

# Request under Clause 4.6 to vary the Height of Building Development Standard

## 1 Introduction

This written request has been prepared in accordance with the provisions of Clause 4.6 – Exceptions to Development Standards of the *North Sydney Local Environmental Plan 2013* (NLEP 2013). This request seeks a variation to the Height of Building standard, adopted under clause 4.3 of NLEP 2013. The request is prepared in support of the amended development application (DA 256/15) which was amended in response to the comments provided by North Sydney Council in relation to a number of aspects of the proposal including height.

### 1.1 THE SITE

The site is located at 221 Miller Street, North Sydney and is legally described as SP49696. The site is a rectangular shaped allotment, with the exception of a 6.12m wide access handle from McLaren Street. The site has a total area of 2,485sqm inclusive of the access handle or 2,007sqm excluding the access handle.

The sites topography slopes from north to south and again from west (Miller Street) to the east (rear). The northern boundary ranges from RL 76.24 at the northwest corner to RL 70.44 at the northeast corner (excluding access handle). This results in a level difference of 5.8m, equivalent to approximately two storeys.

### 1.2 AMENDED PROPOSAL

The amended proposal seeks consents for the following works:

- Demolition of the existing building and basement on the site.
- Five levels of basement car parking accommodating # car parking spaces, # car share spaces, # bicycle storage, plant and servicing equipment, with access provided via the access handle from McLaren Street. The access handle is proposed to be upgraded as part of the proposal and dedicated to Council in fee simple.
- A lower ground floor comprising a community room for hire, back of house facilities and meeting rooms associated with the service apartment component.
- Ground floor plaza incorporating an active retail tenancy and opportunities for outdoor dining towards Miller Street.
- Publically accessible pedestrian through site link adjacent the northern boundary, with associated landscaping and public domain improvements.
- Residential and service apartment lobbies on the ground floor and a gymnasium at the rear.
- 100 serviced apartments, comprising 14 studios, 6 one-bedroom and 80 dual key units on Levels 1 – 5.

- 183 residential apartments, comprising 43 studios, 55 one-bedroom, 76 two-bedroom and 9 three-bedroom units on Levels 6 – 21.
- North facing common roof terrace on Level 21 able to accommodate a range of passive recreational activities including BBQ facilities, seating and dining areas.

### 1.3 HEIGHT OF BUILDING STANDARD

The height of building standard, adopted under clause 4.3 of the NLEP 2013 was informed by the North Sydney CBD Composite Shadow Line (Composite Shadow Line) that existed under the *North Sydney Local Environmental Plan 2001* (NLEP 2001). Subclause 28(D) 2(b) of the NLEP 2001 required that there be no net increase in overshadowing of any land between the hours of 9am and 3pm, 21 June outside the composite shadow area.

The Composite Shadow Line was superseded with maximum RL building heights upon commencement of the NLEP 2013. Accordingly, the maximum building RLs were informed by the Composite Shadow Line.

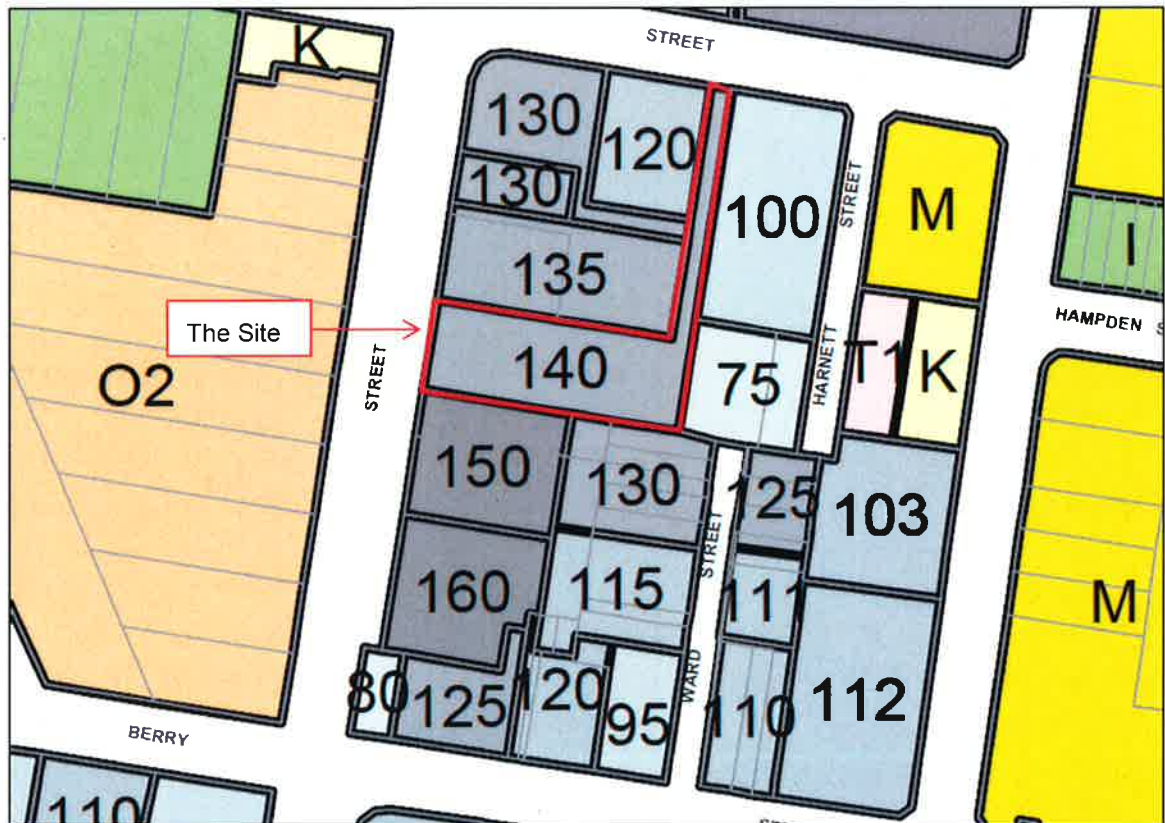
Clause 4.3 of the NLEP 2013 states:

