

WOOLLAHRA LEP 2014

Clause 4.6 Exceptions to Development Standards – Height of Buildings

Proposed Alterations and Additions to an Existing
Commercial Building at

**No. 2A Cooper Street &
24 Bay Street, Double
Bay**

Prepared for:

Brooklyn Lane Investments Pty Ltd

Fortis

33-39 Riley Street

Woolloomooloo NSW 2011

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WOOLLAHRA LOCAL ENVIRONMENTAL PLAN (LEP) 2014
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Brooklyn Lane Investments Pty Ltd

SITE ADDRESS: No. 2A Cooper Street & 24 Bay Street, Double Bay

PROPOSAL: Proposed alterations and additions to an existing commercial building

1. (i) Name of the applicable planning instrument which specifies the development standard:

Woollahra Local Environmental Plan (LEP) 2014

(ii) The land is zoned:

B2 Local Centre. The objectives of the B2 Local Centre Zone are as stated:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To attract new business and commercial opportunities.*
- *To provide active ground floor uses to create vibrant centres.*
- *To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings. Clause 4.3 is stated as follows:

- (1) *The objectives of this clause are as follows—*
 - (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.*
- (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.*
- (2A) *Despite subclause (2) and clause 4.3A, the maximum height of a dwelling house, dual occupancy or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.*
- (2B) *Despite subclause (2) and clause 4.3A, the maximum height of a building on a battle-axe lot on land in Zone R3 Medium Density Residential is 9.5 metres.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

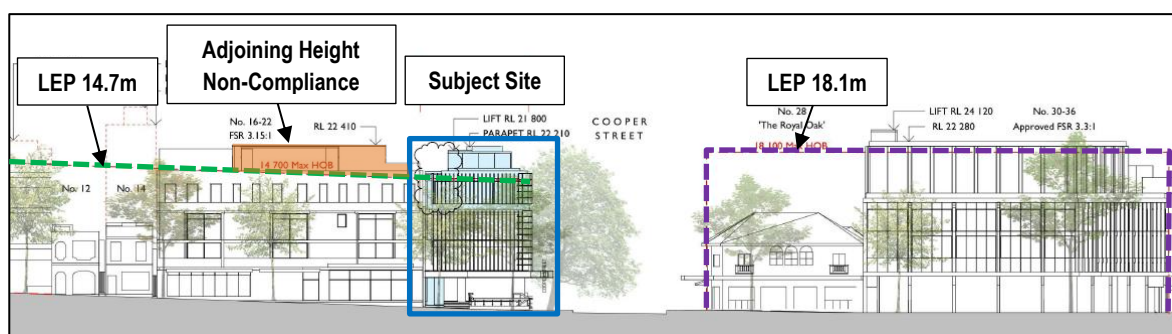
2. Overview

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation is consistent with the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the Height Map which indicates a maximum 14.7m applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The proposal is for alterations and additions to the existing heritage listed commercial building including the construction of two additional levels. There is an existing sub-floor area which forms the existing ground line, even though it bares no relationship to the street level. The proposal will provide a building height of 20.28m – 21.32m, which is 40.41% - 43.20% over the development standard. These maximum heights are measured from the top of the lift overrun (RL 21.80 AHD) and top of the parapet (RL 22.21 AHD), to the existing lower ground level immediately below (see **Figure 1**). However, the top of the street wall is only slightly above the standard with a height of 15.4m when measured from existing street level, and the uppermost parapet height at the Cooper Street frontage will be 17.75m above street level, which more accurately depicts the proposed height within the streetscape. The proposed street wall is consistent with the adjoining street wall at No. 16-22 Bay Street.



Source: Lawton Hurley Architects

Figure 1: Street Elevation Showing Proposed Height

The interpretation of height has been considered by the Court in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (*Bettar*). In *Bettar*, the Court dealt with a site with similar characteristics to the subject site in that a basement existed on some parts of the site. The Court took the approach of measuring height with the intent, in part, of relating the development proposal to its context and made the following relevant comments:

*It is relevant to consider the objectives of the building height development standard in considering how best to determine the maximum height of the building using the dictionary definitions in LEP 2012. As one of the purposes of the development standard is to relate the proposal to its context, it follows that **the determination of the existing ground level should bear some relationship to the overall topography that includes the site...** (emphasis added)*

A similar approach can be undertaken in relation to the subject site, with a focus on how the development will be perceived from the public domain and surrounding properties.

Alterations to the external elevations and the new upper levels will revitalise the site while conserving the heritage significance of the building, known as 'Gaden House'. The amended design ensures the top level is stepped back from both the street frontages and the neighbouring development, which will reduce the perceived scale from the public and private domain. The works will facilitate conservation of the site, by retaining the viability of commercial and retail uses.

The proposal will provide a built form which is well articulated, particularly at the upper levels, and provides a transition between adjoining development to the south. The parapet height at the fourth level and fifth level will match the heights of the sole adjoining property at Nos. 16-22 Bay Street, which is considered appropriate for a prominent corner allotment.

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- | | |
|---------------|---|
| Objective (a) | <i>to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i> |
| Objective (b) | <i>to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i> |

Flexibility is sought in the application of the height development standard to the proposed development in the circumstance of this particular case. The additional height will allow a well designed building that will be consistent with, and contribute to, the evolving character of the Double Bay Centre. The proposed height matches the adjoining property and makes efficient use of the corner allotment. A number of buildings in the surrounding area are subject to development applications to construct developments up to six storeys, many with approvals from the Council or Court.

The additional height will provide a development that will present a more cohesive built form along Bay Street to the south of the site. Strict compliance with the height development standard would not result in a better planning outcome and could undermine conservation efforts. It would also be a lost opportunity to provide additional employment generating commercial floorspace.

Accordingly, the proposal provides an improved planning outcome both for and from the development and flexibility should be afforded in this instance.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Despite non-compliance with the height development standard, the proposal is consistent with the desired mixed use character of the area. Reasons why the proposed development is consistent with the objectives of the height standard are explained below.

(a) To establish building heights that are consistent with the desired future character of the neighbourhood,

The proposal's height is consistent with the built form in the Double Bay Centre area. Neighbouring and surrounding developments are an eclectic mix of residential flat buildings and mixed use developments that vary between two to six storeys. In *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 [63], which also related to a development in the Double Bay Centre, Preston CJ states, *inter alia*:

...the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Accordingly, the desired future character is shaped by the LEP and recent approvals in the vicinity. The adjoining building to the south at Nos. 16-22 Bay Street has the same height limit at 14.7m, however appears well in excess of this control of approximately 20.79m. The proposed roof parapet is slightly below the height of this building at RL 22.21 AHD. To the north, on the other side of Cooper Street, a higher height limit of 18.1m applies.

Further to the north at No. 30-36 Bay Street, the approved built form exceeds the height standard. To the east, there is another approved height exceedance at Nos. 21-27 Bay Street (see **Table 1**). These will now be discussed.

