

# State Environmental Planning Policy No. 1 Development Standards, Objection

## 1.0 Standards objected to

This State Environmental Planning Policy No. 1 - Development Standards (**SEPP 1**) Objection accompanies a Development Application (**DA**) for a mixed use development at 200-220 Pacific Highway, Crows Nest (**the site**). It should be read in conjunction with the Statement of Environmental Effects, by Robinson Urban Planning Pty Ltd, that accompanies the DA.

The objection relates to the following three development standards in North Sydney Local Environmental Plan 2001 (**LEP 2001**):

- Clause 29(2) – Building height
- Clause 30(2) – Building height plane (BHP)
- Clause 31(2) – Floor space ratio (**FSR**) (non-residential)

Lloyd J, in *Winten Property Group Ltd v North Sydney Council* (2001) NSWLEC 46, posed five questions to be addressed in SEPP 1 objections. The extent of departure proposed and the Winten questions are addressed below for each of the development standards to be varied.

## 2.0 SEPP 1 considerations

### Building height (LEP 2001, clause 29(2))

Clause 29(2) states:

*A building must not be erected in the mixed use zone in excess of the height shown on the map.*

For the site, the Map shows a maximum height of 16 metres.

**Figures A and B** compare the existing, approved/commenced and proposed building height (using the definition of *height* and *existing ground level*<sup>1</sup> in LEP 2001). They illustrate the following:

- Building 1 (new building)
  - At the Pacific Highway frontage, new Building 1 has a height of 15.5m which complies with the 16m height standard
  - At the western elevation of new Building 1, a height of 16.7m is proposed which exceeds the 16m height standard by 700mm
- Building 2 (existing building)
  - The existing, approved/commenced and proposed height of Building 2 is 29.2m (RL 123.410)
  - Existing, approved/commenced and proposed Building 2 departs from the 16m height standard by 13.2m
- Building 3 (existing building)
  - The maximum building height of existing and proposed Building 3 is 57.5m (RL 150.560)
  - Existing and proposed Building 3 departs from the 16m height standard by 41.5m

An assessment based upon the Winten questions follows.

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1 Pursuant to LEP 2001:

***height** in relation to a building, means the greatest distance measured vertically from any point on the building to the existing ground level, or the level of the lowest habitable floor, immediately below that point, whichever is the lower, excluding chimneys.*

***existing ground level** means the level of the ground as at December 1997, as shown on Council's digital photogrammetric maps dated December 1997.*

