

**ADDENDUM CLAUSE 4.6 VARIATION**  
**CLAUSE 4.3 - HEIGHT OF BUILDING CONTROL**  
**CITY OF CANADA BAY LEP 2013**



**Demolition & Construction of Residential Flat Building**

**76B St Georges Crescent,**

**Drummoyne**

**10 December 2021**

## TABLE OF CONTENTS

1. INTRODUCTION.....	1
2. SITE & LOCATION .....	2
3. CLAUSE 4.6 VARIATION .....	4
4. THE TERMS OF CLAUSE 4.6 .....	5
5. ENVIRONMENTAL PLANNING GROUNDS.....	7
6. CONSISTENCY WITH THE STANDARD & ZONE OBJECTIVES.....	13
7. COMPLIANCE UNREASONABLE OR UNNECESSARY .....	15
8. CONCURRENCE OF THE SECRETARY .....	18
9. CONCLUSION .....	18

## LIST OF ILLUSTRATIONS

*Figure 1 –Site Survey (Compilation)*

*Figure 2 – Location Map*

*Figure 3 – Aerial Photo*

*Figure 4 – Building Height Planes*

*Figure 5 – Building Section*

*Figure 6 –Sun Eye Diagrams*

*Figure 7 – Zoning Map*

## 1. INTRODUCTION

This report has been prepared to support the determination of a Development Application (DA) **DA2020/0349** currently the subject of an appeal in the Land & Environment Court (LEC), being **Proceedings 2021/00228144**. The proposal seeks approval for the demolition of the existing dwelling at 76B St Georges Crescent, Drummoyne, the construction of a residential flat building containing 3 units and its strata subdivision.

Minor internal renovations are also proposed to the existing Boatshed to repurpose it as a shared recreation building with kitchen facilities, for use by the future residents of the site. No work is proposed to the existing boat ramp, with minor works to the seawall to improve its defence against sea level rise.

This report has been prepared in relation to the amended plans numbered *DA 000 – DA 701 (Not Consecutive), Project No. 2024, Various Issues, with various dates*, as updated post the Section 34 Conference and *dated 09-12-2021*, drawn by *PBD / Architects* with associated Survey, Landscape and Services drawings, Civil, Flooding and Traffic Engineering reports and plans.

Under *Clause 4.3* of the *LEP* the site is subject to a maximum building height limit of 8.5m, with most of the proposed building complying therewith. The subject site falls from St Georges Crescent to the waterfront by approximately 4.75m. As a result, the proposed building will sit below the 8.5m building height line at its western end, by 350mm but will vary the height limit in its middle and eastern portions by between 250mm and 500mm including the parapet.

It is worth noting that the proposal will provide a transition from the 4 – 5 storey Seniors Living building immediately to its north and the adjoining / nearby residential flat buildings to the south that range in height from 2 – 3 storeys.

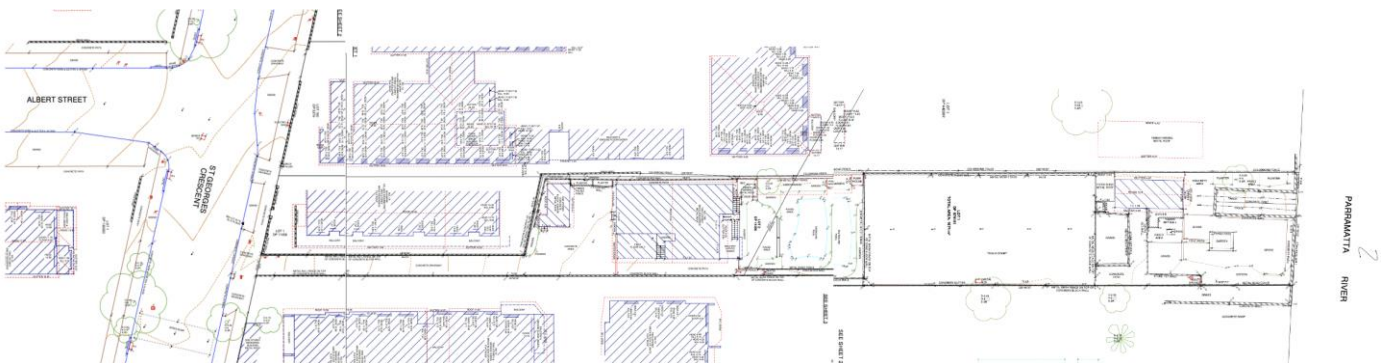
Accordingly, a request to vary the building height standard under *clause 4.6* of the *LEP* needs to be prepared, which is the purpose of this report.

## 2. SITE AND LOCATION

The subject site occupies Lot 1 in DP 579151, and Lot 2 in DP11056 and is known as 76B St Georges Crescent, Drummoyne. It is located on the eastern side of St Georges Crescent approximately opposite its intersection with Albert Street.

