

## Clause 4.6 – Exceptions to Development Standards – Height of Buildings (cl 4.3)

**Address:** 36-50 Hercules Street, Chatswood and 256-260 Victoria Avenue, Chatswood

**Proposal:** The proposal seeks development consent for the demolition of all existing structures and construction of five (5) mixed use buildings containing retail premises, business premises, shop top housing, car parking, childcare centre, landscaping, restoration of a heritage building and associated works.

### 1. Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Willoughby Local Environmental Plan 2012 (WLEP 2012). The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the WLEP 2012.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011, and has incorporated as relevant principles identified in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*

### 2. Description of the planning instrument, development standard and proposed variation

#### 2.1 What is the name of the environmental planning instrument that applies to the land?

The Willoughby Local Environmental Plan 2012 (WLEP 2012).

#### 2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

#### 2.3 What are the Objectives of the zone?

The objectives of the zone are:

##### Zone B4 Mixed Use

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

- *To allow for city living on the edges of the city centre of Chatswood, which supports public transport use, shopping, business and recreational services that contribute to the vitality of the centre, without undermining its commercial role.*

## **2.4 What is the development standard being varied?**

The development standard being varied is the height of buildings development standard.

## **2.5 Is the development standard a performance based control? Give details.**

No.

## **2.6 Under what clause is the development standard listed in the environmental planning instrument?**

The development standard is listed under clause 4.3 of the WLEP 2012.

## **2.7 What are the objectives of the development standard?**

The objectives of the development standard are contained in subclause 4.3(1)(a) to (h), and are:

- (a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- (b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,*
- (d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
- (e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*
- (f) to use maximum height limits to assist in responding to the current and desired future character of the locality,*
- (g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

## **2.8 What is the numeric value of the development standard in the environmental planning instrument?**

Clause 4.3(2) establishes a maximum height of building control for the site. The site has a maximum permissible height of 20 metres (Hercules & Oscar Street) and 9 metres Albert Avenue, in accordance with the Height of Buildings Map.