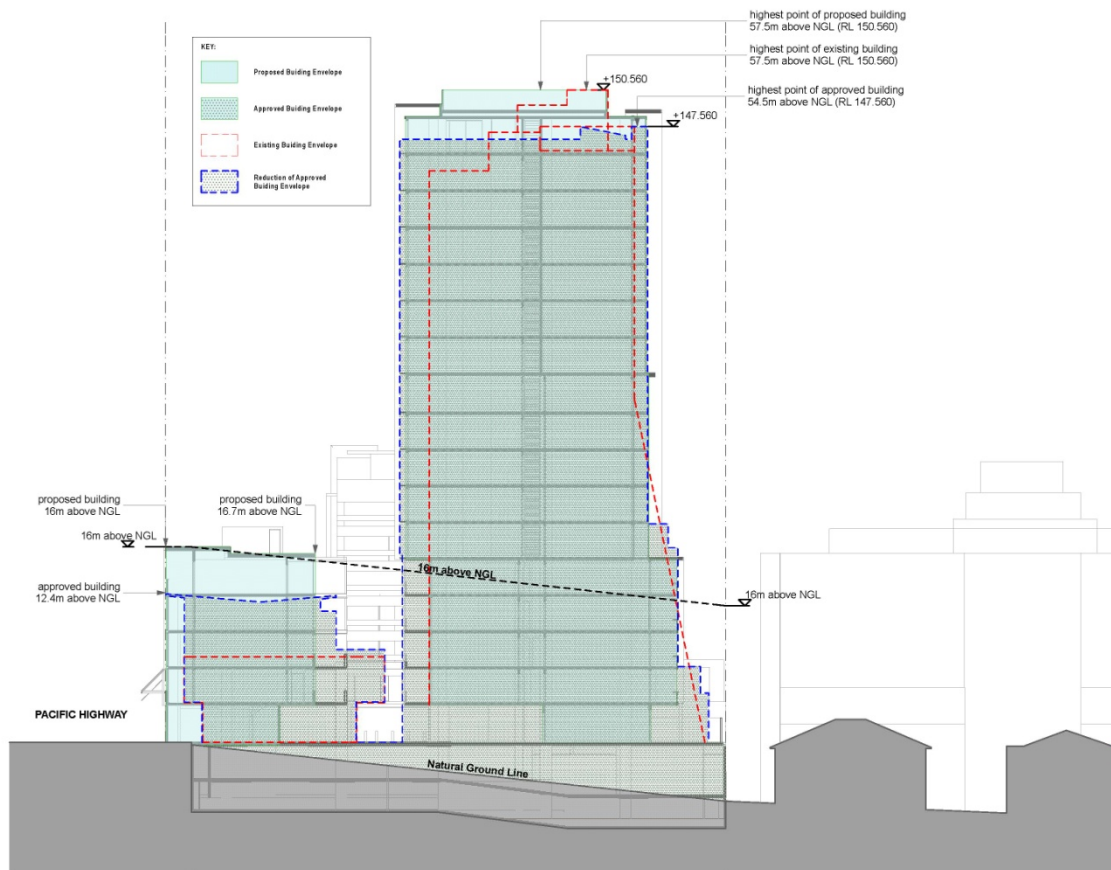


Figure A - Building 1 & 3 height compliance plan (existing, approved/commenced and proposed) (Source JPRA)

