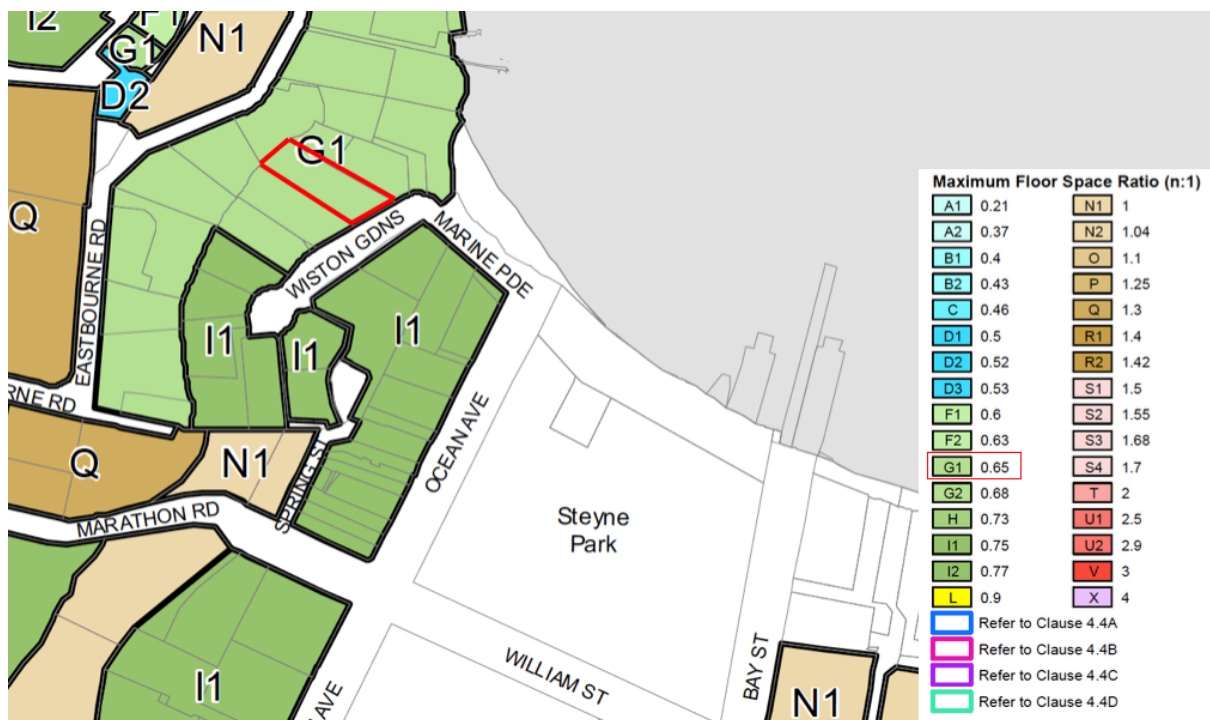


Figure 1: WLEP FSR map, site outlined in red (Source: NSW Legislation)

The numerical value of the development standard proposed to be varied is 0.65:1.

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

3.1. Site area for the purpose of calculations

In accordance with the definition provided in Clause 4.5 of the WLEP, the site area is the whole of 3 Wiston Gardens (Lot 4 in DP 15968), being 828.3m². All proposed gross floor area (GFA) is to be contained within the site.

4. EXTENT OF VARIATION

Clause 4.4 of the WLEP prescribes a maximum FSR for the site of 0.65:1, which equates to a maximum GFA of 538.4m². The proposed building has a GFA of 932.07m² which equates to an FSR of 1.12:1, being an 73% variation of the control.

The proposed GFA, its distribution across each level and its location above or below existing ground level is described in Table 1.