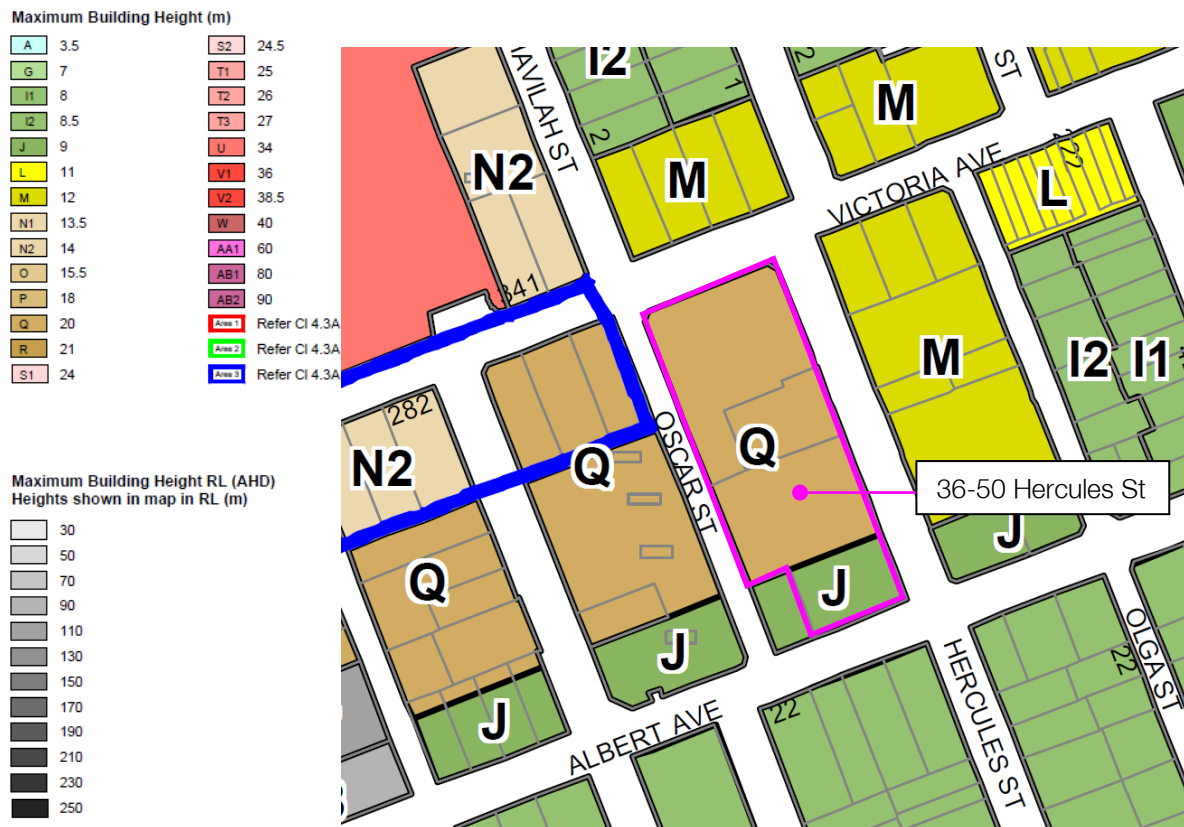


Figure1: Extract from Height of Buildings Map – WLEP 2012

## 2.9 What is the proposed numeric value of the development standard in the development application?

The proposed development involves the construction of five (5) new buildings. The two (2) buildings located along the Hercules Street and two (2) building located on Oscar Street and are subject to a 20m height limit. The third building is located along Albert Street and is subject to a 9m height control. Part of each of the buildings exceeds the building height standards as described in Table 1 below and illustrated in Figures 2 to 6.

Proposed Building	Control	Proposed Height	Max Variation
Albert Street Building	9m	7.5m to parapet 9.1m to top of roof slab 10.2m to clerestory	1.2m
Hercules Street Building North	20m	22.5m to top of rooftop of slab 23.0m to lift overrun	3.0m
Hercules Street Building South	20m	20.6m to top of rooftop of slab 22.9m to lift overrun	2.9m
Oscar Street Building North	20m	27.1m to top of rooftop of slab 27.1m to lift overrun	7.1m
Oscar Street Building South	20m	22.9m to top of rooftop of slab 23.3m to lift overrun	3.3m

The amended plans confirm the development has a maximum height of 10.2m in relation to the 9m height control and 27.1m in relation to the 20m height control. The height exceedences are indicated in Figures 2 and 6. The maximum height of the buildings on Hercules Street and Oscar Street is to the top of the lift overrun. The maximum height of the building fronting Albert Avenue is to the clerestory window.

The height breach varies from 1.2m to 7.1m. The breaches are illustrated in Figures 2 to 6.