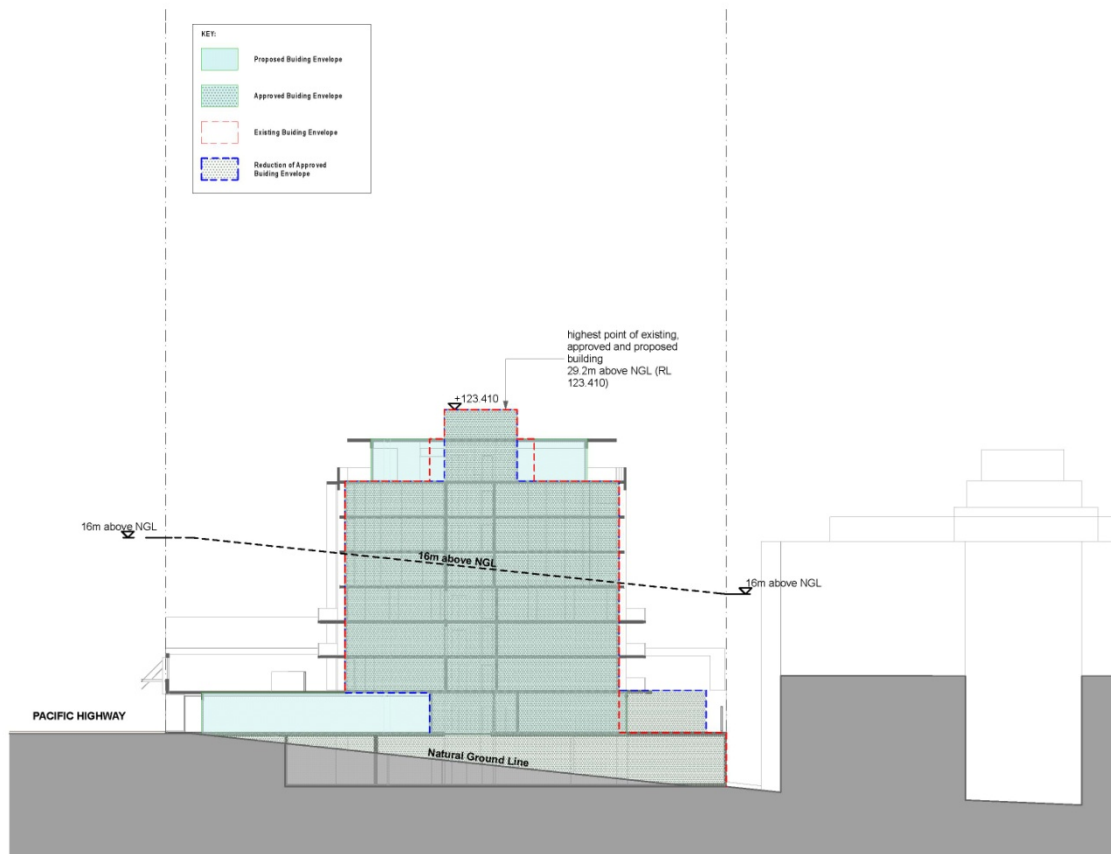


Figure B - Building 2 height compliance plan (existing, approved/commenced and proposed) (Source JPRA)

### 1) Is the planning control in question a development standard<sup>2</sup>?

The building height control is not framed as a prohibition.

The building height control is therefore a *development standard* as defined at clause 4 of the *Environmental Planning and Assessment Act, 1979 (EP&A Act)* (part (c) of the definition refers to the height of a building).

### 2) What is the underlying object or purpose of the standard?

The building height objectives at Clause 29(1) of LEP 2001, and the proposal's satisfaction of same, are detailed below:

#### Building height objectives (a) and (b)

- (a) *ensure compatibility between development in the mixed use zone and adjoining residential areas and open space zones*
- (b) *encourage an appropriate scale and density of development for each neighbourhood that is in accordance with, and promotes the character of, the neighbourhood*

The proposal satisfies building height **objectives (a) and (b)** as:

- New Building 1 is generally consistent with the 16m height standard (15.5 – 16.7m) and has a scale and height consistent with nearby buildings on the Pacific Highway
- The existing and proposed maximum height of Building 2 is the same (29.2m)
- Additions to the envelope of Building 2 are at the top of the building and are setback from the level below
- The existing and proposed maximum height of Building 3 is the same (57.5m)
- The envelope of Building 3, where it adjoins development in the adjoining residential zone, has been reduced (refer **Figure A**)
- Additions to the envelope of Building 3 are located at the top of the building and to the east of the existing plant room, well away from development the adjoining residential zone (refer **Figure A**)

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<sup>2</sup> Pursuant to clause 4 of the Act:

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

...

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

(d) ***the cubic content or floor space of a building,***

..... (our emphasis)

**Building height objective (c)**

*(c) provide reasonable amenity for inhabitants of the building and neighbouring buildings*

The proposal satisfies building height **objective (c)**, providing a reasonable standard amenity for inhabitants of the building and neighbouring buildings as demonstrated below.

An overview of the amenity of the proposed apartments follows (with more detailed set out in the SEE):

- The apartments generally comply with the Residential Flat Design Code Rules of Thumb (as detailed in the Detailed Schedule of Apartments, **Appendix F** and Section 4.1.2 of the SEE)
- The apartments will have a good standard of privacy (privacy is addressed in more detail at Section 4.2.1 of the SEE)
- 71.3% of the proposed apartments are cross ventilated (DCP 2002 requires 75% and the RFDC Rule of Thumb suggests 60%)
- 56.9% of the proposed apartments receive two hours or more of sunlight to their living room balconies between 9am and 3pm in midwinter. If times are extended to 7.30am to 4.30pm, 89.1% of apartments comply (RFDC Rule of Thumb suggests 70% between 9am and 3pm)
- There are no south facing apartments (the RFDC suggests that the number of apartments with a southerly aspect be limited to 10%)
- 169 of 202 residential apartments will enjoy a view to the east, south or west.