#### **4.3 Height of buildings**

- (1) *The objectives of this clause are as follows:*
  - (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
  - (b) *to promote the retention and, if appropriate, sharing of existing views,*
  - (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
  - (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
  - (e) *to ensure compatibility between development, particularly at zone boundaries,*
  - (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*
- (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), the height of the street elevation of any building on land in Zone R2 Low Density Residential that is also within a heritage conservation area must not exceed 5.5 metres unless any adjoining buildings with the same street frontage are at least 2 storeys high.*

As shown in **Figure 1**, the maximum RLs indicated on the Height of Building Map varies. The Height of Building Map sets a height of building standard of RL 140 for the site.

FIGURE 1 – HEIGHT OF BUILDING MAP EXTRACT

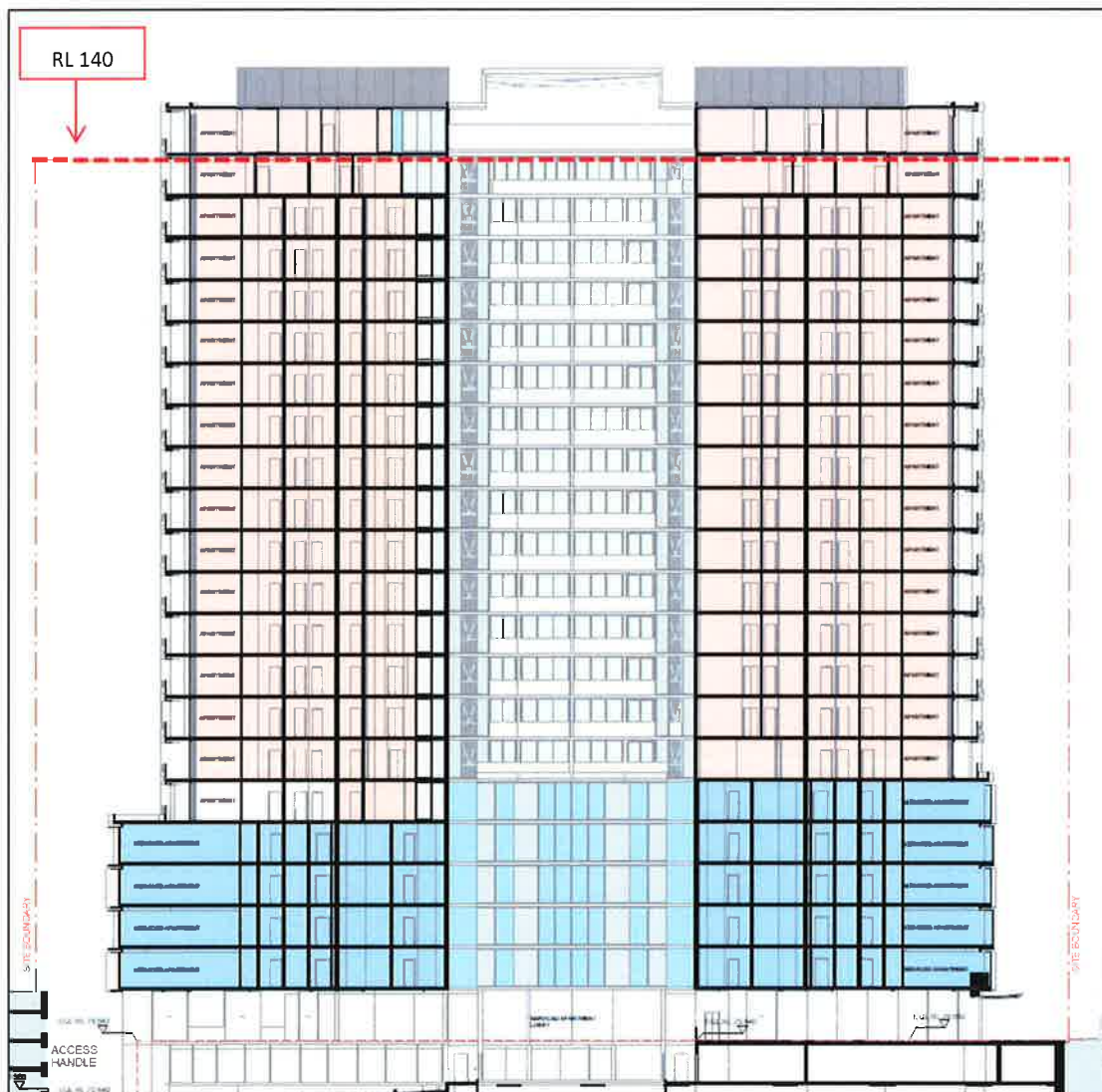


## 2 Proposed Development

As illustrated in **Figure 2** the height of the proposal has been reduced in height from RL 149.7 to RL 146.7 to the top of the plant screen parapet and RL 147.5 to RL 144.1 to the top of the uppermost level of residential accommodation on Level 21.