Figure 2: Albert Avenue Building

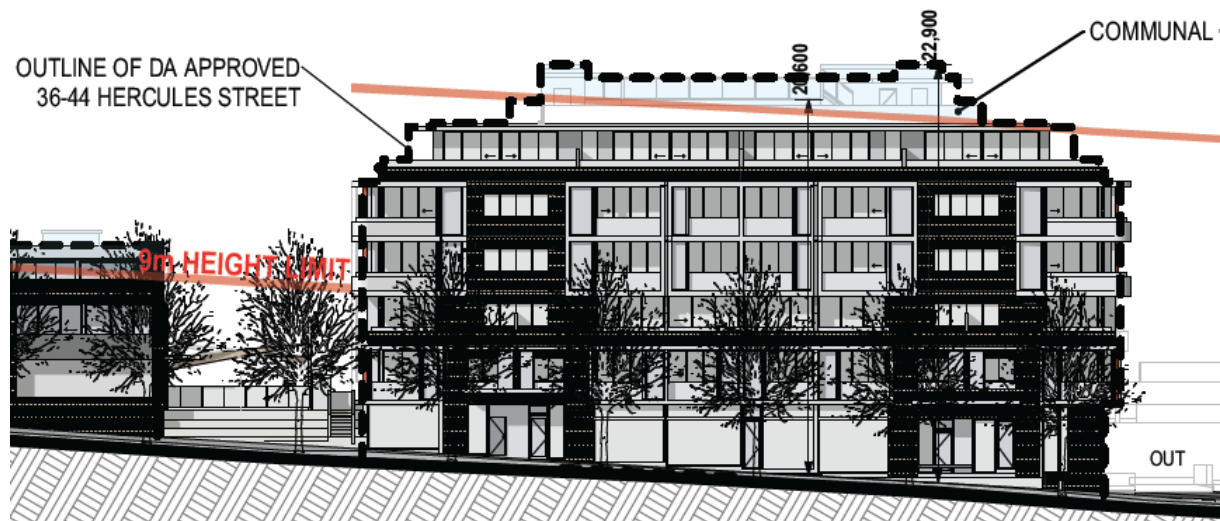


Figure 3: Hercules Building South

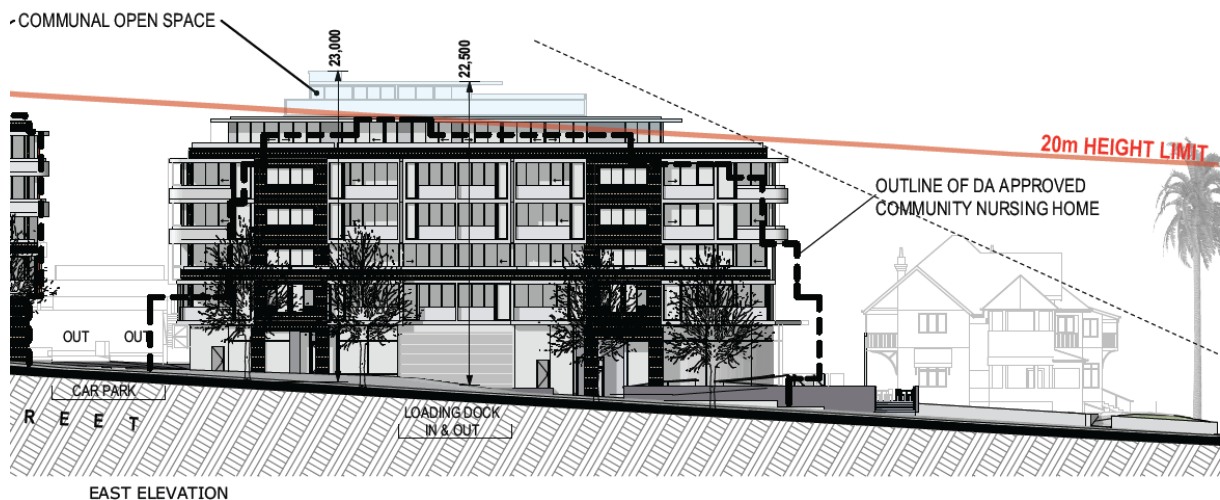


Figure 4: Hercules Building North

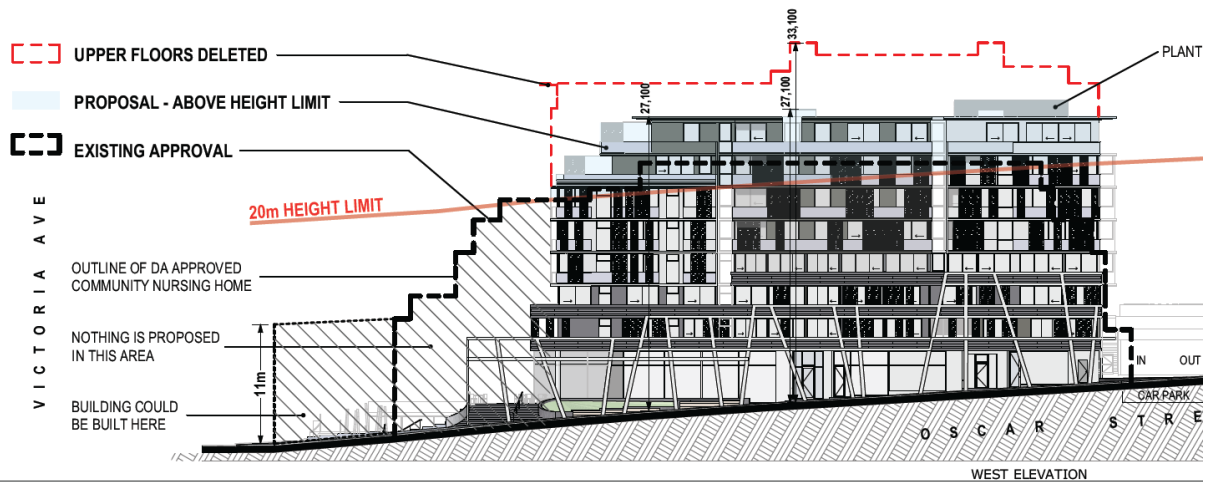


Figure 5: Oscar Building North

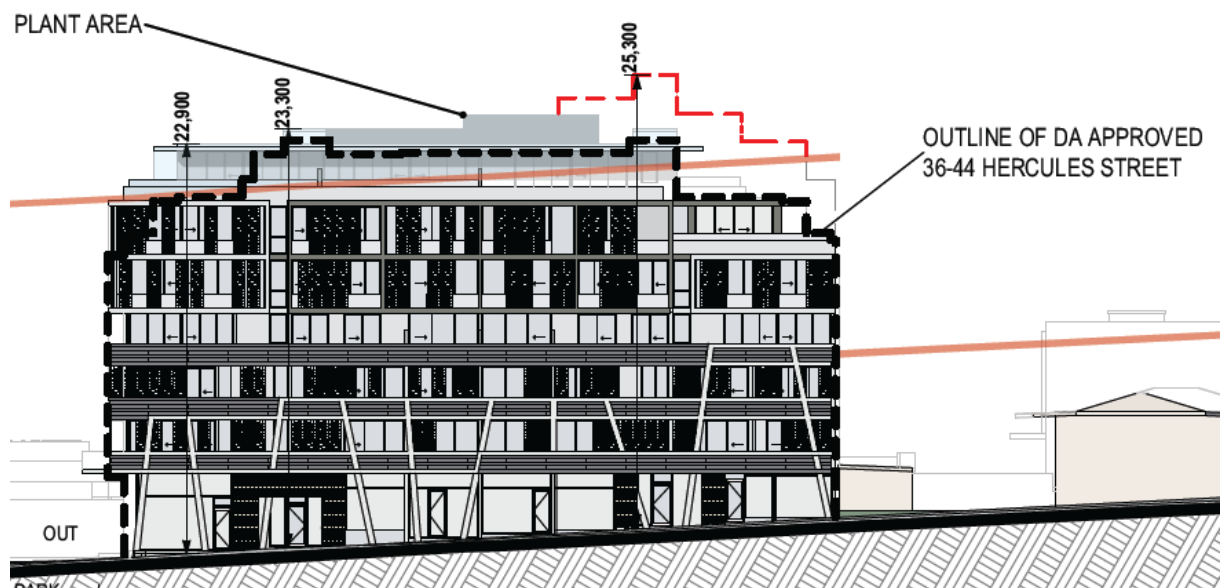


Figure 6: Oscar Building South

## 2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The percentage variation to the 9m and 20m height control at the highest points above existing ground level are as follows:

- 9m height control – 13.3% variation
- 20m height control – 35.5% variation

## 3. Assessment of the Proposed Variation

### 3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- (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.*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a development that contravenes a development standard unless the:

- (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*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.*

### **3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

#### **3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?**

A development that complied with the height control would result in a building being located hard edge to Victoria Avenue at a height of 20 metres. This would mean that the public plaza proposed on this active frontage and the curtilage around the heritage item would be lost. The lack of curtilage around the heritage building is also evident in the approved development for alterations and additions to the existing nursing home under DA2010/549.