The amenity of neighbouring residents is protected as:

- There are no views over the site
- Privacy will be protected by orientation, grade separation, privacy shelves, screens and planting (refer Section 4.2.1 in the SEE)
- Adjoining residents will not experience any significant reduction in solar access (refer Section 4.2.3 and **Appendix L** in the SEE)
- The approved parking at the base of Building 3 has been replaced by apartments and landscaped courtyards, improving acoustic amenity for the adjoining residents in Sinclair Street.

**Building height objective (d)**

*(d) provide ventilation, views, building separation, setback, solar access and light and to avoid overshadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like*

The proposal satisfies building height **objective (d)** as:

- The impact on ventilation to adjoining buildings is unlikely to be appreciable
- There are no views over the site

- Privacy will be protected as detailed above
- Adjoining residents will not experience any significant reduction in solar access (refer Section 4.2.3 and **Appendix L** in the SEE)

**Building height objective (e)**

- (e) *promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient*

The proposal generally maintains the existing relationship between buildings on the site and the natural landform (no new excavation is proposed).

**Building height objective (f)**

- (f) *avoid the application of transitional heights as justification for exceeding height controls.*

The justification for exceeding the height control does not in any way rely upon transitional heights, satisfying **objective (f)**.

Notwithstanding the departure from the building height development standard, the proposal is consistent with the underlying objectives of the standard, as demonstrated above.

**3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act?**

The aims of SEPP 1, as stated at clause 3 of the Policy are:

*This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.*

Clause 5(a)(i) and (ii) of the EP&A Act state:

*The objects of the Act are:*

(a) *to encourage:*

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the building height development standard would tend to hinder the attainment of the objects specified in Clause 3 of SEPP 1 and Section 5(a)(i) and (ii) of the EP&A Act as it would:

- Necessitate demolition of around half of Building 2 and two thirds of Building 3 (refer **Figure A**) which does not represent an economic use of resources
- Frustrate the provision of 202 new dwellings on the site which could make a very meaningful and well located contribution to the dwelling targets for North Sydney (consistent with the Draft North Sydney Residential Development Strategy 2008, as detailed in Section 4.1.2 of the SEE)

**4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

In this instance, compliance with the building height development standard is unreasonable as:

- Proposed Building 1, the only new building, complies with the building height standard at its frontage to the Pacific Highway and the proposed departure of 700mm is internal to the site and will not be perceptible from the public domain
- Existing (to be retained) Buildings 2 and 3 and the approved/commenced development depart from the building height development standard to a similar extent to the proposal
- Where minor additions to the building envelope of existing Buildings 2 and 3 are proposed, the additional space is reasonable for the following reasons:
  - The additional volume is sited in positions that do not affect overshadowing to adjoining and nearby residential development
  - Proposed reductions in the building envelope, when compared with the approved/commenced development, are sited in locations that will somewhat improve the amenity of adjoining residences in Sinclair Street
- Council also has a record of supporting SEPP 1 variations to the height development standard when the existing building on the site already departs from the applicable height standard (including recent approvals at 55 Lavender Street, 61 Lavender Street, 30 Alfred Street, 20-24 Alfred Street, 118 Alfred Street, 88 Alfred Street, the Kirribilli Club at 11 Harbourview Crescent and 5-7 Harbourview Crescent, all at Milsons Point).

**5) Is the objection well founded?**

For the reasons set out above, the proposed departure from the building height development standard is well founded.

## FSR (non-residential) (LEP 2001, clause 30(2))

Clause 31(2) of LEP 2001 states that:

*A building must not be erected in the mixed use zone if the floor space ratio of the part of the building to be used for non-residential purposes is not within the range specified on the map.*

The Map shows a non-residential FSR range of 0.5:1 to 2:1 for the site. With a non-residential FSR of 0.38:1 (based upon a site area of 3,352.4m<sup>2</sup> and a proposed non-residential gross floor area (**GFA**) of 1,270m<sup>2</sup>), the proposal falls short of the prescribed range (by 0.12:1 or 406m<sup>2</sup>).