The property is a battle axe shaped block with a long driveway providing pedestrian and vehicular access. The improvements on the property include a two - storey dwelling, swimming pool and tennis court. The site adjoins the Parramatta River via a sandstone sea wall with an existing boathouse and ramp. The overall area of the property is approximately 1674 square metres (m<sup>2</sup>), as per the **compilation copy of the survey** in *figure 1* below.

**Figure 1 – Site Survey (Compilation)**



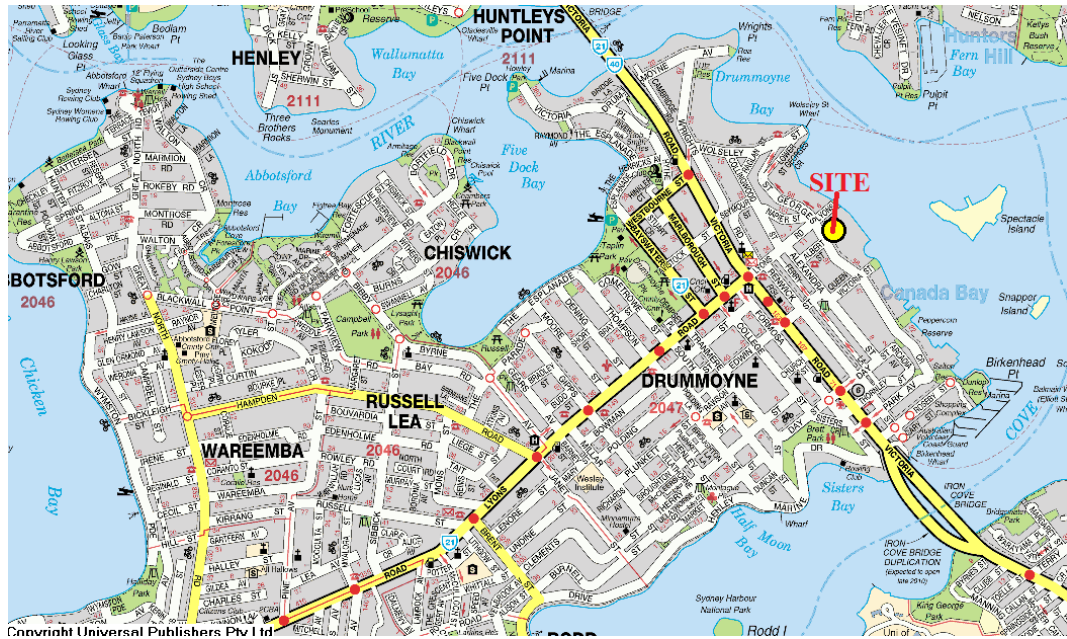
The surrounding development is a mixture of Duplex, town house, multi - unit developments and large dwellings of a myriad of styles and ages. Most dwellings on the eastern side of St Georges Crescent face the river, with many having access and car parking facilities (garages and car ports) facing the street.

Bus services currently run along St Georges Crescent linking to those operating along Victoria Road to the city and major centre of Burwood, whilst the Drummoyne wharf is nearby. The Drummoyne commercial centre on Victoria Road is approximately 3 - 5 minute walk with the Birkenhead Point shopping precinct a further ten minute walk to the south. Nearby recreation areas/ facilities include Peppercorn, Salton and Dunlop Reserves, the Bay Run and Drummoyne Pool, as well as a number of cafes, restaurants and clubs.