Table 1: Proposed GFA

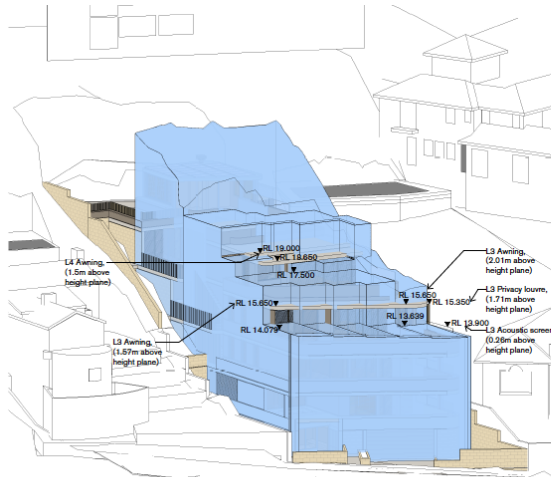
Level	Use	GFA (m ²)	GFA above existing ground level (m ²)
Basement	Carpark	0m ²	0m ²
Ground	Carpark, building entry	49.63m ²	0m ²
Level 1	Residential	208.47m ²	41m ²
Level 2	Residential	200.03m ²	125m ²
Level 3	Residential	274.87m ²	137m ²
Level 4	Residential	181.83m ²	108m ²
Roof terrace	Terrace and cabana	16.96m ²	17m ²
Total		932.07m²	428m²
FSR		1.12:1	0.52:1



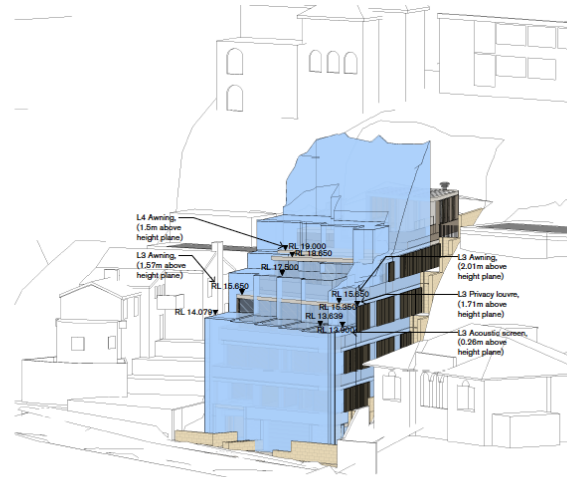
Figure 2: Photomontage of proposed building form (indicated by yellow arrow) viewed from foreshore reserve.

4.1. Comparison of existing, proposed and compliant envelope

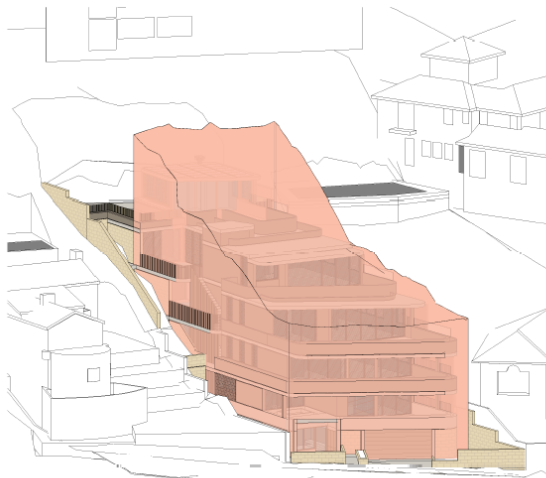
To determine their reasonableness of the variation, this request compares the impacts of the proposed development with comparative compliant building envelope. The form of the proposed development with a compliant envelope is illustrated in Figure 3. The impact from the three different development scenarios is illustrated in the view and shadow diagrams prepared by Tzannes dated 1 June 2021.



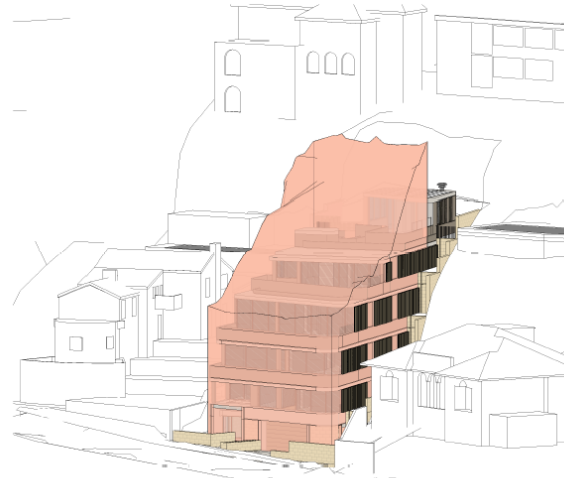
1 | Southern View - Proposed
 Envelope Diagram - Calculating building height from existing excavated basement level