An assessment based upon the Winten questions follows.

### 1) Is the planning control in question a development standard?

The FSR control is not framed as a prohibition.

The FSR control is therefore a *development standard* as defined at clause 4 of the Act (part (d) of the definition refers to the cubic content or floor space of a building (refer footnote 2)).

### 2) What is the underlying object or purpose of the standard?

Clause 31(1) of LEP 2001 states the following objectives for the non-residential FSR development standard:

- (a) *ensure a diverse mix of uses in each building in the mixed use zone, and*
- (b) *minimise traffic generation from commercial development.*

#### **FSR Objective (a)**

The proposal includes the following non-residential components:

1. Retail, cafe and mixed use (Ground floor of Buildings 1 and 2)
2. Serviced apartments (Level 1 of Building 1)
3. Car share facility

The total non-residential area proposed is 1,270m<sup>2</sup> (the car share facility does not constitute GFA, but adds to the mixed use character).

The proposal provides a range of non-residential uses, commensurate with the character of the area, thereby satisfying objective (a).

#### **FSR Objective (b)**

The Traffic Report (**Appendix G**) concludes that the additional development traffic is not expected create any adverse impact on the neighbourhood amenity of nearby local residential streets and that the external traffic impacts would be satisfactory. The proposed quantum of non-residential uses is therefore consistent with objective (b).



**3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?**

Compliance with the non-residential FSR development standard would necessitate an increase in the volume of non-residential space. Such an increase would increase the site's traffic generation.

This part of Crows Nest, being located away from the town centre core along Willoughby Road, is not an ideal location for retail (and to a lesser extent commercial), evidenced by the high number of vacancies existing on the site and difficulties generally in leasing commercial and retail space in this locality.

Increasing the amount of non-residential FSR is therefore contrary to the EP&A Act's object to properly manage, develop and conserve the resources of cities and is not orderly development of land.

**4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

Compliance with the non-residential FSR development standard is unnecessary as non-residential uses are proposed in Buildings 1 and 2 which have ground level frontage to the Pacific Highway. The mix of residential and non-residential activities will therefore be readily apparent, contributing to the mixed use character of Crows Nest and this part of the Pacific Highway.

**5) Is the objection well founded?**

For the reasons set out above, the proposed departure from the non-residential FSR development standard is well founded.

## Building height plane (LEP 2001, clause 30(2))

Adjoining properties at 19-49 Sinclair Street are in Residential B Zone and the adjoining apartment building at 13-17 (also known as 7) Sinclair Street is in Residential C Zone. Pursuant to Clause 30(2) of LEP 2001, the following BHPs apply to the site:

### *(2) Building height plane controls*

*A building must not be erected in the mixed use zone, on land that adjoins or is adjacent to land within a residential or open space zone, if any part of the building will exceed a building height plane:*

- (a) commencing 1.8 metres above existing ground level, and projected at an angle of 45 degrees, at all points from each of the boundaries of the site that adjoin land within the residential A1, A2, B or F zone or open space zone, or*  
...
- (c) commencing 3.5 metres above existing ground level, and projected at an angle of 45 degrees, at all points from each of the boundaries of the site that adjoin land within the residential C zone,*

The compliance of the existing, approved/commenced and proposed development on the site with these BHPs<sup>3</sup> is shown on **Figures C** and **D**. These diagrams show that the existing, approved/commenced and proposed development on the site depart from the BHP to a comparable extent.

### **1) Is the planning control in question a development standard?**

The BHP control is not framed as a prohibition.

The BHP control is therefore a *development standard* as defined at clause 4 of the EP&A Act (part (c) of the definition refers to shape, height and external appearance of a building (refer footnote 2)).