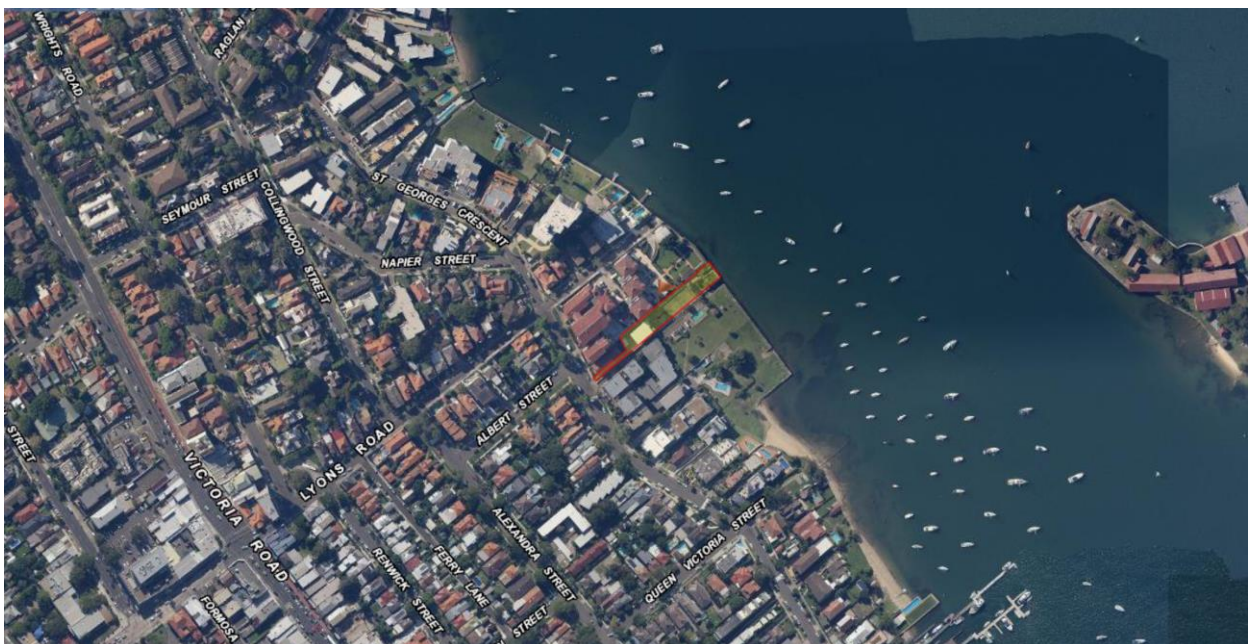
The general location of the property and the surrounding built form are shown in *figures 2 and 3* below.

**Figure 2 – Location Map**



Map reproduced with permission of UBD. Copyright Universal Publishers Pty Ltd. DG 05/05

**Figure 3 – Aerial Photo**



Source: © DEPARTMENT OF LANDS SIX Portal [www.lands.nsw.gov.au](http://www.lands.nsw.gov.au)