Level 21 now comprises communal open space and six apartments and the uppermost level comprises roof plant equipment and lift overrun and motor room. Accordingly, only part of one storey of residential floorspace is proposed above the height standard.

FIGURE 2 – SECTION A



In summary the proposed scale and visual impact of the proposal will be acceptable in the locality and provides an appropriate contextual fit between the buildings fronting Miller Street. The shadow cast by the proposed building envelope is generally consistent with the previous approval and will maintain a *State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development* (SEPP 65) compliant level of solar access to the residential property at 136-142 Walker Street to the southeast.

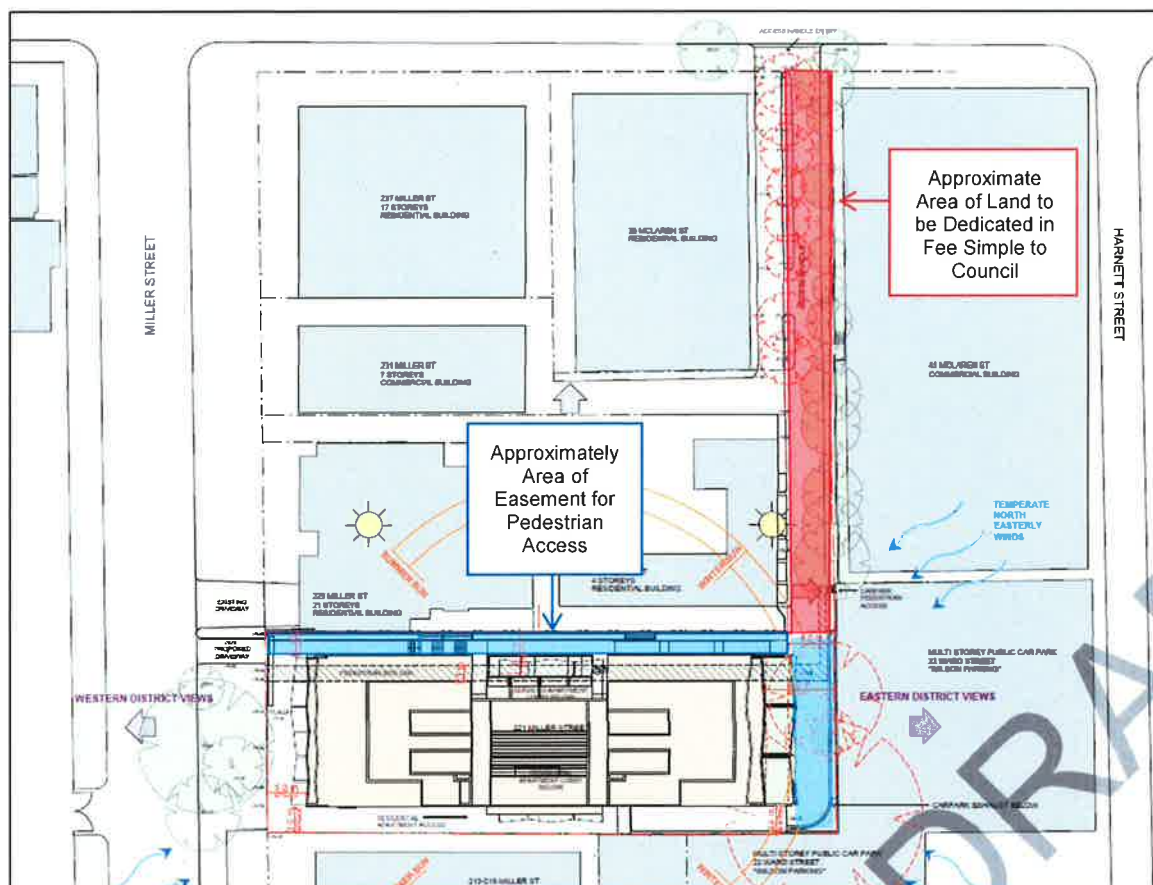
The solar compliance analysis prepared by PSD Matter at **Attachment A** finds that when the residential buildings that are not part of the North Sydney CBD are excluded, there is no net increase above the Composite Shadow Line between the hours of 9am and 3pm on June 21.

The height variation is attributed to the redistribution of floorspace from the lower levels to the uppermost level. As shown in **Figure 3** a generously proportion pedestrian through-site link from Miller Street is proposed. This will be made accessible 24 hours a day via an easement benefiting pedestrian access.



We understand that Council would seek to redevelop the Ward Street carpark site in the future and may seek to link McLaren Street to Berry Street for improved mid-block connectivity. To facilitate this connection, the proponent is willing to upgrade and dedicate this access handle to Council.

FIGURE 3 – SITE PLAN EXTRACT



### 3 Principles of Exceptions to Development Standards

#### 3.1 ENVIRONMENTAL PLANNING INSTRUMENT PROVISIONS - CLAUSE 4.6

Clause 4.6 of the NLEP 2013 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development. Subclauses (3), (4) and (5) from clause 4.6 of NLEP 2013 are extracted below:

- (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*
  - (a) *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.*

### 3.2 NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters are outlined in the following discussion.

#### 3.2.1 WINTEN V NORTH SYDNEY COUNCIL

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the *Standard Instrument templates*.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- 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;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded.