The relocation of floor space away from Victoria Avenue to higher built forms on Oscar & Hercules Street allows for a public plaza and a significant improved curtilage around the heritage item and public plaza area, resulting in a better urban design outcome than that achieved by a development that complies with a control.

The distribution of this floor space across more than one building also ensures that appropriate scale relationships are maintained.

In respect to the Albert Street frontage the noncompliance is a function of clerestory elements which provide architectural interest to the building.

A development that strictly complies with the 9m and 20m height standard is unreasonable or unnecessary in this circumstance for the following reasons:

- It will compromise the opportunity to provide the proposed public north facing plaza and public benefits that this will provide to the wider community. The increased height ensures the FSR is contained within a reduced building footprint across the site and allows for the provision of the public plaza which will be utilised by workers, residents and visitors of the wider area. The plaza is also an important element of the heritage response to the site as it maximises public views of the existing heritage building from the west on Victoria Avenue.
- The scale of the buildings on Hercules Street and Albert Street remains consistent with the scale of buildings previously approved on this site under DA2013/142, despite the non-compliance in the height limits.
- It would result in a less sympathetic response to the existing heritage building on site. The most significant variation to the height limit occurs with the Oscar North Building, which is 7.1m above the 20m height limit. The increased in height has been driven by the need to achieve an appropriate curtilage to the heritage building. A minimum 6m separation between the new building and the heritage building to minimise impacts on its setting and significance has been provided. This is supported by the Statement of Heritage Impact prepared by NBRSP+ Partners, submitted with the development application.
- It would significantly limit the ability to achieve the allowable FSR of 2.5:1 without any discernible environmental or amenity benefits in terms of solar access, privacy or views.

### **3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?**

A development that strictly complied with the standard would potentially result in a building that was not in harmony with the bulk and scale of surrounding buildings – specifically in terms of its relationship with the existing heritage item on site.

The visual quality of the development would also be diminished through the removal of the public plaza and reduced curtilage around the heritage item.

### **3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?**

The development standard cannot be said to be abandoned. However it is noted that the height control has been varied on this site under DA2013/142. The applicable height standard at the time was also varied under DA2010/549.

### **3.2.4 Is the zoning of the land unreasonable or inappropriate?**

The zoning of the land is appropriate for the site.

### **3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?**

The particular circumstance of this site that distinguishes it from others is the heritage item located on the Hercules Street and Victoria Avenue frontage, and the significant slope of the land that slopes from Albert Avenue in the south to Victoria Avenue in the north.

The siting of the heritage item requires a site specific response to ensure an appropriate curtilage. The redistribution of floor space through increased height along Hercules and Oscar Street facilitates a scale of building that respects the setting of the heritage item.

The variation to the height results in a better planning outcome for the site when considered against a current approval under DA2010/549 and a development that strictly complied.

In the circumstances of the case, there are sufficient planning grounds particular to the site to justify contravening the development standard being:

- The increased height ensures the allowable FSR is contained within reduced building footprints across the site and enables the provision of a public plaza and generous curtilage to the heritage building, a particular circumstance of this site.
- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the building height standards.
- Non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss.
- The scale of the proposed development is consistent with the desired scale of the surrounding development and streetscape along Oscar Street, Hercules Street, Victoria Avenue and Albert Avenue.
- The proposal has a maximum FSR of 2.36:1, which readily complies with the maximum FSR development standard of 2.5:1 applying under Cl. 4.4 of the WLEP 2012.
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Willoughby Development Control Plan 2006.