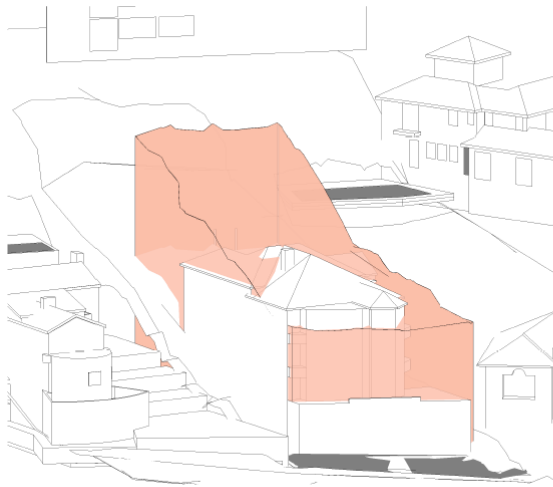
2 | Eastern View - Proposed
 Envelope Diagram - Calculating building height from existing excavated basement level



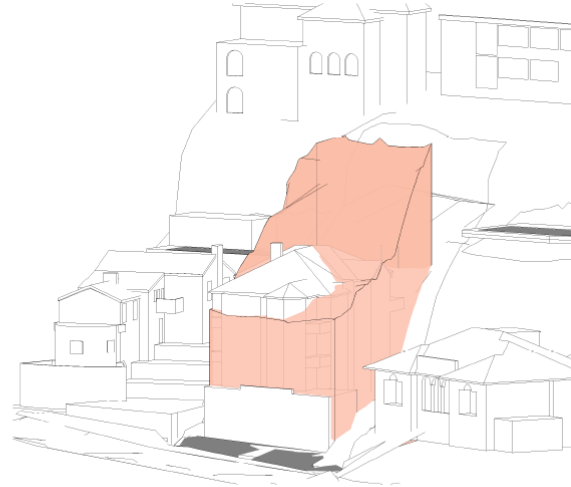
3 | Southern View - Proposed
 Envelope Diagram per Better Definition



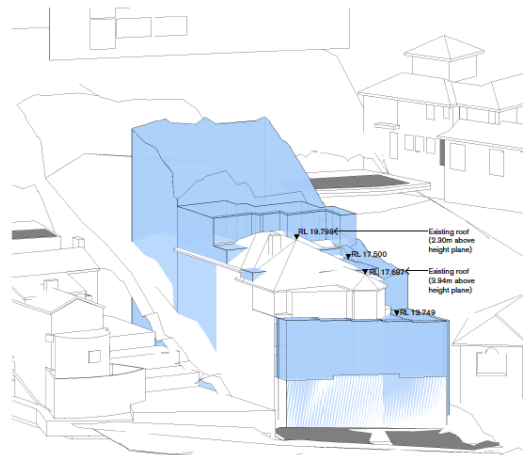
4 | Eastern View - Proposed
 Envelope Diagram per Better Definition



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 3: 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 Court has held that there are at least five (5) 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 (5) 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, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) 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 (1) 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 that Test 1 and 3 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 4.4(1)(a) 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:

- i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and
- ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and
- iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space.

These are discussed as follows:

(i) to ensure the bulk and scale of new development is compatible with the desired future character of the area.

The desired future character of the area is not described within the WLEP, however, a description of the desired future character of the area is to be found in the Woollahra Development Control Plan 2015 (WDCP). 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 4).