### 3.2.2 WEHBE V PITTWATER [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that departs from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

### 3.2.3 FOUR2FIVE PTY LTD V ASHFIELD COUNCIL [2015] NSW LEC

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of clause 4.6 the LEP; and
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

## 4 Consideration of Planning Particulars

The following section addresses the local provisions of clause 4.6 of NLEP 2013 together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

### 4.1 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The planning control in question is clause 4.3 of the NLEP 2013. Clause 4.3 nominates a maximum Height of Buildings of RL 140 for the site. The planning control specifies requirements or fixes standards in respect of the development and falls within the definition of a “development standard” such that it is capable of being varied under clause 4.6 of NLEP 2013.

## 4.2 CONSISTENCY WITH OBJECTIVES OF THE ZONE

The proposed variation to the Height of Building development standard will be in the public interest because it does not prevent the satisfaction of the B4 Mixed Use zone objectives (see clause 4.6(4)(ii)). Specifically, the proposal addresses each of zone objectives in the following ways:

- *To provide a mixture of compatible land uses.*
  - The proposal provides for a mixture of retail premises, serviced apartments and residential uses. All of these are considered compatible uses because the retail can service the other building uses and operating together they will not detract from the amenity the building provides.
- *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 proposal integrates retail, residential and other development in an accessible location being located within 700m of North Sydney Railway Station and on Miller Street which has a number of bus routes.
  - The proposal encourages bicycle usage through the provision of a compliant number of bicycle spaces for residents, guests, employees and visitors.
  - The dedication of a right of way and the rear lane to Council encourages walking and integration of current and future uses by permitting access from Berry and Ward Street to Miller Street and Pacific Hwy bus routes.
- *To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
  - The proposal creates vibrancy and interest by proposing a mix of uses in the mixed use centre and through the provision of an active ground floor and through site link. The through site link has been designed to maximise sightlines and satisfy CPTED principles make it safe and of high urban quality.
  - The dedication of the access handle to Council will facilitate a publically accessible link between McLaren Street and Berry Street, as part of the Ward Street carpark redevelopment. The dedication of this link will provide great flexibility to Council in planning for pedestrian access through this street block adding to vibrancy and interest in the nearby vicinity and ensuring residential amenity is assured.
- *To ensure the viability of centres.*
  - The provision of 105 serviced apartment units and 180 residential units with an active retail ground floor and thru site links will increase the permanent and transient population of North Sydney. This will in turn support the viability of the centre as a whole by creating demand for services in the centre and preventing site isolation.

## 4.3 WHAT IS THE UNDERLYING OBJECTIVE OF THE STANDARD?

The proposed development will be in the public interest because it is considered to be consistent with the relevant objectives of the control (see clause 4.6(4)(ii)) for the reasons outlined in **Table 1**.



TABLE 1 – CONSISTENCY OF THE PROPOSED DEVELOPMENT WITH THE HEIGHT OF BUILDINGS OBJECTIVES

HEIGHT OF BUILDING OBJECTIVES	ASSESSMENT
(a) <i>to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</i>	<ul style="list-style-type: none"> <li>▪ The height of buildings map prescribes an RL level across the entire site, as opposed to a building height that is measured from existing ground level. The RL levels within North Sydney CBD are based on modelling and are site specific. It is our opinion that the objective to step development is not envisaged on this site as an RL level of 140 applies across the site.</li> <li>▪ There is a minor slope from the northwest side boundary to the northeast side boundary of approximately 2m. This is considered a minor gradient and accordingly not so antipathetic to the objective.</li> </ul>
(b) <i>to promote the retention and, if appropriate, sharing of existing views,</i>	<ul style="list-style-type: none"> <li>▪ The proposal involves the replacement of a 15 storey building with a 22 storey building and for this reason it is not anticipated that the proposal will result in significant view loss and because the roof plant level is setback from levels below, which mitigates potential for view loss. Any view loss is likely to be from a side boundary and is therefore more appropriate that there be sharing of views. The 9m setback at the rear is consistent with the setback of the previously approved scheme and so views from that perspective are retained.</li> <li>▪ The proposal provides for improved view sharing at the ground level when compared with the existing and the approved scheme through the introduction of a 3m setback to the northern boundary, which is increased to 9m in the centre of the site.</li> </ul>
(c) <i>to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,</i>	<p>Consideration has been given to the extent of the shadow cast when compared to the approved scheme. The following observations are made:</p> <ul style="list-style-type: none"> <li>▪ The shadow diagrams indicate that at 9am on June 21 there is some minor additional shadow on Council's Ward Street car park and a greater extent of the commercial building at 213-219 Miller Street is affected. There is also additional overshadowing of the commercial building at 51 Berry Street. There are no additional impacts on residential properties.</li> <li>▪ At 12noon on June 21 there is some additional shadow on Council's car park and a greater extent of the northern elevation of the neighbouring commercial building at 213-219 Miller Street is impacted. There are no additional impacts on residential properties.</li> </ul>