Table 1: Nearby Approved Height Breaches					
DA No.	Location	Distance from Subject Site	Development Standard	DA Consent	Final Variation
138/2012	Nos. 16-22 Bay Street	0m (adjoining)	14.7m (current) 13.5m (at time of approval)	18.1m	18.8% (current) 25.4% (at time of approval)
359/2017	30-36 Bay Street & 2 Guilfoyle Ave	40m	Bay Street: 18.1m	Bay Street: 19.96m	10.2%
289/2019	30-36 Bay Street	40m	18.1m	20.84m	15%
33/2018	21-27 Bay Street	30m	Bay Street: 14.7m	Bay Street: 20.05m	36.4%
14/2021	21-27 Bay Street	30m	Bay Street: 14.7m	17.715m	20.5%
321/2021	19-27 Cross Street	220m	14.7m	21.5m	46%
571/2014	16-18 Cross Street	170m	14.7m	19.5m	33%
390/2015	20-26 Cross Street	150m	14.7m	19.91m	35%
617/2017	28-34 Cross Street	140m	14.7m	19.71m	34%
303/2017	357-359 NSHR	140m	14.7m	16.21m	13%

The adjoining development at Nos. 16-22 Bay Street was approved in 2012 with a height of 18.1m. The proposal has the same street wall height as this building, and is slightly below the maximum height of the approved when viewed from the street.

A six storey mixed use development has been approved and constructed at Nos. 30-36 Bay Street (DA359/2017; DA290/2019) with a height of 20.84m (see **Figure 2**). This property is located on the other side of the Royal Oak Hotel, directly to the north, and is also situated on a corner allotment.



Source: Fortis Development Group

Figure 2: Approved Development at Nos. 30-36 Bay Street, Double Bay (Height: 20.84m)

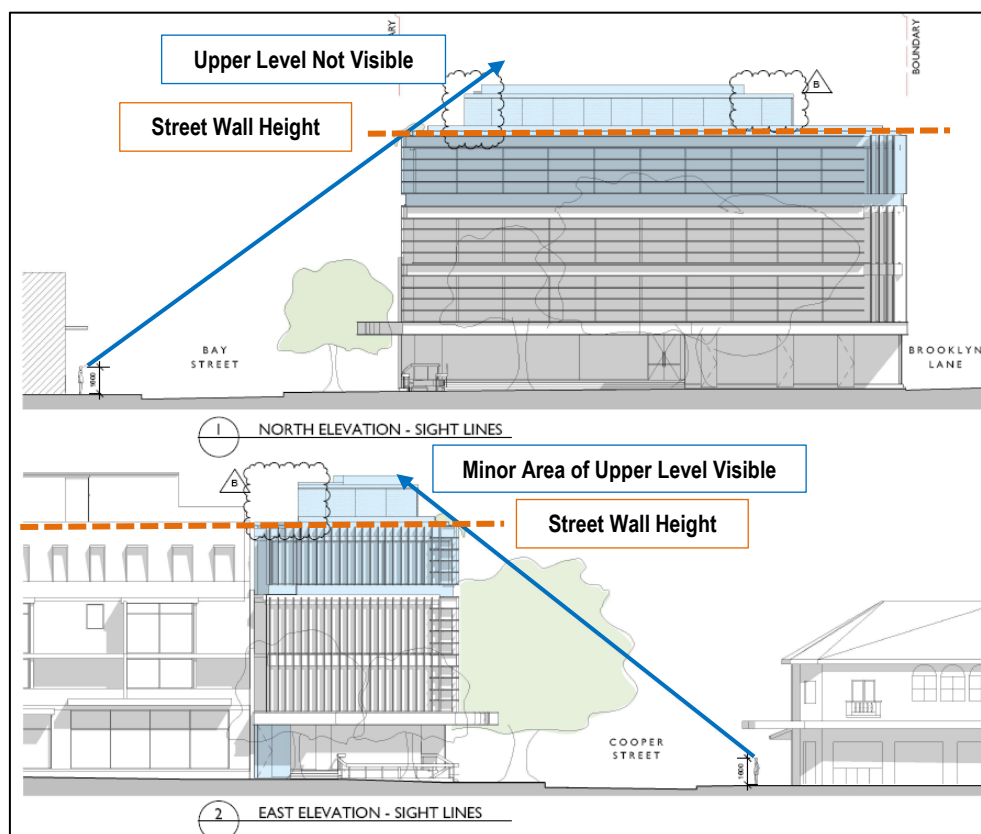
A five storey mixed use development was approved 30m away at Nos. 21-27 Bay Street with a building height of 20.05m (DA33/2018). This was initially determined by the Sydney Eastern City Planning Panel (SECPP) before being approved upon appeal in *Thing Net Pty Limited v Woollahra Municipal Council* [2020] NSWLEC 1063. The most recently approved commercial development at Nos. 21-27 Bay Street has a building height of 17.715m (DA14/2021) (see **Figure 3**).



Source: MHN Union Design

Figure 3: Photomontage of Recently Approved Development at Nos. 21-27 Bay Street (Height: 17.715m)

As previously discussed, the height and setback of the uppermost level ensures the proposed street wall is consistent in height with the adjoining development, and is only slightly above the permitted LEP height. The proposed setback of the upper level also minimises the visibility of the additional height when viewed from the street (see **Figure 4** on the following page).



Source: Lawton Hurley Architects

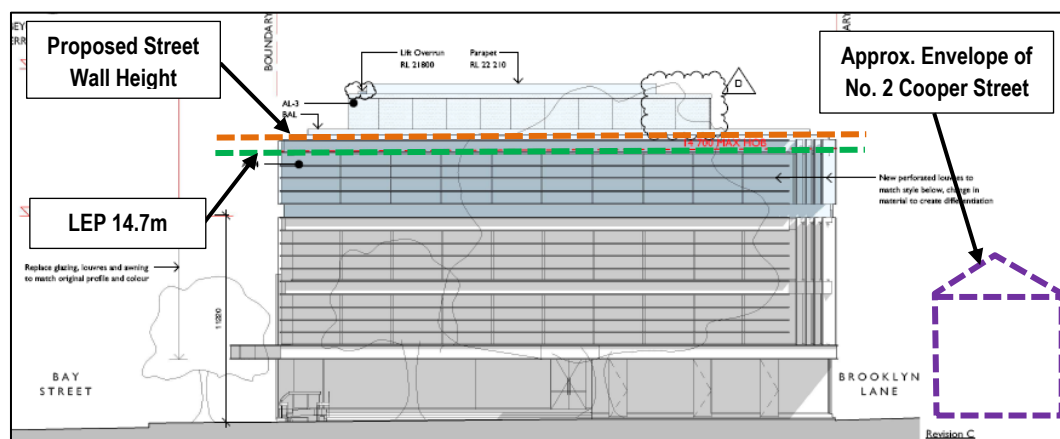
Figure 4: Sightline Diagrams from Bay Street and Cooper Street

The approvals and heights indicated in the table on the previous pages demonstrate an emerging higher density built form character. The proposed additional building height will provide highly sought-after commercial tenancies on a prominent corner allotment.

Accordingly, despite the variation to the height development standard, the proposal is consistent with the desired future character of the Double Bay Centre.