### **3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?**

#### **3.4.1 Objectives of the Height of Building standard**

The proposal remains consistent with the relevant objectives of the height of building standard despite the noncompliance as demonstrated below:

*(a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*

The scale of the proposal is appropriate for the scale of the adjoining sites as envisaged under the height controls. The three (3) storey scale of the Albert Street building responds to the two (2) storey scale of the dwelling houses to the south, while providing a transition to the higher scale of development to the north. The Albert Avenue building principally maintains the same scale as the building approved at this location under DA2013/142. The encroachment into the height limit is minor as illustrated in Figure 2.

The proposed six (6) storey buildings on Hercules Street substantially comply with the 20m height control as illustrated in Figure 3 and 4. The encroachment into the height control is principally attributed to the roof-top structures associated with the communal landscape and recreation facilities on both buildings. These structures and facilities are setback from the edge of the level below to reduce their visibility and overall contribution to the scale of the building. The height of the Hercules Building South is consistent with the height of the building previously approved in this location under DA2013/142.

As a result of the site topography, a small section of the residential apartments on level 5 of Hercules Building North also encroaches into the height control. The setback to the apartments on this level has been increased with the provision of larger balconies. This creates a reduced building footprint from level 4 below, which minimises the visibility of the building element on this level from the street. This proposed Hercules Building north maintains the same scale as the Hercules Building South, and is consistent with the scale of development previously approved on Hercules Street.



The buildings on Oscar Street are six (6) to eight (8) storeys in height. The height of the Oscar South building has been increased and is 1.3m higher than the building previously approved at this location under DA2013/142. The Oscar Street North building is eight (8) storeys and is approximately 5.8 metres higher than the building approved under DA2010/549. The proposed increased height is appropriate for the sites location on the edge of the Chatswood centre and will not be out of character with the scale of surrounding development that is envisaged under the height controls. Importantly, the greatest encroachment into the height controls has been located within the Oscar North building (refer to Figure 6) which fronts the proposed public plaza and commercial strip on Victoria Avenue, which is characterised by larger scale development.

The proposal complies with the maximum FSR control of 2.5:1 with a proposed FSR of 2.36:1. The scale of the proposal has been driven by the need to ensure the distribution of floor space across the site provides an appropriate curtilage to the heritage building on the corner of Victoria Avenue and Hercules Street. The proposed curtilage includes all of the Hercules Street and Victoria Avenue frontages and minimum separation of 6m to Oscar North and Hercules North building. This has also enabled the provision of a north-facing public plaza to Victoria Avenue, which increases the visibility of the heritage building. The visual and physical separation between the heritage item and the new development was also considered preferable to allow it to be appreciated in a more three dimensional manner when viewed from a variety of locations. The scale and design response is considered appropriate as detailed in the Statement of Heritage Impact prepared by NBRS+ Partners, submitted with this application. Overall compliance with the height controls would result in an inferior heritage and public domain outcome for the proposed development. This is evident in the previously approved DA for the redevelopment of the nursing home (Reference DA-2010/549), which did not provide any separation or curtilage to the heritage building. Overall the scale and bulk of the proposal is appropriate as it ensures a sympathetic and harmonious response to the heritage characteristics of the site.

While the three (3) to eight (8) storey scale of the proposed buildings is higher than the single storey buildings to at No. 17 Albert Avenue, this building does not reflect the dominant scale of development along Oscar and Hercules Street. Furthermore, single storey buildings are not consistent with the desired future height and scale of development that is envisaged with the proposed 9m and 20m building height controls. Furthermore, No. 17 Albert Street is an isolated site, which the applicant attempted to purchase to amalgamate with subject site, without success.

***(b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,***

The proposal will have minimal impacts on adjoining and nearby properties in terms of views loss, overshadowing, loss of privacy and visual intrusion. The consolidation of the site to create a large street block has eliminated potential amenity and interface impacts that previously existed between the aged care facility and the DA approved for the southern part of the site (DA2013/142).

The proposal will overshadow the single storey dwelling at No. 17 Albert Avenue. As outlined in the SEE, this is an isolated site and overshadowing is unavoidable if the subject site is to be redeveloped in accordance with the development standards under WLEP 2012.