## HEIGHT OF BUILDING OBJECTIVES ASSESSMENT

- At 3pm on June 21 the majority of additional shadow falls onto the roof of the substation and the commercial building at 76 Berry Street.
  - The shadow diagrams indicate that the impacts of the proposed building envelope will maintain a compliant level of solar access, in accordance with the ADG to the residential property at 136-142 Walker Street.
  - The proposal will not result in a net increase in overshadowing of the Miller Street (special area) between 12 noon and 2pm.
  - As discussed in Section 4.7, when the residential buildings outside the North Sydney composite shadow study are excluded, the modelling suggests the proposed development will not result in overshadowing of land outside the composite shadow area. In addition, the proposal will not result in overshadowing of public reserves.
- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- The level above the height standard will not result in adverse privacy impacts for residents or existing dwellings, given that these levels are located above the roof level of the neighbouring residential mixed use development at 225 Miller Street.
  - A maximum height of RL 75 and RL 130 applies to the Ward Street car park site which is the most likely site for new residential development. It is therefore unlikely that the variation proposed would result in adverse privacy impacts in the event this site were redeveloped as towers on these sites would have a height less than the proposal. The proposed 9m rear setback also assists with achieving the visual privacy objectives in the ADG.
- (e) *to ensure compatibility between development, particularly at zone boundaries,*
- The subject site is not adjacent to a zone boundary, however, the neighbouring site to the south is provided with a height standard of RL 150. With a maximum height of RL 146.7, a transition in height would be maintained to any future development and this site.
  - The proposal has been designed to be compatible with future developments on 229 Miller Street to the north and 213 Miller Street to the south, which are likely to incorporate a 9m setback to the eastern boundary and provide similar side setbacks.

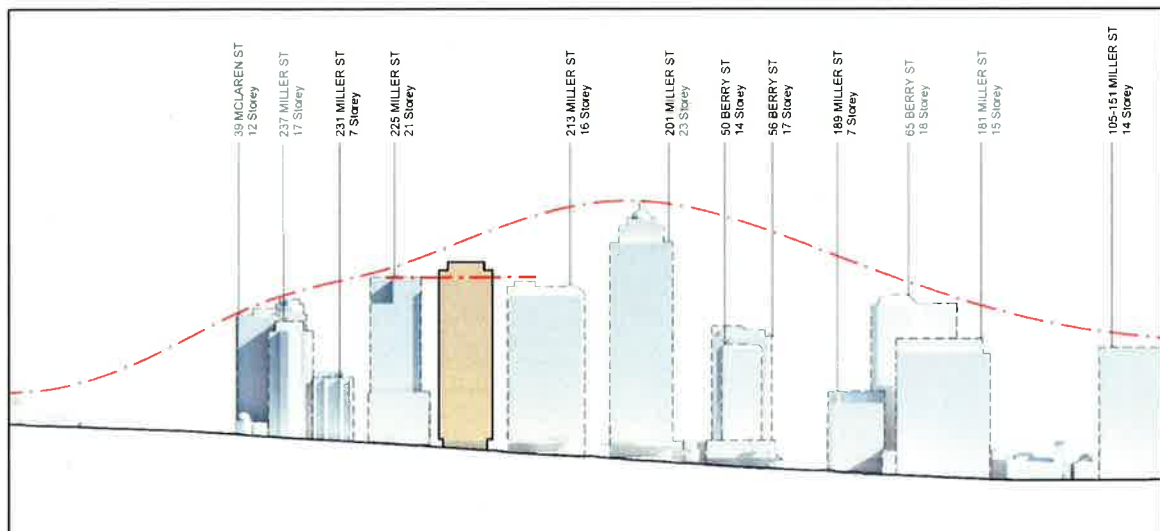
## HEIGHT OF BUILDING OBJECTIVES ASSESSMENT

(f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area*

- As demonstrated in **Figure 4** the proposal is an appropriate contextual fit in terms of scale and density between the buildings at 39 McLaren Street and 201 Miller Street. Furthermore, there would be sufficient separation distance provided between the subject tower from any future tower forms on adjacent sites.
- 213 Miller Street to the south is prescribed with a maximum height of RL 150 and therefore any redevelopment of this site is likely to be of a similar or greater height than that proposed.
- The provision of a 3m north (side) setback at the podium levels and the relocation of this floorspace to the upper levels assists in providing for building separation at the lower levels and results in a more slender tower form on this site.
- The site is surrounded by land zoned B4 Mixed Use under the NLEP 2013. This site is not adjacent to land zoned for residential purposes and is sufficiently separated from residential zones.
- The site and the surrounds are located within a B4 Mixed Use zone and are or have been appropriately developed with high density mixed use buildings, characteristic of the area and the context. This density has been informed by the former Composite Shadow Line. Accordingly, given the shadow cast by the proposed development does not extend beyond the Composite Shadow Line, the density is appropriate in this context.

The development despite the minor non-compliance with the development standard is consistent with the objectives of the control.

FIGURE 4 – MILLER STREET ELEVATION



4.4 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

The aims and objectives of clause 4.6 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.*

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

- “(a) *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 co-ordination of the orderly and economic use and development of land...*”

The development is generally consistent with the objects of the EP&A Act, in respect to the following:

- The site is located within an established urban and high density environment and is presently developed for commercial purposes. The redevelopment of the site for retail, serviced apartment and residential uses contributes to urban consolidation and may contribute to reducing demand to develop more environmentally sensitive lands.
- The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.

- The thru site link and dedication of the access way to Council promotes and enables Council to co-ordinate the orderly use of the land by enabling future pedestrian and vehicular connections and preventing site isolation.