MAP 2 Darling Point Precinct

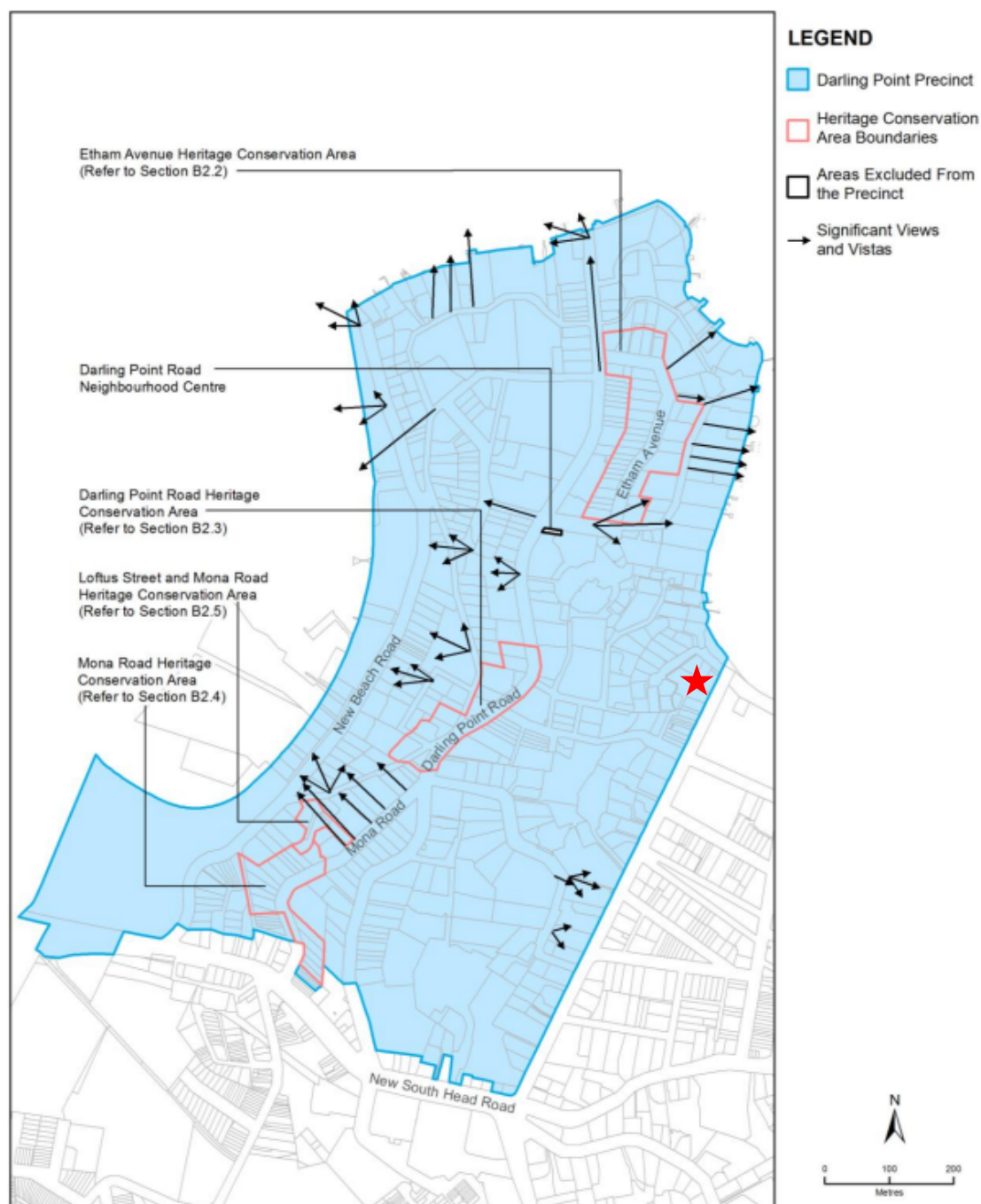


Figure 4: Map showing Darling Point Precinct with approximate location of site indicated by red star (Source: WDCP and City Plan)

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 2: 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 5 to 9).



Figure 5: 12 Wiston Gardens



Figure 6: 11 Wiston Gardens (Source: Google Street View)

Desired future character - s.1.2.2 of the WDCP



Figure 7: 6, 7 and 8 Wiston Gardens



Figure 8: 2 Marine Parade (Source: Google Streetview)



Figure 9: 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

Desired future character - s.1.2.2 of the WDCP

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;*
- *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."*

The development respects the adjoining heritage items to the north and south and complements their architectural styles, providing improved amenity, particularly with regard to visual impact and view loss.

Where an existing building does not comprise historic or aesthetic value, sympathetic contemporary design is permitted.

As ascertained above, the existing building does not comprise historic or aesthetic value, therefore a contemporary design is proposed.

Where new development occurs, the buildings are to provide a height, bulk, and scale compatible with those buildings that are predominantly two to four storeys in height, and have regard to the visual impact of the development from the harbour.

The proposed building has a stepped form that complements the topography and is consistent with the desired future scale, being generally two - four storeys in height, with a small five storey section in the southern elevation (Figure 10).