***(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,***

The Hercules Street, Oscar Street, Albert Avenue and Victoria Avenue plaza elevations of the development are of a high quality as detailed in photomontages and schedule of material and finishes. This is also supported by the Urban Design Peer Review, prepared by SJB Urban. The non-compliances with height controls do not compromise the visual quality of the development.

*(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*

The parts of the proposed building that exceed the height standard will not disrupt existing views from surrounding properties.

*(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*

The proposal at 2.36:1 is less than the overall maximum FSR of 2.5:1 applying to the site under Clause 4.4.

Furthermore, as outlined above, the proposed height is appropriate given the heritage building located on the site and the constraints and opportunities this presents.

*(f) to use maximum height limits to assist in responding to the current and desired future character of the locality,*

The proposal responds to the desired character of the locality as it substantially complies with the height standards, with the exception of the Oscar North Building. This is supported by the Urban Design Peer Review prepared by SJB Urban which identifies that the site occupies an important transition zone between the medium to high density residential development to the east, low to medium residential to the south, and higher density commercial and for this reason the scale of development is both appropriate to the existing and planned future character for the precinct.

*(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*

The proposed height variations do not undermine the character of the commercial office core or retail shopping core of the Chatswood CBD.

*(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

The proposal provides a transition in scale from the low density residential development along Albert Avenue to the higher density business, retail and residential development to the north along Victoria Avenue.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard, and is compatible with adjoining development.

### **3.4.2 Objectives of the zone**

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the height of building control as demonstrated in the assessment of the objectives below:

*To provide a mixture of compatible land uses.*

The proposal provides for a mix of compatible land uses. Four (4) of the proposed buildings will accommodate retail premises and shop-top housing, while the fifth building will accommodate a child care centre, business premises and shop-top housing.

*To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The site is within an accessible location. It is approximately 800m from Chatswood Railway station and is located within a Major Public Transport Corridor as defined by Clause C4.1-E of the Willoughby Development Control Plan.

*To allow for city living on the edges of the city centre of Chatswood, which supports public transport use, shopping, business and recreational services that contribute to the vitality of the centre, without undermining its commercial role.*

The site is located on the fringe Chatswood CBD. The proposal incorporates shop-top housing to support the public transport use, shopping business and recreation services within the Chatswood Centre and contribute to its vitality.

### **3.5 Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?**

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use. It has not responded to the particular circumstances of the site, particularly given the location of a heritage item and the slope of the site.

### **3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?**

The objects set down in Section 5(a)(i) and (ii) are as follows:

*“to encourage*

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, 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 coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

### **3.7 Is there public benefit in maintaining the development standard?**

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height would result in a poorer urban design outcome in respect to the presentation of the building to Victoria Avenue. The redistribution of floor space through additional height on buildings on Oscar and Hercules Street facilitates the provision of an active retail frontage, public plaza and improved curtilage to the heritage item.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site.

### **3.8 Is the objection well founded?**

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

The development does not hinder the attainment of the objects specified within clause 5(a)(i) and (ii) of the Act.

### **4.0 Conclusion**

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

Development standards are a means of implementing planning purposes for a development or area.

The proposal provides a building height that ranges from three (3) to eight (8) storeys along the street front and at the interface with adjoining development. This height is complementary to the likely future and existing scale of development. The building height is considered appropriate to the context and circumstances of the site, being within a mixed use transition area located on the fringe of the Chatswood CBD and adjoining a residential area.

A development strictly complying with the numerical standard would result in a diminished response to the setting of the existing heritage item due to a reduction in the curtilage to the heritage building. It would also result in a loss of the public benefit that is afforded with the proposed public plaza along Victoria Avenue. The proposed heights allows for a distribution of floor space that maintains a generous curtilage to the heritage item and provides a north facing public plaza.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses and would not result in an appropriate urban design response to the site. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the particular site circumstances and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the height control to be enforced. It is concluded that the variation to the height development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.