(b) To establish a transition in scale between zones to protect local amenity,

The subject site adjoins a contemporary mixed use development to the south of the site. The proposed upper levels are recessed from the street frontages and the adjoining site. The proposed height will match the neighbour at Nos. 16-22 Bay Street, providing consistency in the streetscape. The lowered presentation to the west provides a transition to existing lower density uses at No. 2 Cooper Street and further along the street, which is zoned R3 Medium Density with a height standard of 10.5m, whilst still retaining the prominence of the corner site (see **Figure 5** on the following page).



Source: Lawton Hurley Architects

Figure 5: North Elevation Demonstrating Transition to No. 2 Cooper Street

(c) To minimise the loss of solar access to existing buildings and open space,

To assess the impact of the proposed development in terms of solar access, half hourly shadow diagrams between 9:00am and 3:00pm have been prepared for the winter solstice (June 21). These demonstrate that the height non-compliance will not result in significant additional overshadowing compared to a compliant envelope (see **Figure 6** on the following page).

The relevant ADG and DCP controls are as follows:

(ADG)

Living rooms and private open spaces of at least 70% of apartments in a building receive a minimum of 2 hours direct sunlight between 9 am and 3 pm at mid winter in the Sydney Metropolitan Area...

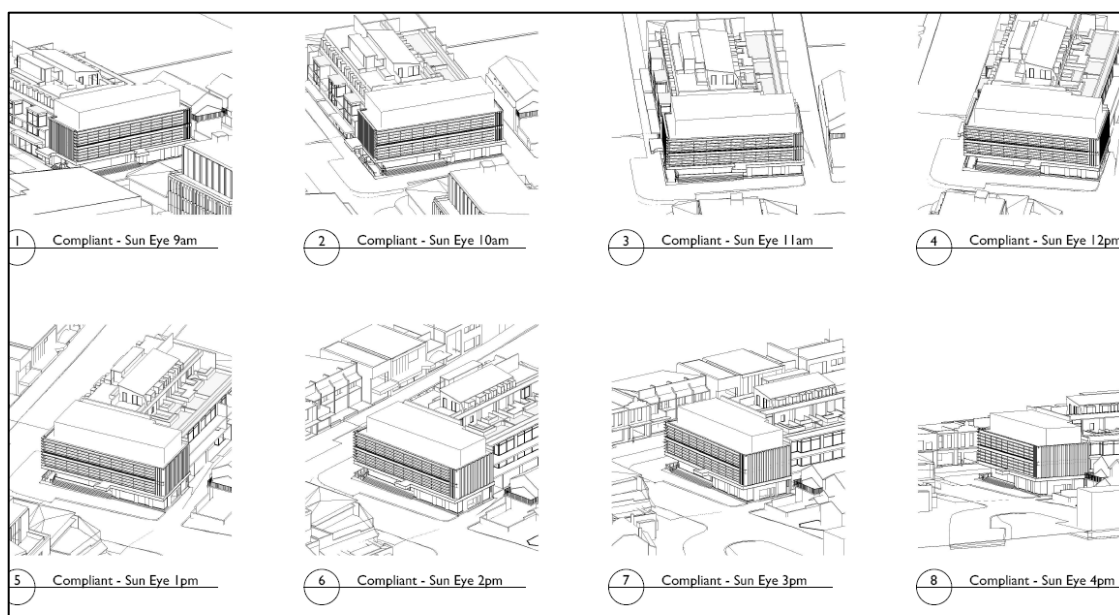
(DCP)

Development which does not comply with the control drawings must maintain existing solar access to existing development for at least three hours between 9am and 3pm on 21 June to north facing windows of habitable rooms, and at least two hours to at least 50% of the private open space.

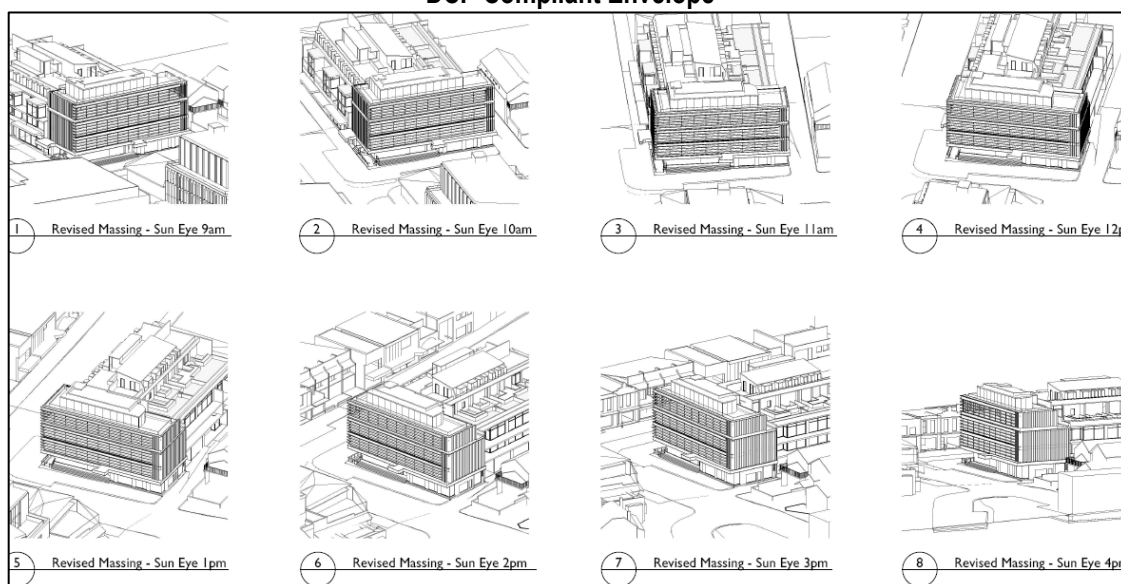
The western terrace adjoining the living room is the primary private open space of Unit 42 at Nos. 16-22 Bay Street, and the proposal retains the same extent of additional shadows to this terrace at 9:00am when compared to a compliant envelope. At 9:30am – 10:30am there is minor additional shadow compared to that as a result of a compliant envelope. From 11:00am – 3:00pm there is only negligible additional shadows, with significantly improved areas of solar access provided when compared to a compliant envelope (see **Annexure A**).

The eastern terrace is the secondary private open space of Unit 42. Solar access to this terrace is regarded less highly, given it is not the primary open space and is not directly accessible from the dwelling (access obtained through the common area and up a set of stairs). In any case, the proposed shadow diagrams demonstrate some additional shadows between 9:00am – 10:00am, and negligible additional shadows between 10:30am – 12:30pm and at 3:00pm. Solar access is retained as existing between 1:00pm – 2:30pm (see **Annexure A**).

The proposal retains existing levels of solar access to the north facing living room windows of Unit 51 of Nos. 16-22 Bay Street. Additional shadows to the rooftop terrace adjoining the living room of Unit 51, as a result of the additional height, occur between 9:00am – 10:00am. At 10:30am there is only a negligible area of additional shadow. From 11:00am to 3:00pm the proposal will have no impact on existing levels of solar access to this terrace (see **Annexure A**). Further, Unit 51 has a secondary private open space at the rear accessible from the bedroom, which is not affected by the proposal.