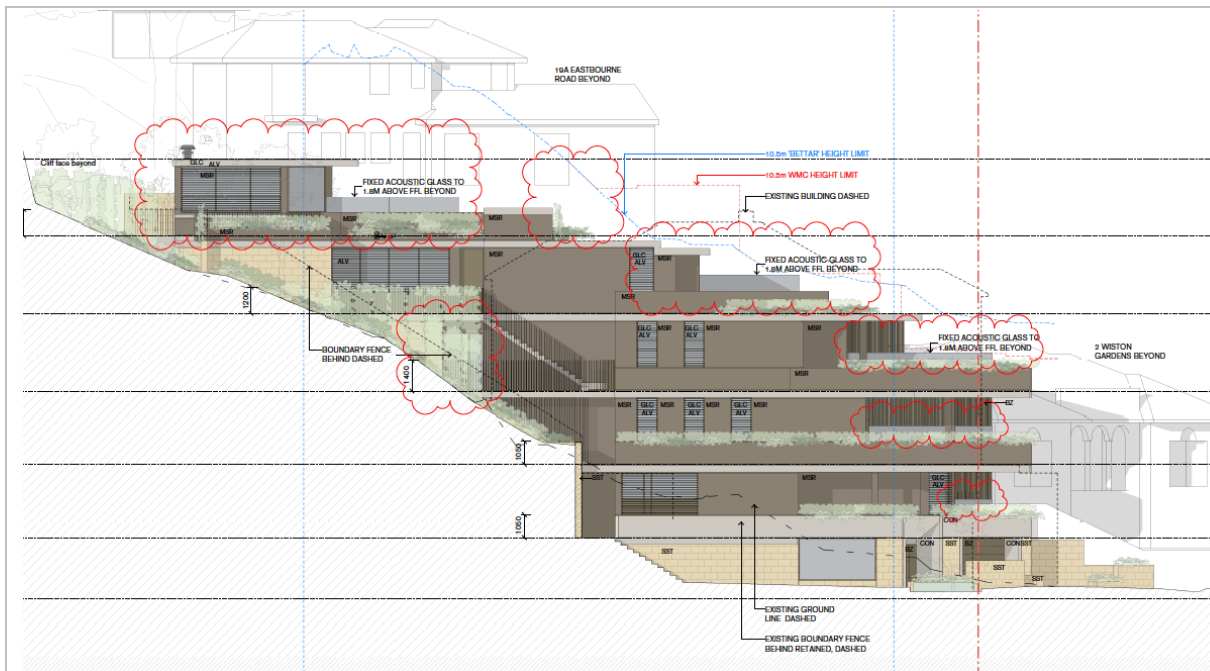


Figure 10: Proposed - southern elevation (Source: Tzannes)

The proposal is consistent with the height and scale of buildings in the precinct as stipulated in the WDCP, in particular:

- the building is compliant with the height standards under cl. 4.3 (Height of Buildings) and 4.3A (Exceptions to building height) of the WLEP where building height calculated in accordance with the accepted NSWLEC practice established in *Bettar* and *Stamford*. A height of buildings cl4.6 request had been prepared for abundant caution;
- the proposed building is generally lower than the comparative compliant envelope, the existing building and maintains the scale relationship with the adjoining buildings
- the difference in height between the existing and proposed building and the building on No's 2 and 5A Wiston Gardens, is attributable to their lower building form (No.2 Wiston Gardens) and lower ground level (No.5A Wiston Gardens)
- 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
- 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 428m² of gross floor area above ground level when extrapolated from the existing ground level at the edges of the current building which is 110.4m² 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

Desired future character - s.1.2.2 of the WDCP

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 level 4 and the 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
- 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 the roof terrace provides view sharing. Refer to objective ii. below for a detailed assessment of views and demonstrates the proposal achieves this characteristic. The proposed design is superior, in this regard, when compared with a development that might be expected if strict compliance with the maximum FSR was required.

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

Table 3: 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 doesn't currently exist. 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)

Desired Future character objectives - s1.2.2 WDCP

- 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 (ground level) 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 development'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;*
- *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

Desired Future character objectives - s1.2.2 WDCP

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 existing building has a poor interface with the street having five garages with a high parapet, five hard stand spaces with five spaces in tandem 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 compliant 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 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 bulk and scale of the proposed building is compatible with the desired future character of the area and therefore the first objective of the control is achieved.

ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

The proposal minimises adverse environmental effects on the use and enjoyment of adjoining properties and does not affect the achievement of this objective. Potential environmental effects relate to view loss, overshadowing, privacy, traffic generation and excavation.