#### 4.5 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 (1) of the NLEP 2013. Refer to discussion in Section 4.3 above.
- The height of building standard, adopted under clause 4.3 of the NLEP 2013 was informed by the North Sydney CBD Composite Shadow Line (Composite Shadow Line) that existed under the North Sydney Local Environmental Plan 2001 (NLEP 2001). Subclause 28D 2(b) of the NLEP 2001 required that there be no net increase in overshadowing of any land between the hours of 9am and 3pm, 21 June outside the composite shadow area. For this purpose a Composite Shadow Line was prepared to show the maximum heights permissible in light of the composite shadow control. The Composite Shadow Line was superseded with maximum RL building heights upon commencement of the NLEP 2013. Accordingly, the maximum building RLs were informed by the Composite Shadow Line. The proposal complies with the Composite Shadow Line which suggests the breach of the standard is not unreasonable or unnecessary. The proposed variation is similar to the scope of the variation approved at 231 Miller Street, Sydney. This development was approved with an RL 132.33 to the roof of Level 18 (being the upmost level of residential accommodation), RL 135.22 to the top of the plant room/common room and RL 136.222 to the lift, exceeding the height standard of RL 130 by 2.33m, 4.22m and 6.22m respectively.
- The development proposes a maximum height of RL 144.1 to the roof of Level 21 (being the upmost level of residential accommodation/common open space), RL 146.7 to the top of the plant room, exceeding the height standard by 4.1m and 6.7m, but not for the whole level
- As demonstrated in **Figure 5**, the proposal incorporates a generously proportioned through site link and rear set back, which allows for clear sightlines from Miller Street to the rear and vice versa. Consequently, floorspace lost as a result of the dual height through site link has been partially redistributed to the upper levels.
- When compared to the approved scheme the proposal seeks to create a more slender tower form when viewed from Miller Street or the rear. This is achieved by providing 3m side setbacks to Levels 1–5. The floorspace that is foregone at the lower podium levels as a result of the setbacks and the generously proportioned through-site link is partially offset by relocating to the topmost residential level.
- When compared to the approved scheme the podium setback of 3m improves sightlines from Miller Street to the rear and vice versa and results in an improved amenity outcome for pedestrians using the through site link.
- Level 21, which exceeds the height standard comprises part communal open space, which will be available for all residents of the building. Given this level is located one storey above the maximum height of the building to the north (225 Miller Street), it will enjoy excellent solar access and regional views. The relocation of the common open space below the height standard would require additional screening and is likely to result in adverse privacy impacts for the residents of 225 Miller Street. Accordingly, the proposed height exceedance is considered a better planning outcome.



- The SEE demonstrates that any impacts associated with the proposed development are acceptable, particularly given there are no significant solar access impacts on residential properties when compared to the previous approval or a height compliant development. The proposal complies with Clause 6.3 of the NLEP 2013 in that there will be no net increase of the Miller Street (special area) between 12 noon and 2pm.
- The visual impacts associated with the additional height are negligible, particularly as the screened plant equipment is setback from the levels below. The setting back of these levels assist in providing for modulation in the roof form and improves visual interest when the site is viewed in a regional perspective.
- The setback from the northern boundary of 3m for the podium levels provides an improved separation between buildings when compared to the approved scheme. By contrast to the approved scheme, which provided a nil setback to the northern boundary for the podium levels, this proposal allows for views through the site. These changes are considered to be a better planning outcome than the development that was previously approved on this site.

FIGURE 5 – THROUGH SITE LINK SECTION



#### 4.6 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is not a performance based control.

#### 4.7 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? GIVE DETAILS.

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- The proposed height is visually acceptable when viewed from the surrounding locality. The height of the new tower provides for an appropriate contextual fit, noting that it is likely to be less than the height of a future tower on the neighbouring site to the south, which is provided with a building height standard of RL of 150.
- The proposal is considered an improved planning outcome when compared to the previously approved planning outcome by providing a more slender tower through the introduction of 3m to 6m side setback to the northern boundary at the podium levels. Furthermore, the relocated east-west through-site provides for enhanced sightlines and will achieve greater levels of natural light than the through-site in the previously approved scheme.
- The proposal is in the public interest as it will provide a generously proportioned through-site link along its northern boundary, which improves pedestrian connectivity within the North Sydney city centre. Furthermore, the proponent is proposing to dedicate the access handle to Council, which will assist with the future redevelopment of the Ward Street carpark site.

- The overshadowing associated with the height above the RL 140 standard has a negligible impact on surrounding properties and maintains a compliant level of solar access to residential properties (refer to shadow diagrams submitted with amended drawings).
- The solar compliance analysis prepared by PSN Matter at **Attachment A** demonstrates that when the residential buildings not part of the North Sydney CBD are excluded to allow a free extension of the shadow, there is no additional shadow outside of the Composite Shadow Line as a result of the increased height.

*"The model was test for all times between 9am and 3pm and as a result of our testing and calculation it is our conclusion that the proposed development will not result in overshadowing of land outside the composite shadow area."*

#### 4.8 IS THE OBJECTION WELL FOUNDED?

The proposed exception to the Height of Building development standard will, in part, facilitate the provision of a communal open space area that has excellent amenity. By providing communal open space on Level 21, it will receive excellent solar access and regional views. In contrast, strict compliance with the height standard would result in the common open space being at a similar RL to the neighbouring development to the north with associated privacy impacts.

The proposed development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular the variation does not diminish the redevelopment potential or amenity of any adjoining land.

#### 4.9 WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The non-compliance will not raise any matter of State or Regional Significance.

#### 4.10 IS THERE A PUBLIC BENEFIT OF MAINTAINING THE PLANNING CONTROL STANDARD?

Under Clause 4.6 (5)(b) there must be consideration of the public benefit associated with maintaining the development standard. If the standard was maintained, then such a high quality mixed use development that has an active, safe and functional through site link and dedication of land to Council for the future Ward Street car park redevelopment would not occur. That is, there would be no public benefit in applying the control strictly. Furthermore, as to consistency in approach in maintaining the standard, we note that the extent of the variation is consistent with the extent of previous approved variations. Appropriate built form design elements, visual analysis and consistency with the broader controls supports the view that there is public benefit in approving the variation and not maintaining the standard.