DCP Compliant Envelope



Proposed Envelope

Source: Lawton Hurley Architects

Figure 6: Sun Eye Diagrams (21 June)

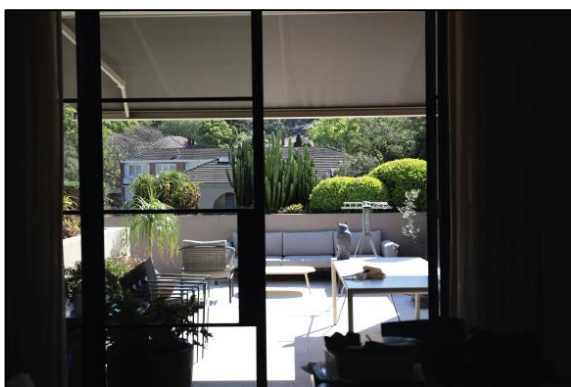
As demonstrated in **Annexure A** and **Figure 6** on the previous page, impacts on solar access are minimised as a result of the proposal. Solar access to neighbouring apartments is generally retained in accordance with the Apartment Design Guide requirements. The primary open space of Unit 51 and secondary open space of Unit 42 will comply with the DCP requirement to have 'at least two hours to at least 50% of the private open space'. There is also no impact on adjoining north facing windows, with existing levels of solar access retained.

(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

It appears that landscaped and tree canopy outlooks, views of Double Bay and beyond, and buildings in the distance are obtained from the private open space of Units 42 and 51 at No. 16-22 Bay Street, and some of these views and outlooks may be slightly affected by the proposed height.

Unit 42 has primary views from the west-facing living room windows and primary private open space, towards buildings and landscaping and trees to the west (see **Figure 7**). These views over the side boundary are not impacted by the proposal. When facing north, there are no existing water views given the height of existing buildings beyond (with a height limit of 18.1m), and existing dense trees. There is a tree canopy outlook to the north, which is partially obstructed by a solid wall to the terrace approx. 1.8m tall. Compared to a compliant envelope, the proposed height offers an improved outlook from the terrace table, and a minor impact on the tree outlook to the north from the BBQ. Views towards landscaping and buildings towards the south are retained.



Existing View to the West from Living Room

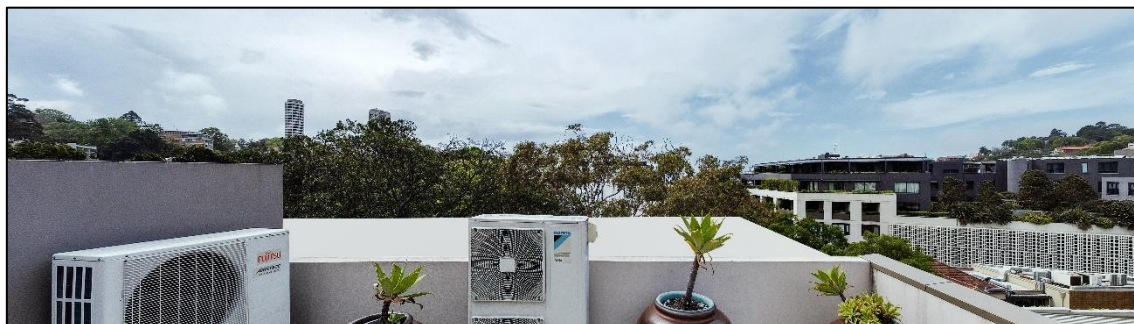


Existing View to the West from Primary POS

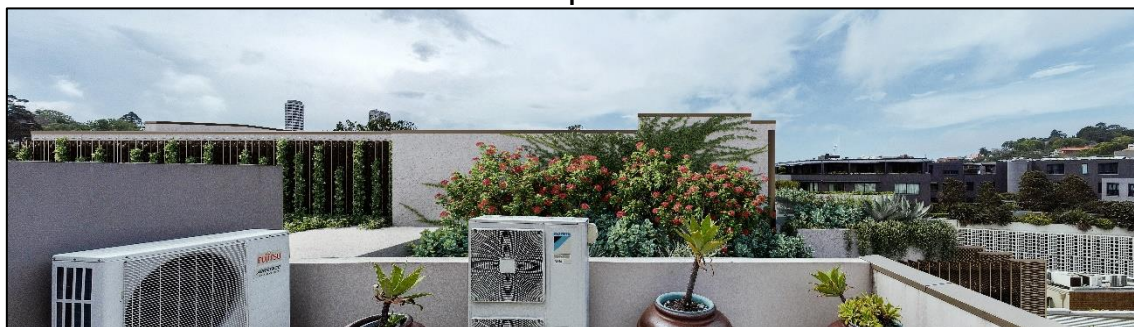
Source: AE Design Studio

Figure 7: Views Retained to the West from Unit 42 (Vantage Point 1)

Views are also obtained from the secondary private open space of Unit 42. However, these are valued less highly than from the primary private open space as this terrace is not directly accessed from the dwelling but rather from the common area and a set of stairs. It is also where the air conditioning plant is located. In any case, there is an uninterrupted outlook to the east towards Double Bay, and Bellevue Hill beyond across the side boundary, which is not impacted by the proposal. There is an outlook towards the tree canopy to the north, however existing buildings along Bay Street block any potential views beyond. The proposed height affects this tree outlook, however the proposal includes dense landscaping at the upper level to retain the green outlook from this location (see **Figure 8** on the following page).



Compliant



Proposed

Source: Lawton Hurley Architects

Figure 8: Compliant and Proposed Render Showing Views and Proposed Landscaping to the North from Unit 42 (Secondary POS, looking North)

The primary private open space of Unit 51 has a tree canopy outlook with buildings beyond towards the north west. The proposal will have a minor impact, however a large portion of the outlook to the west is retained (see **Figure 9**). Views towards the west are over medium density zoned land with a lower height standard, so will not be impacted by future development. The proposal includes landscaping at the upper level to retain the green setting when looking directly north from this private open space (see **Figure 10** on the following page).



Source: AE Design Studio

Figure 9: Views to the West Retained from Unit 51
Primary Private Open Space (Vantage Point 5)



Source: Lawton Hurley Architects

Figure 10: Compliant and Proposed Render Showing Views and Proposed Landscaping to the North from Unit 51 (Primary POS, looking North)

Accordingly, there are no water or district views across the site that will be impacted by the proposed height. The proposal will retain a large portion of views towards the north west, west and east from the private open space of Units 42 and 51, and the outlook to the north of the tree canopy will be replaced by a landscaped façade at the upper level. The area of additional height therefore minimises impacts on views from surrounding development.

Privacy

The building is oriented towards the three street frontages, away from adjoining development to the south. There will be no openings along the side boundary, with the services core taking up a large portion of the southern boundary. The roof terrace is stepped back from the boundaries to minimise overlooking, forcing users to look up and over the rooftops of neighbouring sites.

Planter boxes and balustrading surrounding the Level 4 level terrace will provide screening to surrounding properties. The upper level office tenancy has been further set back to increase building separation to surrounding development. Prominent vertical privacy screens along the external façade above the height limit match the existing presentation and provide additional privacy.