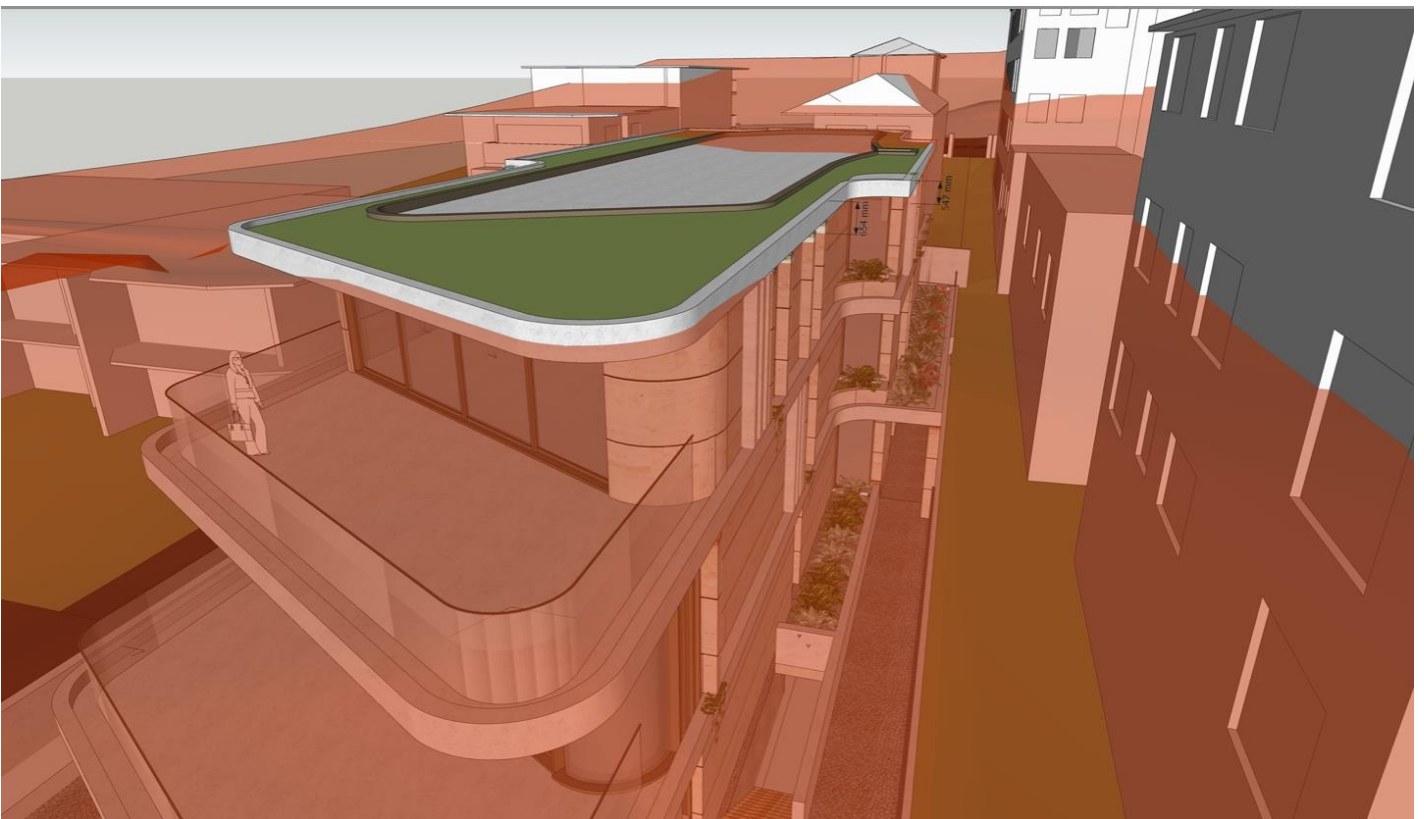
### 3. CLAUSE 4.6 VARIATION

*Clause 4.6* of the LEP outlines the matters to be considered by Council where a proposal seeks to vary a numerical standard contained within the LEP. The subject development seeks to vary the Height of Building standard currently contained within *clause 4.3* of the *LEP* and therefore an assessment under clause 4.6 is required.

This clause 4.6 variation request has been prepared in accordance with the Land and Environment Court's decision in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and also having regard to the Court of Appeal's more recent decision in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

As proposed most the building is compliant with the height requirement with the variation limited mainly to the roof structure as shown in *Figure 4* below.

**Figure 4 – Building Height Blanket**



## 4. THE TERMS OF CLAUSE 4.6

Development consent may still be granted to the proposed development (despite the non-compliance with the maximum height) if a variation to the relevant control is approved under clause 4.6 of the LEP. *Clause 4.6* states as follows:

### *4.6 Exceptions to development standards*

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

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

*(2)Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. ...*

*(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.***

*(4)Development consent must not be granted for development that contravenes a development standard unless:*

- (a)the consent authority is satisfied that:*
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) the proposed development will be in the public interest because it is **consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and (emphasis added)***

- (b) the concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider:*
- (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. ...*
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3)...*

This document provides a written request from the applicant seeking to justify the contravention of the Building Height standard in accordance with [clause 4.6](#).

[Clause 4.6](#) continues to be an appropriate and frequently applied mechanism to ensure that planning rules have appropriate levels of flexibility, when the circumstances warrant it. Some recent examples of the application of [Clause 4.6](#) by the Land and Environment Court are as follows:

- In *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 the Land and Environment Court approved a residential flat building in Randwick with a 55 per cent variation of the height limit (at its highest point) and a 20 per cent exceedance of the floor space ratio control.

The Court was satisfied that the clause 4.6 request by the applicant's town planner was comprehensive and had addressed all of the prerequisites. The Court was also persuaded that the site was 'unusual in terms of its location at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation'. Those features, when taken together with other benefits of the proposal such as its design excellence and internal amenity, provided sufficient environmental planning grounds to justify approval via clause 4.6.



- In *Moskovich v Waverley Council* [2016] NSWLEC 1015 the Land and Environment Court approved a residential flat building in Bondi with a floor space ratio of 1.5:1. The development standard was 0.9:1. The exceedance was around 65 per cent. The Court's decision set out a detailed analysis of the decision of the Court in *Four2Five v Ashfield Council*, which concluded that the large numerical exceedance of the FSR control could be supported.
- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the 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.

## 5 ENVIRONMENTAL PLANNING GROUNDS

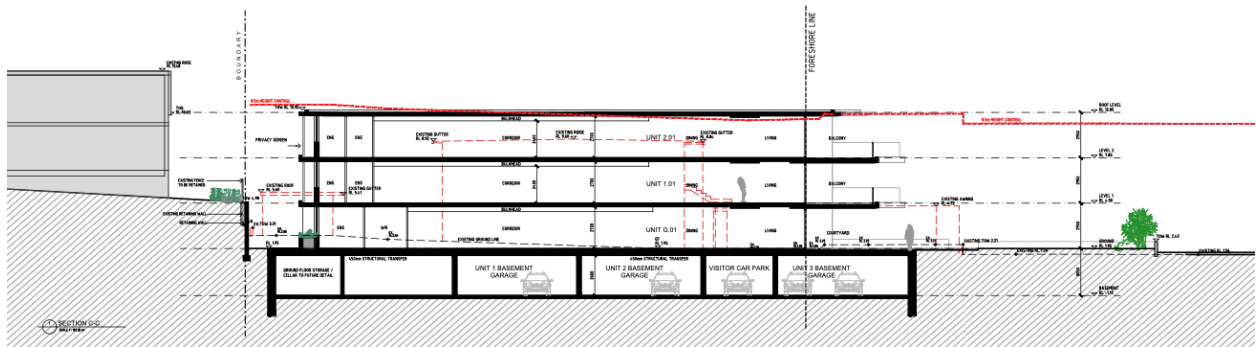
There are sufficient environmental planning grounds to justify contravening the building height standard.