<sup>3</sup> Pursuant to LEP 2001:

**building height plane** means a plane projected at an angle of 45 degrees over a site, commencing, at the height specified in this plan, along the boundary of the site or along any other line or boundary specified in this plan for the purpose of establishing a building height plane.

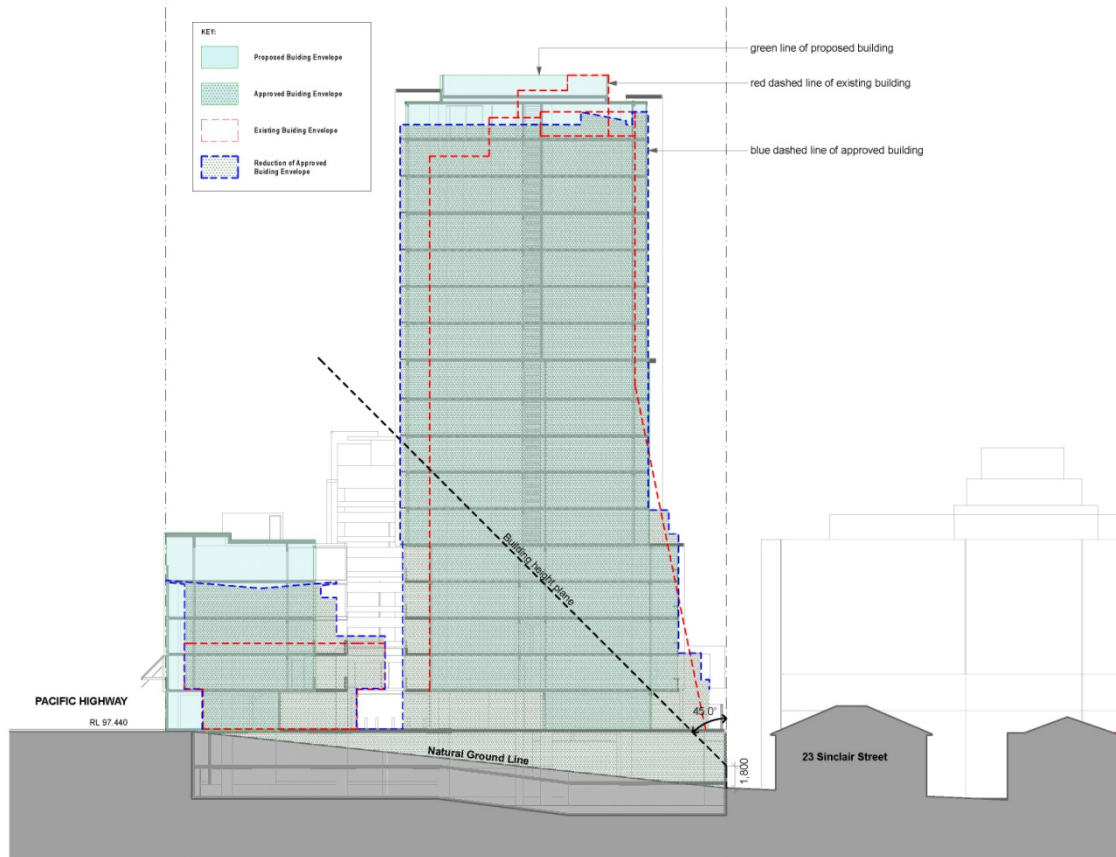


Figure C- Building 1 & 3 BHP (Cl. 30(2) (a)) compliance plan (existing, approved/commenced & proposed) (Source JPRA)