Importantly, as the new upper levels will be occupied by office tenancies, they are unlikely to be occupied beyond the standard working hours of 8:00am to 6:00pm Monday to Saturday. Accordingly, areas over the height limit are unlikely to generate any privacy impacts in the early morning, evening or over the weekend. Impacts on privacy to neighbours are therefore minimised.

Overshadowing

As discussed under Objective (c) on the previous pages, the additional height will result in minimal additional overshadowing on adjoining or nearby properties, and comply with the DCP requirements.

Visual Intrusion

The upper level will be stepped back from each street frontage to reduce the perceived bulk and scale. This is discussed in the Design Statement, which states the following with regard to the upper level design development:

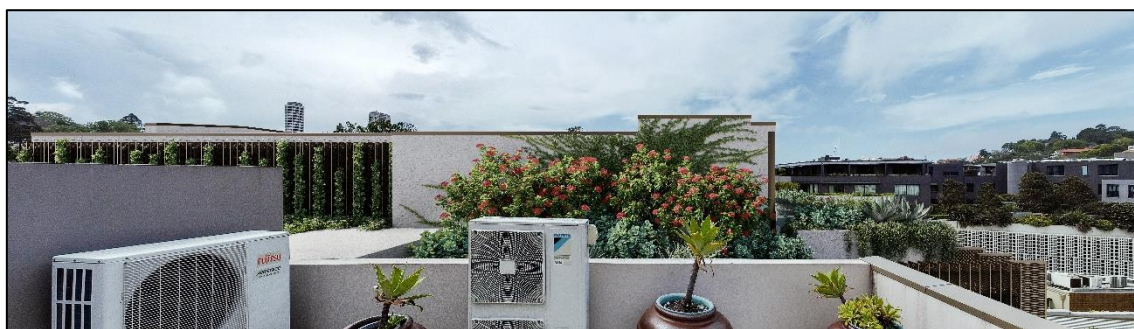
There were three directions discussed by the team in the Design Workshops. The team agreed broadly on the following points:

- The corners of the existing building were a strong presence in the street with some nuance in their detailing, and that these corners should be reinforced on the first additional level
- ...
- That the second additional level would require a significant setback to reduce the overall scale of the addition relative to the existing building

...

- Set back the top most level in a light colour with a screen to drop back and not compete with the levels below

From the primary private open space of Unit 42, there is reduced visual intrusion from the terrace table (VP1), and only minor additional built form from the BBQ (VP2), compared to a compliant envelope. The proposed built form is well setback from the secondary private open space of this unit, and the upper level includes dense landscaping to the upper levels to retain the green setting and minimise a sense of enclosure (see **Figure 11**).



Source: Lawton Hurley Architects

Figure 11: Render Showing Proposed Landscaping and Separation to the North from Unit 42 (Secondary POS, looking North)

From the primary private open space of Unit 51, the proposed building is again well separated from the terrace to minimise a sense of enclosure, and includes landscaping to enhance the outlook (see **Figure 12** on the following page). The rear private open space accessible from the bedroom of Unit 51 is not affected.



North



North-East

Source: Lawton Hurley Architects

Figure 12: Renders Showing Proposed Landscaping and Separation from Unit 51 (Primary POS)

Accordingly, by setting back the massing of the upper level and including landscaping along the façade, it softens the built form and minimises visual intrusion to the neighbouring development.

In conclusion to Objective (d), the minimization of impacts has occurred for adjoining neighbours by the provision of good design to the upper level including the provision of articulation, setbacks, the provision of extensive planting, the relocation of the lift.

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

N/A – No public views of the harbour are identified in the immediate vicinity across the site.

Accordingly, although the proposal is above the height development standard, it remains consistent with the objectives of the standard, and will provide a consistent built form within the streetscape, whilst maintaining the amenity of nearby residents.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are a number of environmental planning grounds that justify the additional height in this particular circumstance. In addition to compliance with the objectives of the zone and development standard; environmental planning grounds include the commercial use, heritage listing, corner allotment, consistency in the context, acceptable environmental impacts; urban design benefits; and kitchen exhaust and lift overrun access. These will now be addressed.

Commercial Use

The proposal responds to a recognised demand for commercial floor space within the Woollahra Local Government Area (LGA) generally and the Double Bay Centre specifically. The commercial use will provide additional local employment and contribute to the daytime activation and vibrancy of Double Bay. There may also be economic multiplier benefits and the stimulation of further renewal in the area.

The commercial use of the upper levels has different needs to residential floors. In particular, the floor to ceiling heights have to increase. Enforcing strict compliance while maintaining the requested floor to ceiling heights would necessitate, at a minimum based on the *Bettar* interpretation, the removal of the entire upper level which provides a 99m² office tenancy. This would be an inefficient use of the site and would not facilitate the orderly and economic development for a commercial use in accordance with Object (c) of the EPA Act.

Heritage Listing

As indicated throughout this report, the proposal will provide an enhanced heritage outcome for the heritage building by providing for its refurbishment and continued maintenance. The height exceedance provides additional commercial floorspace which will improve the viability of the continued conservation of this site. This includes the substantial costs involved in replacing the deteriorating exterior facades of the building. The works also provide for the adaptive reuse of the building, allowing the heritage interiors to be enjoyed by the community. The HIS (separately submitted), states, inter alia:

The new vertical addition to the building is in keeping with the original design intent of Neville Gruzman and is considered a sympathetic approach to adding height to this particular building. Multiple options were considered during the design development phase – which largely included a contrasting architectural language – however these were deemed to be inappropriate in the context of the heritage item.

...

The introduction of new upper levels would be respectful of the existing building, incorporating the language of horizontal and vertical elements at the exterior which, as a direct result, would emulate Gruzman's original intention to provide solar protection for the users of the building. The uppermost level, at the roof, would be sufficiently setback from the front line of the building and would make negligible impact on the building's presentation to the Double Bay Centre. Overall, this is seen as a sympathetic approach to adding height to the building.

...

The scale of the new upper-levels addition would not be such that it would visually dominate the building or its significant elements, including its presentation to the Double Bay Centre. A dark horizontal spandrel has been used to separate the new structure from the original below, and the repetition of the building's visual language at the new 3rd level (to be differentiated through the use of different materials for the louvres) is seen as a sympathetic manner to add height the building without competing with its established and strong presentation. The uppermost level would be sufficiently setback from the front lines of the building, thereby significantly minimising its potential visual impacts.

Prominent Corner Allotment

The subject site is uniquely located on a prominent corner allotment. A slightly higher building in this location forms a visual gateway and an urban design benefit. The proposal is consistent with the height and scale of the adjoining property, being 0.2m below the maximum height at its tallest point. This is an improvement on the existing incompatible relationship.

The corner location also means environmental impacts are minimised, as there is significant building separation on three sides. The significance of corner sites are recognised in the DCP through specific controls, of which the proposal complies with (see Table 3 in the SEE). The small corner allotment comes with site constraints, such as less efficient floor plates. The site should not be penalised for addressing all three street frontages, and additional height is appropriate in this instance.