It is acknowledged that this clause 4.6 request must focus on the non-compliance rather than the benefits of the development as a whole (as per *Initial Action*), however as per the decision in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, it is also relevant to the height breach to note that the development in the main meets the objectives and controls of the relevant Environmental Planning Instruments and DCP.

The amended design acknowledges the site's location by retaining a substantial setback from the foreshore (> 60 m) and by improved softening of the built form, using glass balustrades to the waterfront terraces and varying materiality to break up the long side facades. Even though the building height exceeds the LEP maximum the new stepping form ensures the retention of the river views by a majority of the surrounding and nearby development.

The western end of the proposed building is at or below the permissible height limit and although it removes the immediate water view from the upper level of the building immediately to the west, this is not a result of the height variation. That view is compromised by the maximum height level itself, as indicated by the building section in [figure 5](#) on the following page.

**Figure 5 Building Section**



As shown in the section above the variation from the LEP height limit is 670mm at its greatest towards the waterfront side of the building. The minor variation is purely due to the fall of the land.

**Richard Lamb & Associates** were engaged to undertake a view analysis as per the principles in “**Tenacity**”. This assessment reviewed all views from surrounding properties and while the proposal does impact on some minor views to the waterway, substantive views remain from those locations and / or would be impacted by a compliant building envelope. Dr Lamb concludes his report as follows:

*This concludes my assessment of the impacts of the proposal on view sharing with neighbouring properties.*

*The assessment confirms the finding of my December 2020 report, that impacts on views in the private domain would be very limited. There are minor non-compliances of the proposal with the FBL and the development standard for the height of buildings, the impact resulting from which would be reasonable.*

*The extent of impact on two viewing places would be moderate or severe, both in the Scalabrini Village development, one an aged care unit and the other a Town House in 76A, St Georges Crescent. The non-compliant parts of the proposed development would not cause increased impacts on view sharing. Any complying development would cause similar extents of impact and view sharing is reasonable in both cases, despite severe view loss in one case.*

*The only dwelling assessed where there would be a quantitative difference in view caused by a non-compliance with a statutory control compared to strict compliance is Unit 31 in Drummoyne Waters, where one view across the side boundary was considered, initially in isolation. There is a minor view loss. If it was the only view available to this apartment, the importance of the impact would be greater. However, the apartment has unimpeded, panoramic, scenic views from the same location studied, in which there are no impacts.*

*Taking everything relevant into consideration, the view sharing outcome of the proposal on this apartment is considered to be reasonable.*

Subsequent to Dr Lamb's assessment, the eastern extent of the building has been reduced, with the glass line now aligning with the foreshore building line (FBL) and the depth of the terraces on levels 1 and 2 reduced to a maximum internal dimension of 3.2m. The consequence of these reductions in the length of the building, is that any perception of view loss is further lessened.

As such, to require strict compliance with the height control would mean that either (a) some of the habitable accommodation within the proposed upper storey would need to be deleted or (b) the lower floor pushed further into the ground. Either option would negatively impact on the residential amenity of the proposal. In terms of the latter option, such action would impact on the required stormwater management and sea level rise design solutions proposed, while creating a subterranean feel for the ground floor unit