Public interest or benefits will be achieved by the proposal (among other things) as follows:

- The proposal to dedicate the access handle to Council in fee simple will grant Council the control over this space which will assist in the redevelopment plans for the Ward Street carpark site and allow the orderly and integrated development of this land in the future.
- Through the introduction of an active through site link and public domain improvements this proposal will enhance pedestrian access through city centre generally.

These public benefits associated with the east-west link would not be achieved without flexibility given to the height control.

## 5 Conclusion

A variation to the Height of Building standard under clause 4.3 of the NLEP 2013 as it relates to the redevelopment of the site at 221 Miller Street, North Sydney will deliver a good planning outcome.

The proposed height above the RL 140 height standard will not adversely impact the amenity of surrounding properties and results in a similar level of overshadowing to what has been previously approved on the site. The variation attributed to Levels 21 and the screened roof plant equipment is due in part to the provision of 3m side setbacks to the podium levels. This setback has several urban design benefits, including enhanced amenity to the through site link and improvements to building separation at the lower podium levels.

There are negligible additional environmental impacts above those caused by a compliant height. Furthermore, the proposal achieves design excellence and will offer public benefits, including the dedication of the access handle to Council and the creation of a generously proportioned east-west through-site link. The contribution of these public gestures through the site provide enhanced connectivity through the block, which are much needed to unlock the potential for the future Ward Street carpark renewal.

Based on the reasons outlined above, it is concluded that the request is well founded and that there are sufficient environmental planning grounds, particular to the circumstances of the proposed development to warrant flexibility in the application of the development standard.

## Request under Clause 4.6 to vary the Height of Building Development Standard (Clause 6.4(2) of NSLEP 2013)

This request has been prepared in support of a development application for a mixed use development at 221 Miller Street, North Sydney and seeks an exemption to the Miller Street setback standard applying to the site under the *North Sydney Local Environmental Plan 2013* (NLEP 2013).

### 1) CLAUSE 4.6 CONSIDERATIONS

The proposed development involves a minor departure from the Miller Setback standard in Clause 6.4 of the NLEP 2013 to accommodate the awning. Development consent may, subject to Clause 4.6 of the NLEP 2013 be granted for development even though the development would vary a development standard imposed under NLEP 2013.

The following considerations are addressed in this request to vary the setback standard imposed under clause 6.4 of the NLEP 2013.

- *"That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;*
- *That there is sufficient environmental planning grounds to justify contravening the development standard;*
- *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 public benefit of maintaining the development standard; and*
- *Any other matters required to be taken into consideration by the Director-General before granting concurrence."*

### 2) THE PROPOSED VARIATION

Clause 6.4 (2) of NLEP 2013 states:

*"(2) Development consent must not be granted for the erection of a building on land identified as "Miller Street Setback" on the North Sydney Centre Map unless:*

- (a) the building height will be less than 1.5 metres, and*
- (b) the part of the building that will be on that land is used only for access to the building or landscaping purposes."*

The North Sydney Centre Map requires a setback of 5m, as measured from the Miller Street site boundary. As illustrated in **Figure 1** the building has been setback a minimum of 5m from Miller Street and complies with the standard. An exception is sought to accommodate the glazed awning. With a building height of 3.1m to 3.5m, this is setback between 3.2m and 4m from Miller Street. It therefore encroaches into the 5m setback area.



The proposed awning will improve the climatic conditions by providing weather protection to pedestrians. Overshadowing is minimised given the awning comprises glazing. As shown in **Figure 2** the awning will be read as an architectural feature and provides for a 'human scale'.

FIGURE 1 – NORTH ELEVATION

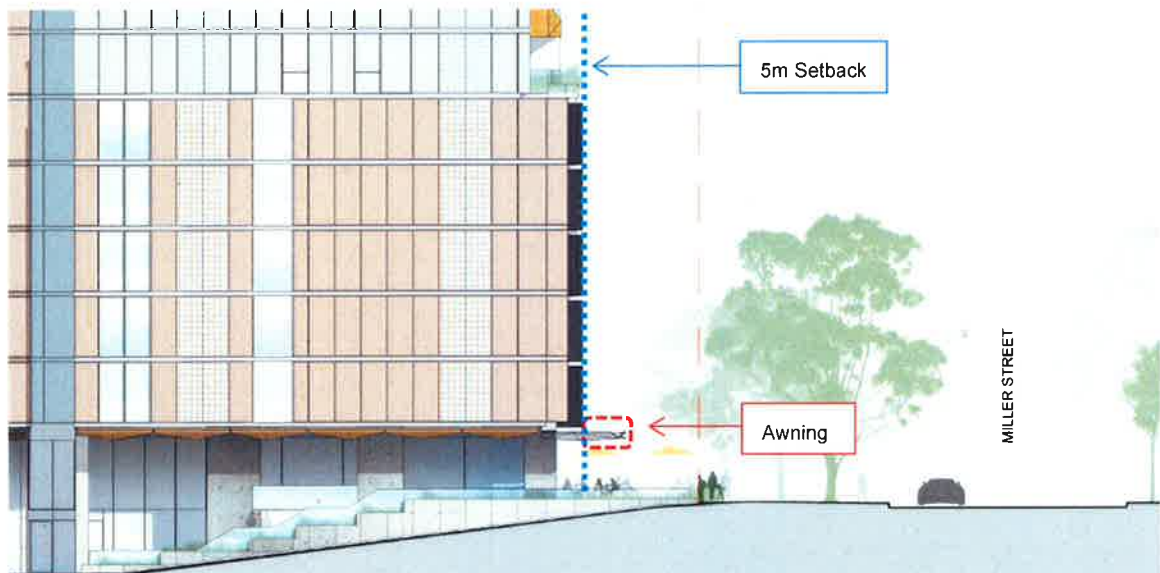


FIGURE 2 – MILLER STREET SETBACK





### 3) OBJECTIVES OF THE ZONE AND THE STANDARD

Clause 4.6 (4)(a)(ii) requires that a request for exemption from a development standard must establish that the proposed contravention is consistent with both the objectives of the standard and the zone.