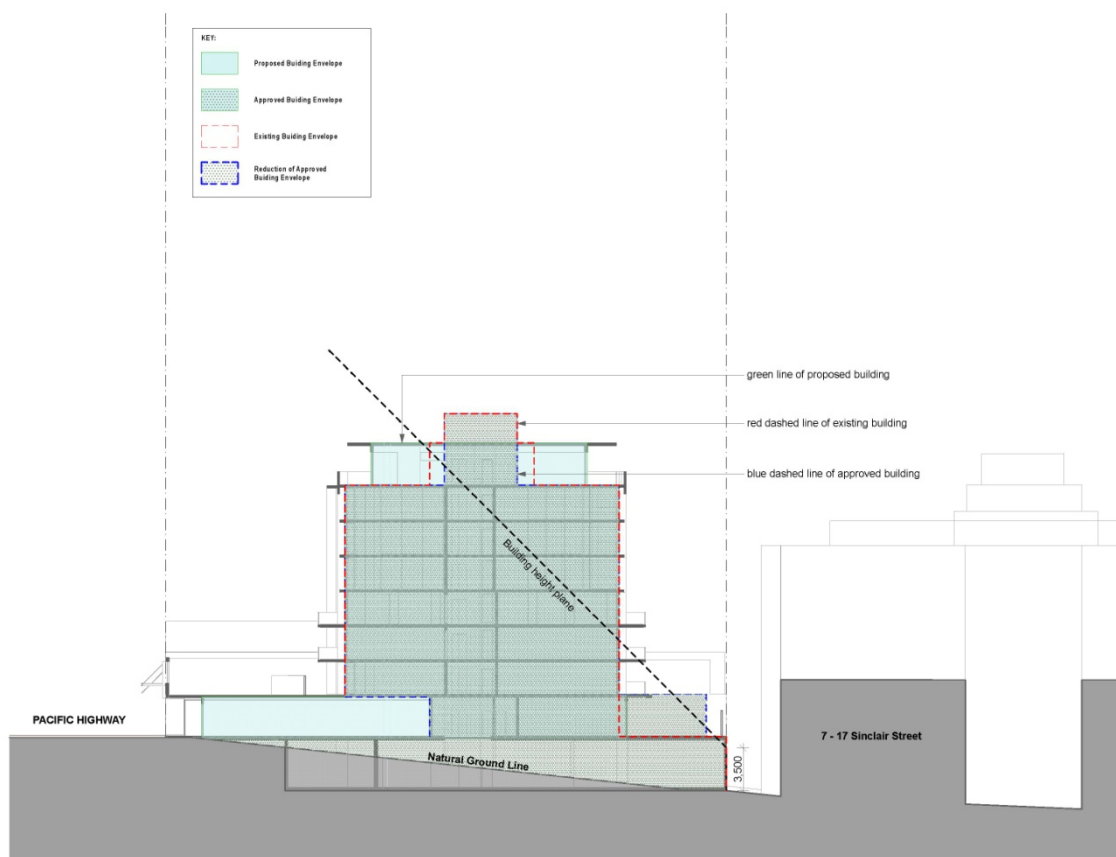


Figure D - Building 2 BHP (Cl. 30(2) (c)) compliance plan (existing, approved/commenced & proposed) (Source JPRA)

## 2) What is the underlying object or purpose of the standard?

The BHP objectives at Clause 30(1) of LEP 2001 and the proposal's satisfaction of same are detailed below:

### **BHP objective (a)**

*(a) ensure compatibility between development in the mixed use zone and adjoining residential or open space zones*

The proposal satisfies BHP **objective (a)** as:

- The existing, approved/commenced and proposed development on the site depart from the applicable BHPs to a comparable extent (refer **Figures C** and **D**)
- The visual impact of the development, as viewed from the adjoining residences in Residential Zones B and C will be materially improved by replacing the uniform western façade of the existing Buildings 2 and 3 with an animated residential presentation (refer existing western view and photomontages at **Figures 27 to 29** in the SEE)

### **BHP objective (b)**

*(b) minimise adverse effects on land in adjoining residential or open space zones in relation to ventilation, views, building separation, solar access and light and to avoid overshadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like.*

The proposal satisfies BHP **objective (b)** as

- The impact on ventilation to adjoining buildings is unlikely to be appreciable
- There are no views over the site
- Building separations are generally consistent with the approved/commenced development on the site (refer Architectural Plans)
- Privacy will be protected as detailed above
- Adjoining residents will not experience any significant reduction in solar access (refer Section 4.2.3 and **Appendix L** in the SEE)