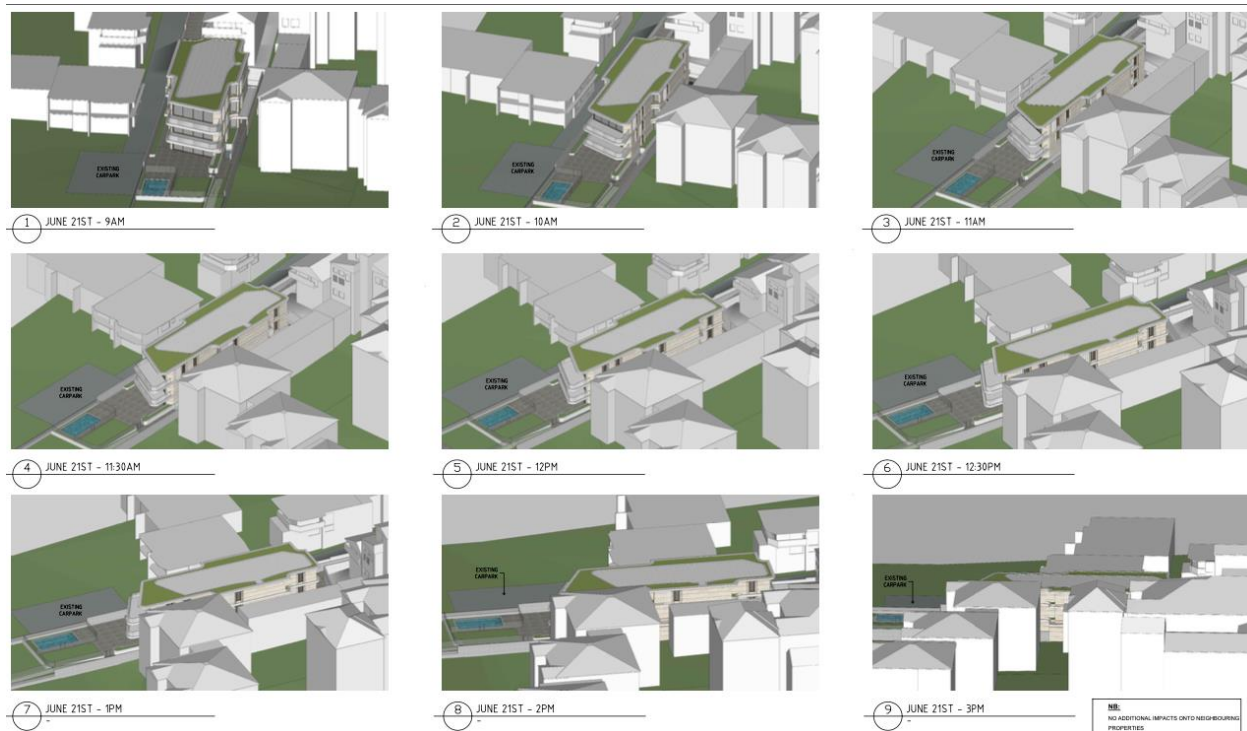
It is also a relevant circumstance of the case, and an environmental planning ground, that the height breach is limited to the eastern portion of the building, where it will not have any adverse impact on any nearby property or public place. It will not result in the loss of any significant water views from adjoining properties, with the majority retaining the existing iconic eastern views of the Harbour Bridge City and Opera House (where available) and foreground Parramatta River, including Cockatoo Island. The size and quantum of the variation is such that it will not be perceived when the proposed building is viewed in the round.

In terms of potential shadow impacts it is worth noting from the shadow diagrams forming part of the DA plans, that the shadows from the minor height overrun will not be greater than a complying building in terms of impact on solar access to neighbouring residential sites.

This is as a result of the sun direction through the course of the day, the increased side separation to the adjoining building (No. 72 – 76), incorporating the wide driveway to that property south of the proposal and the greater height of the building to the north of the subject site

This position is confirmed through the sun eye diagrams in **plan DA 600** to be submitted with the amended plans, which clearly shows that all windows in the adjoining developments receive the required hours of winter sun as shown in *figure 6* below.

**Figure 6 – Sun Eye Diagrams**



A better planning outcome can also be considered in terms of the potential impact of the proposal from the increased height on the public domain and in an urban design sense. Any assessment of these issues must consider the proposal in terms of the context of the site, its built form, the appropriateness of medium density development in the locality and the design parameters of the *Canada Bay DCP*.

Such an assessment must also consider the compatibility of the proposal with its surroundings, in terms of the parameters laid out in the matter of *Project Venture Development Pty Ltd v Pittwater Council* by the L & E Court. In this sense the proposed use is permissible within the relevant zoning, while in terms of its proposed height provides a transition from the 4 – 5 storey buildings to the north of the site and the 2 – 3 storey residential flat buildings to the south.

When viewed from the Parramatta River, the minor height variation will be imperceptible bearing in mind the substantial setback of the building from the foreshore. This context is further strengthened in consideration of the light - weight structure and appearance of the water side terraces on levels 1 and 2.

It is also worth noting that the variation in building height is a function of the topography of the land and the requirement to achieve a minimum flood level ensuring the facilitation of the rational & efficient re development of the site. A strictly compliant building would not comply with the flood level and result in a sub optimal built form.

Such an outcome would not be in accord with the objects of the EP&A Act. At paragraph 23 of his judgement in Initial Action, Preston CJ considered this issue and stated as follows:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

In that regard the proposed height variation will facilitate the orderly and economic development of the land, while promoting the good design and amenity of the built environment. Both of these matters are objects under Section 1.3 of the EP&A Act

It may be suggested in certain submissions that the above benefits could be achieved by a smaller compliant development. However, to ensure that the building height completely met the LEP height standard would necessitate a reduction of at least a part, if not a full level, within the



building reducing its yield. Such a reduction would impact on the viability of the project to a level not commensurate with the minor nature of the proposed variation. The additional height is unlikely to impact and or be perceived from the public domain.

In the circumstances of this proposal, a better outcome is also achieved by varying the relevant height standard through:

- The re invigoration of an older site with a new vibrant modern building, that although marginally greater in height, respects its surroundings and reduces its impact on nearby residential properties.
- The increased height does not result from or create additional habitable floors above that envisaged in the relevant LEP height control, ensuring the desired future character of the area expected under the LEP is maintained.