#### 3.1 Objectives of the B4 Mixed Use Zone

The proposed variation to the Miller Street setback development standard does not prevent the satisfaction of the B4 Mixed Use zone objectives. Specifically, the proposal addresses each of zone objectives in the following ways:

- *To provide a mixture of compatible land uses.*
  - The proposal provides for retail premises, serviced apartments and residential uses, all of which are compatible 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.*
  - The proposal is in an accessible location being located within 700m of North Sydney Railway Station. A number of bus routes operate along Miller Street and Pacific Highway.
  - The proposal encourages bicycle usage through the provision of a compliant number of bicycle spaces for residents, guests, employees and visitors.
- *To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
  - The proposal provides for a vibrant mixed use centre and the provision of an awning improves climatic conditions for those visiting the site. This will encourage activity within the setback area and enhance the vibrancy of Miller Street.
- *To ensure the viability of centres.*
  - The provision of 105 serviced apartment units and 180 residential units will increase the permanent and transient population of North Sydney, supporting the viability of the centre as a whole. The provision of awning will not adversely impact the viability of the centre.

#### 3.2 Objectives of the Height of Building Development Standard

While the proposal seeks a minor variation to the numerical Miller Street setback standard, it is consistent with the objective of the control (Clause 6.4 (1) of the NLEP 2013) as outlined below:

- a) *The objective of this clause is to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren Street and Mount Street.*
  - The proposal will not compromise the objective from being satisfied given the building has been setback a minimum of 5m from Miller Street in accordance with the standard. As demonstrated in the Landscape Plan the setback area comprises landscape features, including high quality paving, seating, trees and ground cover plantings.
  - The awning is sufficiently setback from the existing streets trees and has been designed so that it will not compromise the canopy of the proposed trees.
  - The awning does not compromise the open landscaped quality that is intended along the Miller Street frontage.

#### 4) THE DEVELOPMENT STANDARD IS UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Clause 4.6 (3) (a) of the NLEP 2013 requires that a proposed variation to the development standard must demonstrate that compliance with the development standard is *'unreasonable and unnecessary in the circumstances of the case'*.

In **Wehbe V Pittwater Council (2007) NSWLEC 827** Preston CJ set-out five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

- 1) *The objectives of the standard are achieved notwithstanding non-compliances with the standard.*
- 2) *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*
- 3) *The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unnecessary.*
- 4) *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- 5) *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. This is, the particular parcel of land should not have been included in the particular zone.*

As outlined in Section 3.2 of this variation, the proposed development is consistent with the objective of the Miller Street setback standard. It is noted that the physical encroachments comprising a substation were permitted into the 5m setback zone at 225 Miller Street. By contrast, the awning will not obstruct pedestrian movements or reduce the provision of landscaping.

The strict application of the Miller Street setback standard would compromise the façade design and potentially deter persons from using this space.

The proposed landscape character of the Miller Street setback area strikes an appropriate balance of landscaping that is open as well as providing an opportunity for outdoor dining, that is weather protected with an awning.

#### 5) SUFFICIENT ENVIRONMENTAL PLANNING JUSTIFICATION.

Clause 4.6 (3) (b) of the NLEP 2013 requires that a proposed variation to a development standard must demonstrate that there are *sufficient environmental planning grounds to justify contravening the development standard*.

The following outlines the key reasons the proposed development is appropriate for the site and a departure from the strict application of the development standard is reasonable:

- The proposed awning comprises glass, permitting solar access and natural light to penetrate the ground floor. Whilst the awning may generate some additional overshadowing, it is noted that this would be minor. The overshadowing diagrams demonstrate that there would be no net increase in overshadowing on the Miller Street (special area) between 12 noon and 2pm.
- The awning provides for modulation to the façade and comprises high quality materials.

## 6) THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD

Under Clause 4.6 (5)(b) the consent authority must consider if there is public benefit associated with maintaining the development standard. Given the nature of the proposed variation, which will deliver a high quality mixed use development that provides for an active ground floor and through site link and weather protected outdoor seating to help activate the Miller Street frontage, there would no public benefit in applying the control strictly. The provision of an awning is considered to be in the public interest for the reasons outlined throughout this document.

## 7) ANY OTHER MATTERS

Under clause 4.6 (5)(c) there are no other matters to consider.

## 8) SUMMARY AND CONCLUSION

A variation to the Miller Street setback control under Clause 6.4 of the NLEP 2013 as it relates to the redevelopment of the site at 221 Miller Street, North Sydney will deliver a good planning outcome.

The provision of an awning has several advantages, notably it will improve the environmental amenity of the public domain, encourage pedestrians and patrons to utilise this space and result in an enhanced urban design outcome. The proposal will not compromise the provision of landscaping within the setback area and therefore satisfies the objective of the standard.

The proposal meets the intent of the standard and in accordance with Clause 4.6, demonstrates that strict compliance with the Miller Street setback standard is unreasonable and unnecessary in this case.