## 3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?

As with the height development standard, a requirement to comply with the BHP development standard would tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the EP&A Act as it would:

- Necessitate demolition of around half of Building 2 and two thirds of Building 3 (refer **Figure C**) which does not represent an economic use of resources
- Frustrate the provision of 202 new dwellings on the site which could make a very meaningful and well located contribution to the dwelling targets for North Sydney

(consistent with the Draft North Sydney Residential Development Strategy 2008, as detailed in Section 4.1.2 of the SEE).

**4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

Compliance with the BHP development standard is unreasonable:

- Proposed Building 1, the only new building, complies with the BHP standard
- Existing (to be retained) Buildings 2 and 3 and the approved/commenced development depart from the BHP standard to a similar extent to the proposal
- Where minor additions to the building envelope of existing Buildings 2 and 3 are proposed, the additional space is reasonable for the following reasons:
  - The additional volume is sited in positions that do not affect overshadowing to adjoining and nearby residential development
  - Proposed reductions in the building envelope, when compared with the approved/commenced development, are sited in locations that will somewhat improve the amenity of adjoining residences in Sinclair Street
- Council also has a record of supporting SEPP 1 variations to the BHP development standard when the existing building on the site already departs from the applicable BHP standard (including recent approvals at 55 Lavender Street, 61 Lavender Street, 30 Alfred Street, 20-24 Alfred Street, 118 Alfred Street, 88 Alfred Street and the Kirribilli Club at 11 Harbourview Crescent 5, all at Milsons Point).

**5) Is the objection well founded?**

For the reasons set out above, the proposed departure from the BHP development standard is well founded.

### 3.0 Compliance with the planning objectives of the locality

Pursuant to the zoning and permissible land use table at Clause 14 of LEP 2001, the objectives of Mixed Use Zone are to:

#### **Mixed Use Zone**

##### **1 Objectives of the zone**

*The particular objectives of this zone are to:*

- (a) encourage a diverse range of living, employment, recreational and social opportunities, which do not adversely affect the amenity of residential areas, and*
- (b) create interesting and vibrant neighbourhood centres with safe, high quality urban environments with residential amenity, and*
- (c) maintain existing commercial space and allow for residential development in mixed use buildings with non-residential uses at the lower levels and residential above, and*
- (d) promote affordable housing.*

Notwithstanding the departures from the building height, non-residential FSR and BHP development standards in LEP 2001; the proposal is consistent with the objectives of the Mixed Use Zone as it:

- Includes residential apartments, retail/cafe uses and serviced apartments and will not unreasonably affect the amenity of any residential areas (in the Mixed Use Zone) (satisfying **objective (a)**);
- Apartments will overlook the Pacific Highway footpaths and internal courtyard, improving safety, a high standard of architectural design is proposed and good residential amenity will be achieved within the limitations imposed by the orientation of the site and dimensions of the existing building (satisfying **objective (b)**);
- The proposal has ground level shops addressing the full site frontage to the Pacific Highway (satisfying **objective (c)**); and
- Apartments have been designed to accommodate a range of households including professional couples, retirees and small families. Notably, the proposed apartment mix is consistent with the projected demand for small dwellings identified in the Draft Residential Development Strategy 2008 and predicted by residential market experts CBRE (refer Section 4.1.2 and **Appendix O** of the SEE) (generally consistent with **objective (d)**).

## 4.0 Conclusion

Whilst the proposal does not comply with the building height (clause 29(2)), BHP (clause 30(2)) and non-residential FSR (clause 31(2)) development standards in LEP 2001; it nevertheless satisfies the five SEPP 1 tests established by the Court.

Compliance with the development standards is therefore unnecessary and/or unreasonable in the circumstances of the case, and refusal of the development application on these grounds is not warranted.