Consistency in the Context

This report demonstrates that the proposed additional height is compatible with the context and desired future character the area. The proposal has been thoughtfully designed to present as a four storey (with the fifth storey stepped back) development which is consistent with the context. A number of recently approved and constructed developments in the vicinity also exceed the height limit as demonstrated in **Table 1**. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

Notwithstanding the height exceedance, the building will present a similar bulk and scale to the surrounds. It is also worth noting that in the Court approval for Nos. 28-34 Cross Street, the Commissioner stated, inter alia:

Here there is a discrete section of Cross Street the subject of the approvals. The Site falls within that section. The approvals were not for the purpose of meeting an urban design imperative in existence at that time, but rather were deliberate decisions to allow buildings of a significantly greater height and floor space in this locality than the controls envisaged. The abandonment is confined to this block of Cross Street on the southern side. That much is plain from the approvals and the configuration and uses in Cross Street between Bay Street and Knox Lane.

The Council deliberately and knowingly decided that larger buildings were appropriate in the block of which the Site forms part. That, in my view, amounts to an abandonment of the controls for this part of Double Bay.

Equitable Access

An area of height non-compliance relates to the lift overrun on the roof. The lift overrun will be not be visually dominant as it is located away from the boundaries where it will not be readily visible from the public domain. The materiality and design of the overrun ensures it will form a recessive element in the proposal. The lift overrun is necessary to provide equitable access to every level of the building in accordance with the *Disability Discrimination Act 1992*.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b). We therefore consider contravening the development standard to be justified.

Urban Design Benefits

The proposal has utilised the footprint of the existing building for the proposed works, and the upper level will be further set back from the front, side and rear boundaries to enhance articulation, and reduce the bulk and scale of the built form and its impact on neighbouring development. The use of varied materials and finishes that are sympathetic with the heritage values of the existing building will uplift the appearance of the façade, providing an enhanced design outcome when compared to the existing built form.

Articulation and massing of the upper levels provides contemporary additions that create visual interest and contribute to the desired future character of the area. The terrace and associated planter box at the fourth floor level will provide additional soft landscaping on a site with limited opportunity for deep soil landscaping.

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

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

The applicant submits that the consent authority can be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this written request, and having regard to the site and locality.

In our opinion, the proposal is consistent with the objectives of the Height Development Standard, as already demonstrated; and the B2 Local Centre Zone, as discussed below:

Objective: *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Response: The proposal will provide retail and commercial uses that will serve the needs of the LGA. The height exceedance allows for additional commercial floorspace.

Objective: *To encourage employment opportunities in accessible locations.*

Response: The proposal will provide additional employment space in an area with a recognised demand for office space in an area very accessible by public transport or private vehicle travel.

Objective: *To maximise public transport patronage and encourage walking and cycling.*

Response: The subject site is highly accessible by public and active transport networks. There are a range of public transport options in close proximity including bus, train and ferry services. The high level of pedestrian amenity in Double Bay encourages walking and cycling to access the proposed retail/business uses.

Objective: *To attract new businesses and commercial opportunities.*

Response: The busy corner location will be highly attractive for businesses and shops. The new tenancies above the height limit will provide additional amounts of office space in a sought after area close to the City.

Objective: *To provide active ground floor uses to create vibrant centres.*

Response: Tenancies within the renovated contemporary mixed use building will provide active frontage to both Bay and Cooper Street at the ground floor level.

Objective: *To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.*

Response: The additional height matches the adjoining site and will appear compatible in the streetscape. As discussed under the development standard objectives above, the proposal and restrained design of the areas above the height limit will not result in unreasonable amenity impacts on residential uses in the vicinity.

Objective: *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

Response: The proposal provides a bulk and scale that is in keeping with the desired future character of the area and is compatible with existing and approved surrounding development. The proposed upper levels will be well articulated, set back and treated with landscaping to soften the built form.

From this, we consider the proposal is in the public interest and should be supported.

7. **Clauses 4.6(4)(b) and 4.6(5) Requirements**

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The height non-compliance will enhance the amenity and functionality of the proposed mixed use building without significantly, unreasonably or unacceptably impacting neighbouring properties.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the additional height, the proposal will appear consistent in the streetscape and align with the height and scale of existing development and approved developments along Bay Street. The increased height allows contemporary alterations and additions which are in keeping with the existing built form and utilise the full potential of the site, without unreasonably impacting on the amenity of surrounding development.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 2** on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the development objectives of the B2 Local Centre Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 2: Compliance Matrix

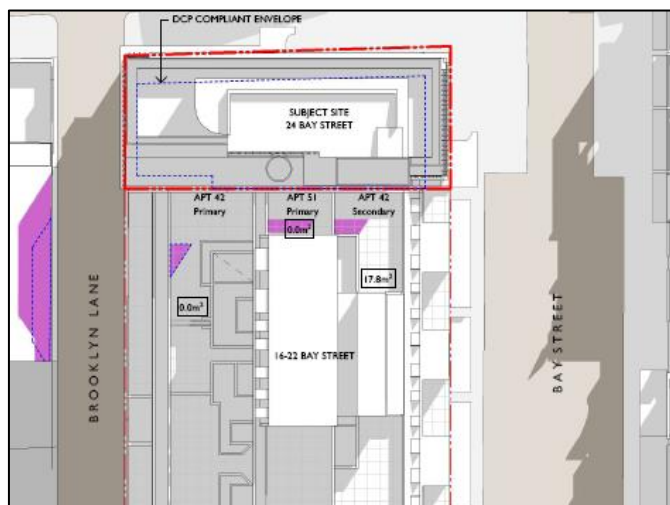
Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.3: Height of Buildings	
12	What is the control	1 & 2	14.7m	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposed height facilitates a development consistent with the planning objectives of the area and density of the B2 Local Centre Zone; The proposed works above the height control will be compatible with nearby existing and future development; The height exceedance does not result in significant environmental impacts; The height provides a prominent corner building; The height facilitates additional commercial floorspace which provides local employment and contributes to the conservation of the heritage item; and The proposal improves the site in accordance with Object (c) of the EPA Act, to promote orderly and economic use of the land. 	YES
26-27	2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.	6	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the B2 Local Centre Zone.	YES