Views

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 4: Views from adjoining properties

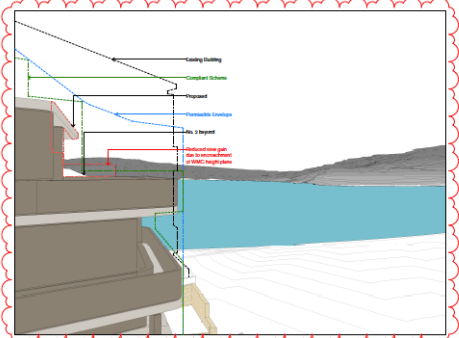
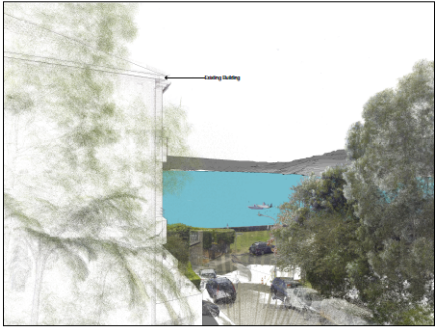
Property	Location of views
5A Wiston Gardens	<ul style="list-style-type: none"> Main bedroom balcony - water views of the south of Double Bay and land views including parts of Steyne Park and the grass promenade. Front terrace ground floor - water views of the south of Double Bay and land views including parts of Steyne Park and the grass promenade. Pool deck - partially obstructed water views of the south of Double Bay (due to vegetation) and land views of Double Bay below. Dining and formal dining rooms at ground level - obstructed views of the south of Double Bay and the grass promenade.
17 Eastbourne Road	<ul style="list-style-type: none"> 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. 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. 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. 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. 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.
19A Eastbourne Road	<ul style="list-style-type: none"> 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.

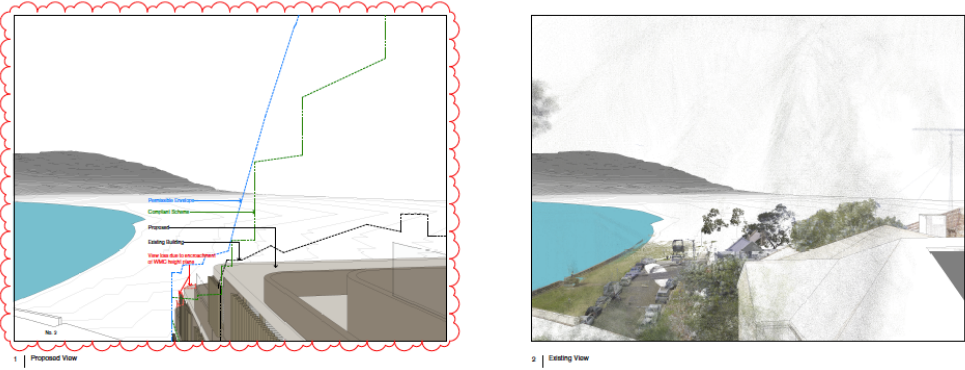
Property	Location of views
	<ul style="list-style-type: none"> Living and dining room and library/tv room at the main level - views of the south of Double Bay, grass promenade and Steyne Park. Master bedroom balcony at the entry level - views of the south of Double Bay, grass promenade and Steyne Park. Pool terrace - obstructed water views due to existing vegetation.
19 Eastbourne Road	<ul style="list-style-type: none"> 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.
13A Eastbourne Road	<ul style="list-style-type: none"> 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 Vaucluse, Woollahra, Bellevue Hill, Bondi Junction and Edgecliff.

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 5: Extent of impact

Property	Extent of impact
5A Wiston Gardens	<ul style="list-style-type: none"> 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 Vaucluse ridgeline are extended in width, giving greater context and adding an additional element of visual interest. 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 present dense vegetation on the north boundary at 5A Wiston Gardens covers this potential view. Water views from the elevated pool deck at the rear of the site will be increased. <div style="display: flex; justify-content: space-around; align-items: flex-end;"> <div style="text-align: center;">  <p>1 Proposed View</p> </div> <div style="text-align: center;">  <p>2 Existing View</p> </div> </div> <p>Figure 11: View from 5A main bedroom balcony (Source: Tzannes)</p>
17 Eastbourne Road	<ul style="list-style-type: none"> 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. 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 is negligible due to the increased height of the viewing point.

Property	Extent of impact
19A Eastbourne Road	<ul style="list-style-type: none"> 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. <div style="display: flex; justify-content: space-around; align-items: flex-end;">  </div> <p><i>Figure 12: View from 19A pool deck (Source: Tzannes)</i></p> <ul style="list-style-type: none"> Impact on views from the upper levels of the dwelling is negligible due to the increased height of the view point.
19 Eastbourne Road	<ul style="list-style-type: none"> 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.
13A Eastbourne Road	<ul style="list-style-type: none"> 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.