When viewed in the round, the majority of the visible portion of the structure is below the height limit and will therefore not dominate the foreshore of East Drummoyne. Its relationship between the buildings on both its immediate sides is one of transition from a much taller building (north) to a similar height building to the south.

In this context if the additional height is not approved the site's capacity to provide increased residential variety and housing opportunities within the locality would not be fully utilised. Furthermore, no significant adverse impacts arise from the non-compliances. The only potential adverse impacts from an increased height could be an increased shadow impact or view loss on adjoining land. As discussed previously in this section of this report, these matters have been considered in detail and any impacts found to be acceptable and within the parameters of the relevant controls and the principle of view sharing.

These facts, taken together, constitute environmental planning grounds sufficient to justify contravening the development standard. In addition, the factors discussed in **section 6** below are also relevant 'environmental planning grounds' and although not repeated in this section, are nevertheless relied upon for the purposes of this variation request.

## 6 CONSISTENCY WITH THE STANDARD & ZONE OBJECTIVES

The proposed development will be in the public interest because it is consistent with the objectives of both the LEP Height of Building standard and relevant land use zone. The reasons why are set out below.

*Clause 4.3* of the LEP contains objectives indicating the purpose of the height control. These objectives have recently been altered in an amendment to the LEP (26-02-21). As this matter remains undetermined, those updated objectives are listed below together with comments on the proposal's performance against them.

*(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*

**Comment:** The amended proposal generally accords with the LEP height limit (8.5m), with its bulk and scale substantially less than the building immediately to its north and commensurate with the development to its south. It is not obviously perceptible from St Georges Crescent due to the battle axe nature of the subject site and its fall from the street, while its 60+m setback from the foreshore, ensures its compatibility with the majority of nearby development. In that context the character of the area and its attributes as expected under the planning framework will not be detrimentally affected by the proposal.

*(b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—*

*(i) visual and acoustic privacy, and*

*(ii) solar access and view sharing,*

**Comment:** The amendments proposed as part of the current proceedings, (reduced built form and screening) have addressed both of these matters, resulting in an acceptable outcome. The issue of view sharing has been prominent in the design development of the project, as assessed and found to be acceptable by Dr Lamb in his review. The reduced length of the building and softening of the waterside terraces have further improved this relationship with adjoining properties.

*(c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*

**Comment:** The proposed building height at its upper eaves is in the main compliant, or less than the permissible height. Its location within the middle of the R3 zone ensures that there is no negative impact with any lower density zone. The design has carefully considered the windows in neighbouring buildings and any shadow impact will be generally commensurate with that cast by a compliant height building, ensuring the maintenance of local amenity. This proposed built form will provide a transition in terms of height between the buildings to the north of the site (4 – 5 storeys) and those to the south (2 – 3 storeys).

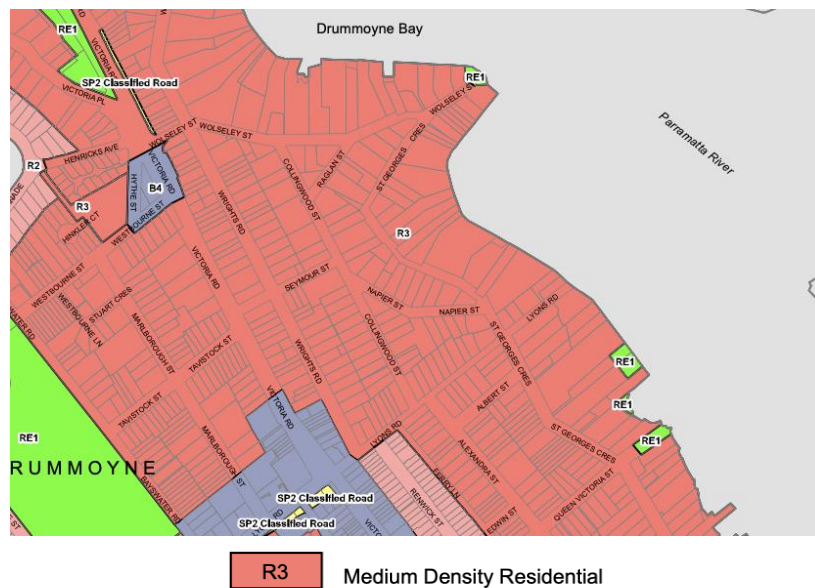
*(d) to ensure that buildings respond to the natural topography of the area.*

**Comment:** The proposed building is sited commensurately with the gradient of the site and generally follows the existing ground level as it tapers from the west to the east of the site. The minor height variation is purely as result of this land fall and the need to protect the building from future tidal influences and normal stormwater circumstances.