28-29	Second Precondition to Enlivening the Power – That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES
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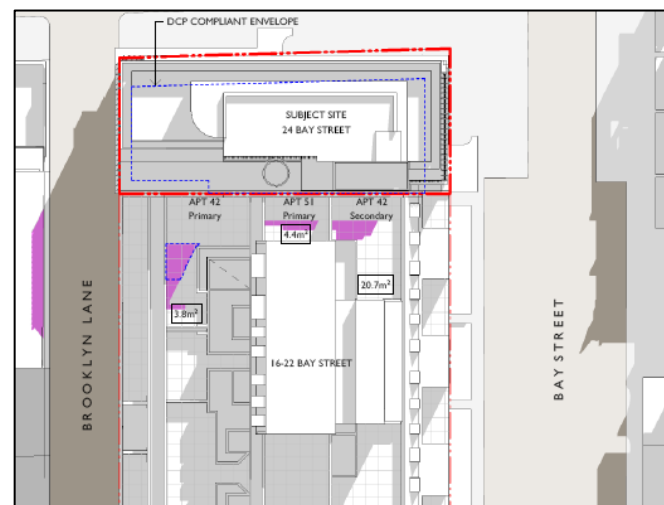
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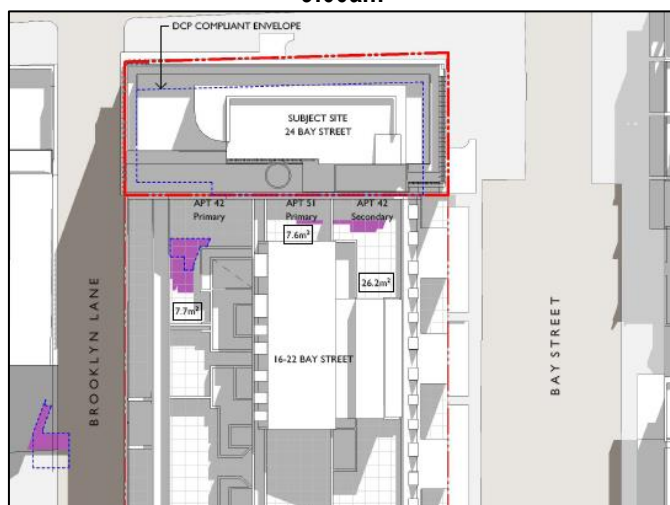
ANNEXURE A