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.

Overshadowing

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) as follows.

Table 6: Solar access

Time Mid-Winter	POS at 5A	Existing Solar Access	Proposed Solar Loss
9.00am	Secondary POS - pool, pool deck and cabana	43m ² or 57%	19m ² or 25%. Loss of solar access to the pool only, cabana and pool deck unchanged.
10.00am	Main ground level POS	3m ² or 4%	3m ² or 4%, no solar access at 10.00am.
	Secondary POS - pool, pool deck and cabana	40m ² or 53%	23m ² or 31% to the pool and an extremely small area of the eastern edge of the deck.
11.00am	Main ground level POS	6m ² or 8%	6m ² or 8%, no solar at 11.00am.
12.00pm	Main ground level POS	2m ² or 3%	2m ² or 3%, no solar at 12.00pm.

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 area currently received 4m² of solar access (31%), the proposal increases solar access by 9m² achieving 100% solar access at 9.00am mid-winter. 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 100% 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.

Excavation

The site is heavily constrained by the existing rock outcrop with rolling to very steep hills with slope gradients varying from 25-70%. Such slopes make excavation inevitable with a redevelopment of the site. The renewing of the site including providing underground parking is a strong benefit of the proposal and improves the streetscape presentation of the building significantly. Further, the proposal provides two (2) space per residential dwelling (as allowed by the WDCP). The design of the driveway increases the availability of on-street parking.

A comparative compliant scheme would result in an inferior built form outcome causing adverse visual and view impacts and a poorer presentation to the streetscape. The geotechnical and heritage consultants have confirmed the stability of the site for the proposed excavation and that no adverse vibration or other amenity impacts will be imposed onto the adjoining heritage items.

Traffic Generation

The proposed development does not increase the number of apartments on the site and will not result in any additional traffic generation along Wiston Gardens.

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.

In summary, the proposal minimises adverse environmental effects on the use and enjoyment of adjoining properties and the public domain.

(iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space

The proposed building is surrounded by deep soil landscaping, with large consolidated areas in the front and rear setbacks. The basement car parking is contained below the footprint of the upper levels, allowing for deep soil planting to be provided in the side setbacks. In total 256.83m² of deep soil and soft landscaping is to be provided or 31% of the site, compliant with the WDCP deep soil landscape requirements. A breakdown of the deep soil area and its location is provided in the figure and table below.

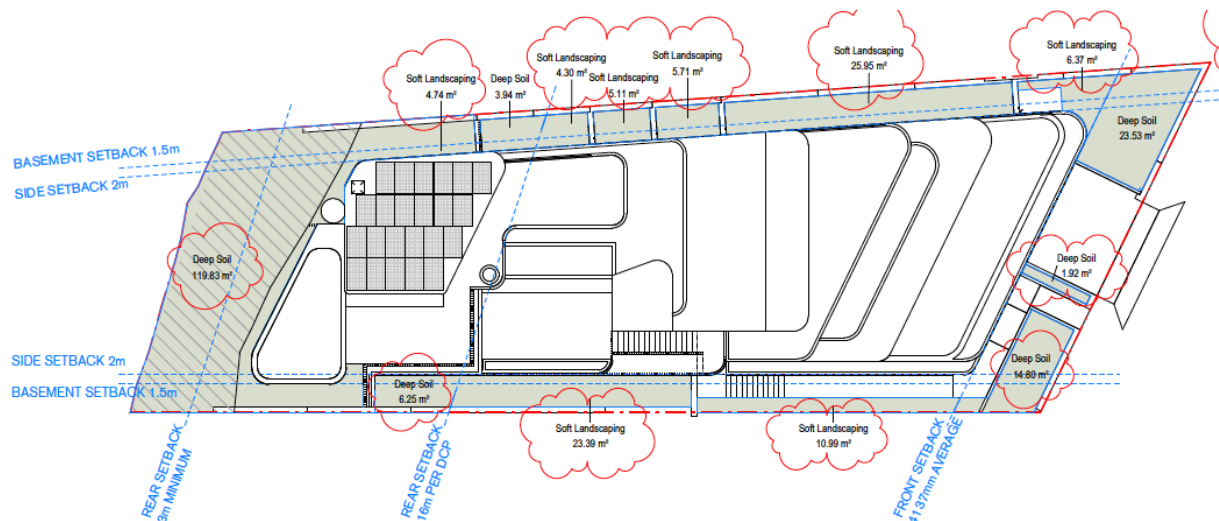


Figure 13: Deep soil and soft landscaping (Source: Tzannes)