### **Consistency with the zone objectives**

The LEP zones the subject site ***R3 Medium Density Residential*** (see ***figure 7***) with the proposed residential development permissible with Council's consent as discussed in the Statement of Environmental Effects (SEE), to be submitted with the DA. Under the zoning table ***“residential accommodation”*** is permissible, with ***“residential flat building”*** being a component thereof.

The relevant zoning map is also shown in ***figure 7*** on the following page.

**Figure 7 - Zoning Map**

Source: Canada Bay LEP 2013 – Zoning Map

The Land Use table in the LEP sets out the zone objectives and permissible uses with the proposal being compliant with those matters. The objectives of the zone that are relevant to the proposal are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.....*

The proposal satisfies these objectives in that it provides for the ongoing residential occupation of the site within a similar built form to many other nearby residential flat developments. It will maintain the range and type of residential accommodation available in the area within a scheme that fits within the medium density nature of the precinct.

## 7 COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. There are a number of reasons why this is so.

*Firstly*, there are no adverse consequences attributable to the proposed non-compliant aspect of the development. To ensure absolute compliance with the height standard would necessitate the removal of part / all the upper habitable floor of the building with the loss of that unit.

The burden placed on the landowner via such a requirement would be disproportionate to any adverse consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 [15]).

An absence of environmental harm is a valid reason as to why strict compliance with a control may be unreasonable or unnecessary (*Initial Action*).

*Secondly*, requiring strict compliance (and refusing the DA) will *thwart* achievement of the objectives of the height standard as discussed earlier in this report

*Thirdly*, the proposed built form is similar in bulk and scale to the majority of the residential flat buildings in the precinct. Those development range in height from 2 – 3 storeys and generally within the LEP height limit, such as the proposed development. The height variation does not arise from an attempt to add additional habitable floors, while the substantive setback from the foreshore ensures that the building will not dominate views from the Parramatta River.

Fourthly, the relationship of the site with St Georges Crescent being a battle axe block ensures that it is not readily evident from that area of public domain. When it is viewed down the driveway the perception will be one of compliance, as the most visible western portion of the building is below the maximum height limit. When viewed from the nearby publicly accessible foreshore space, the separation distance between it and the building, will render the minor increase in building height imperceptible.

Fifthly, the site is one of the last, if not the last in its street block to be redeveloped for medium density development. The property value and strata subdivision status of the other developments in the area make it unlikely that any will be redeveloped in the near future. The exception is possibly the Scalabrini site immediately to the north of the subject property, which if at all, is likely to be retro fitted (to retain its existing building height and scale) rather than demolished and re – built.



In this locational context, the granting of the minor height variation over such a small portion of the proposed building, will not result in the setting of any precedent.

*Sixthly*, it would be both unreasonable and unnecessary to require strict compliance in consideration of the topography of the land because the area of greater sensitivity is at the rear (western) end of the site, over which views are retained

*Finally*, requiring strict compliance (and reducing the height the proposal) will undermine achievement of the relevant zone objectives, as previously discussed.

The proposed development achieves a balanced development outcome between an acceptable built form within the **R3** zone and the surrounding mixed density neighbourhood. The built form outcome will be one of quality, with care taken in the design phase to ensure that any adverse impacts to surrounding properties and the public domain are minimised. Finally, the location of the site, close to the Drummoyne town centre promotes walking and public transport use.

In view of all of the above, compliance with the numerical LEP standard for building height is considered to be unreasonable and unnecessary in the circumstances. If approved, the proposal (when built) will not be out of place with, nor detrimental to the amenity of its surroundings and will fit within the desired future character of the area as envisaged in the relevant planning framework. The proposed development represents a good fit with the aims of the LEP, the objectives of both the height standard and relevant zone.

Approval of the non-compliant building height allows for a development that provides added community benefit and an improved planning outcome, from both a functional precinct layout perspective and transport outcome. The proposal development will continue to contribute to the improved overall supply of housing stock in the area, bettering both housing choice and affordability.

## 8 CONCURRENCE OF THE SECRETARY

In accordance with the recent Planning Circular (PS 18 – 003) dated 21 February 2018 the concurrence of the Secretary (of Department of Planning and Environment) can now be assumed for the proposed height variation.

Further, and generally as to concurrence considerations, for the reasons outlined above – and particularly having regard to the site-specific nature of this Clause 4.6 variation request – there is nothing about this proposed height variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. There are no other relevant matters required to be taken into consideration before granting concurrence.

## 9 CONCLUSION

An assessment undertaken against the relevant planning framework indicates that the proposal is an acceptable one. It will not impact negatively on the amenity of nearby residents. The variation to the building height standard contained within the LEP is a matter that any reasonable Authority properly exercising its planning powers could agree to.

*David Furlong - Director*

*BTP, MPIA*