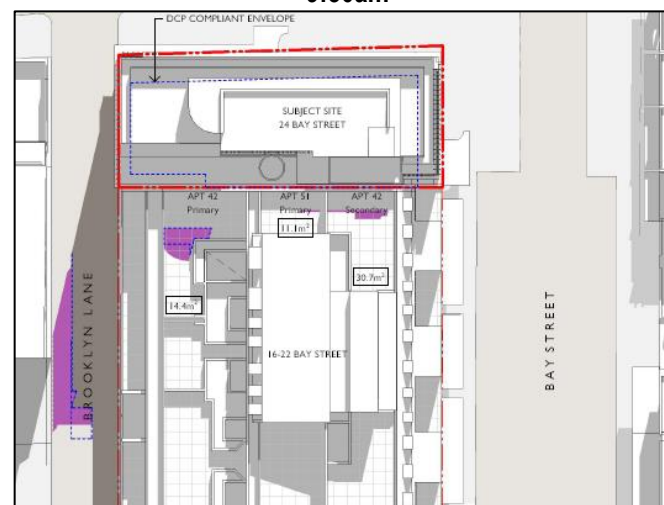
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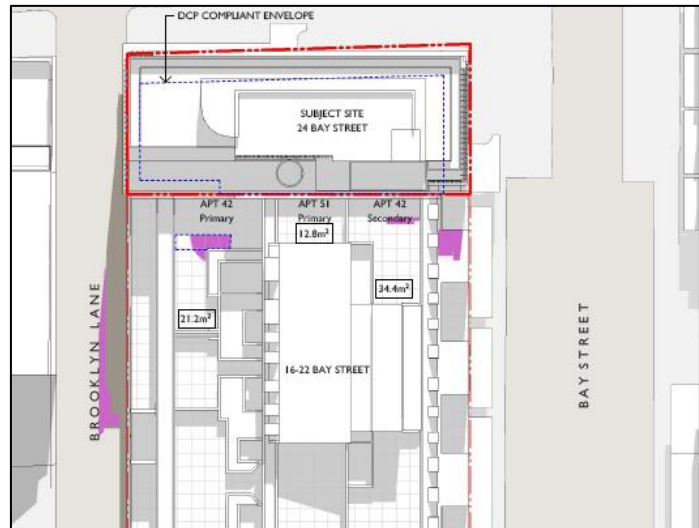
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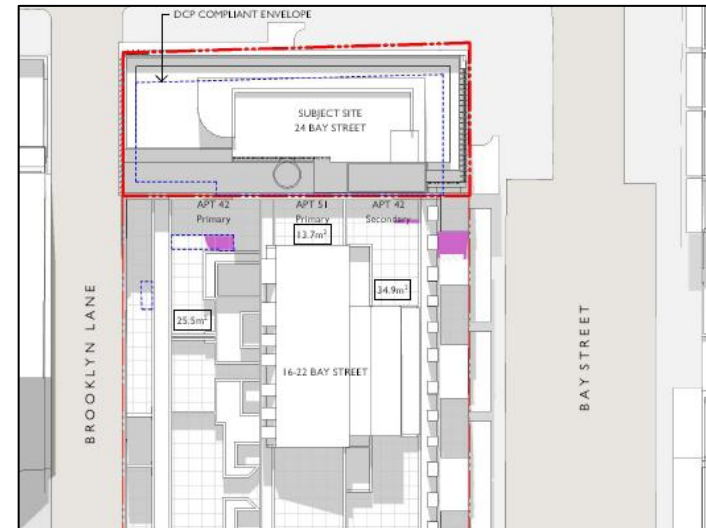
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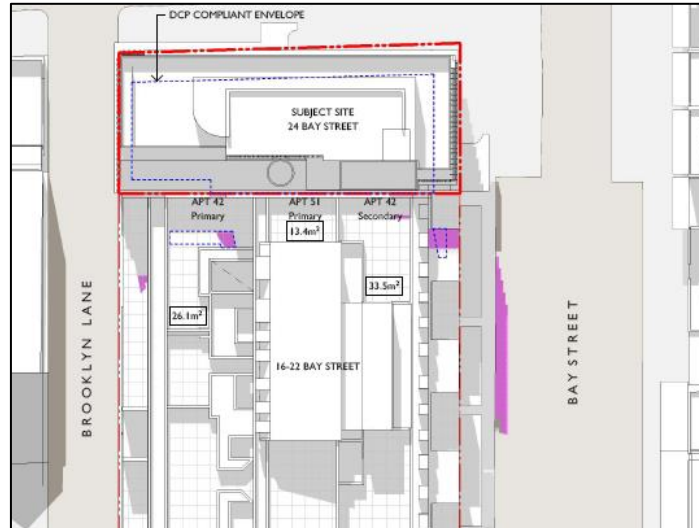
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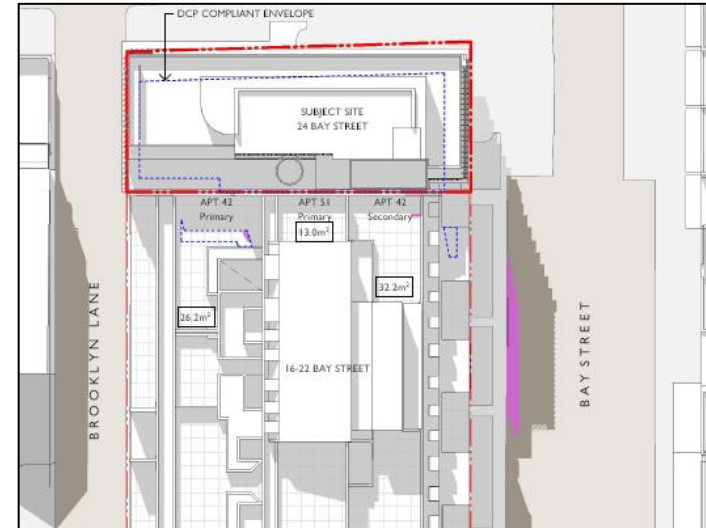
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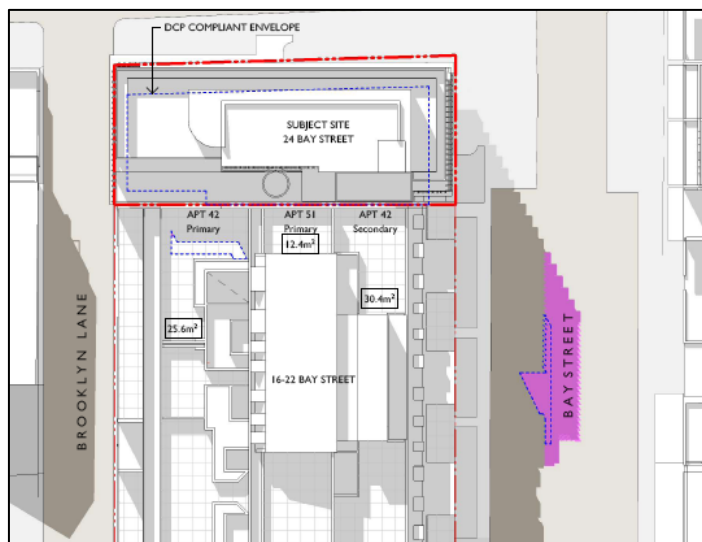
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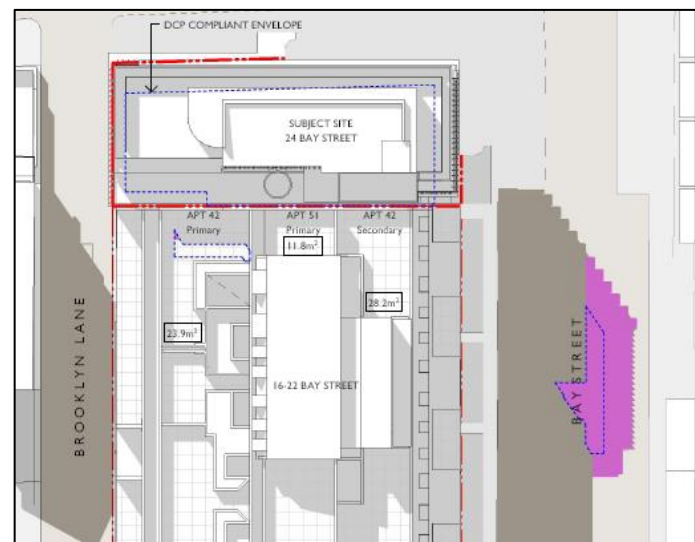
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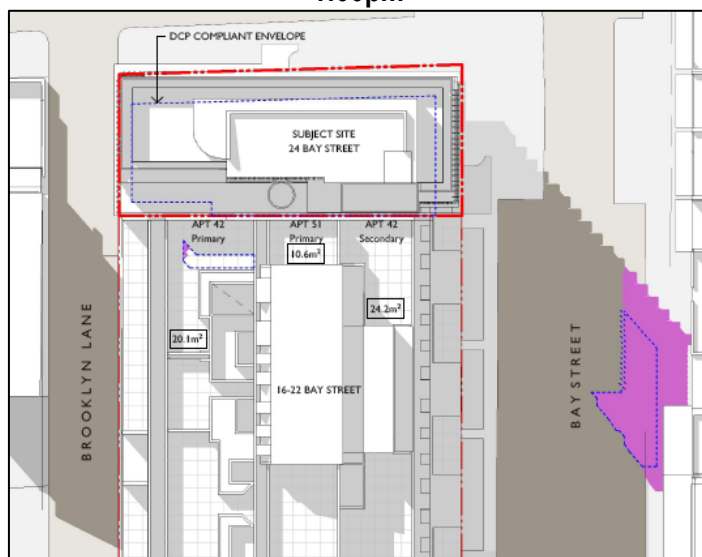
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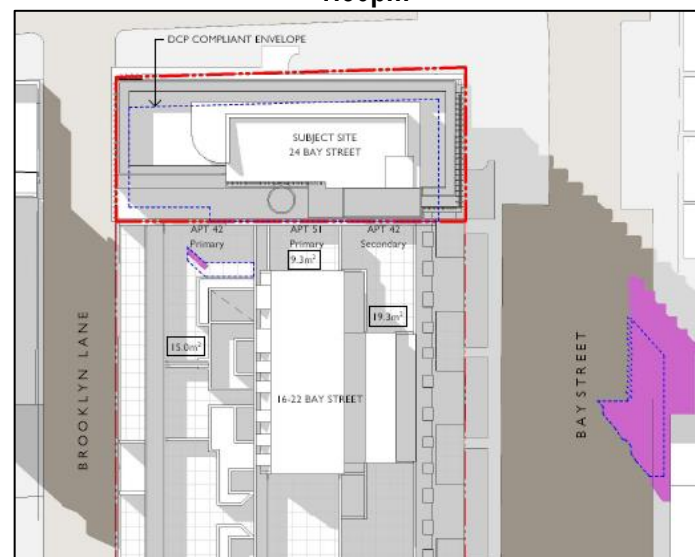
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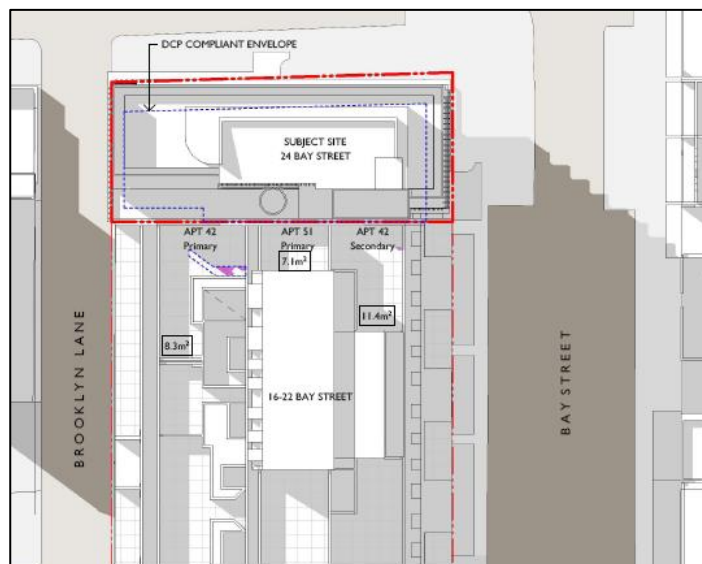
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3:00pm

KEY

-  EXISTING SHADOWS
-  OVERSHADOWING WITH DCP COMPLIANT ENVELOPE
-  OVERSHADOWING WITH REVISED MASSING
-  AREA m² IN DIRECT SUN