Table 7: Deep soil and soft landscaped area

Location	Area (m2)
Front setback	40.25
Rear setback	130.02
Side setbacks	86.56
Total	256.83

The deep soil planting in the front setback will create a soft interface between the building and the street and place the building in a landscape setting. This is a significant improvement on the existing circumstance, in which the whole front setback is entirely hard surfaces. The landscape scheme includes three trees in the area, each with a mature height of 15.0m.

The deep soil landscaping in the rear includes the cliff line at the rear of the property. The cliff line is an important landscape feature in the locality, presenting as a green wall. It extends across the rear boundaries of the properties on the western side of Wiston Gardens and delineates development on the upper and lower portion of the hill.

Each of the apartments has an easterly facing terrace with views of Double Bay. The primary east/north facing terraces range from 30.4m² to 64.96m² in area, have functional shapes and are accessible from the primary living spaces. In addition, apartments 1, 2 and 3 have an additional terrace accessible from secondary bedrooms and dual bedrooms on level 1, 2 and 3. Apartment 4 benefits from three (3) separate private open spaces, two (2) at level 4 and one (1) at the roof terrace which includes a plunge pool. These terraces are designed amongst high quality green roofs and will deliver a high standard functionality and aesthetic for the future residents of the development.

The proposed contravention does not affect achievement or consistency with this objective as it still allows adequate provision for deep soil planting and areas of private open space.

As demonstrated, the objectives of the FSR development standard (in clause 4.4(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 (undermined) if compliance was required with the consequence that compliance is unreasonable.

If compliance was required with regards to the allowable FSR on the site, it is considered objective (ii) would be undermined. Objective (ii) states:

(ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

The proposed building has been carefully designed and results in less impact on adjoining properties and the public domain, than a compliant building envelope.

5A Wiston Gardens is the property whose amenity is most sensitive to redevelopment of the site. That property sits to the south and below the level of the subject site, and obtains access to sunlight and views from the view corridor and sun access planes which extend across the site.

The building mass has been minimised in the south eastern corner to protect and extend view corridors. The façade has been setback behind the compliant building envelope line, the balconies cantilevered and parking provided on or below ground. The analysis in s 5.1 above demonstrates that the proposed design provides 5A Wiston with greater views than are currently available or would be available from a compliant building envelope.

The south-western corner of the building has been massed to reduced its impacts on 5A Wiston Gardens. The building is generally single storey in height at the boundary and steps upward in height toward the north to minimise its bulk. A compliant envelope is three storeys in height at that location and has significantly greater bulk.

A compliant scheme would have greater view impacts and bulk, defeating (or at least undermining) the aims of the objective of minimising environmental effects and it is therefore unreasonable to provide it.

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 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 FSR development standard as set out in the preceding sections 6 in detail. As discussed above, the non-compliant development does not result in any overall adverse environmental impact (when improvements when compared to the likely compliant built form) 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 complaint 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:

- It would be possible, but less desirable in planning terms (when compared to the proposed development) to develop the building that complies with the GFA for the site. The proposed distribution of building mass is superior to one that would be necessitated by a complying development.
- The proposed development has re-distributed GFA 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. 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 building mass is separated by cantilevered balconies with extensive planting and stepping of the built form toward rear property boundary.
- 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. It provides improved views of the harbour, 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 perceived building mass (which is located above the ground level when extrapolated from the existing ground level at the edges of the current building as per *Bettar*) is 21% less than would otherwise be permitted by the FSR standard that applies to the site. The building mass which is located below existing/finished ground level and technically constitutes GFA would not facilitate a reduction of the building envelope above ground if it were removed due to the function and purpose of the rooms concerned, nor would it reduce the amount of excavation required to accommodate car parking on the site in a manner which minimised the impact on the streetscape. This achieves key objectives below:
 - in the EP&A Act - the objective in section 1.3(c) as quoted above; and
 - in the WLEP - the aim in clauses 1.2(2)(b) 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.

For completeness we note that the size of the variation (73%) 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 8: 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 8, 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 contravention, under clause 4.6 of the WLEP, to the FSR development standard 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 3) 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 FSR 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.