



Additional Information Received (DA's & CC's & CDA's)

CUSTOMER SERVICE

Property Address: 723-731 Victoria Road

LDA No: LDA 2015/0654 CC No: -
(include prefix - eg LDA2009/0001) (include prefix - eg PCA2009/1234)

CDA No: -
(include prefix - eg CDA2009/0001)

Assessing Officer / Inspector: Sanju REDDY

Information Received: Clause 4-6 Report

If additional DA/CDA plans: 3 sets provided - (Initials)

If additional CC plans: 3 sets provided - (Initials)

Do the additional plans include site plan, elevations or shadow diagrams?
(please circle)

YES - 3 sets A4's provided (DA Only) _____ (Initials)

NO

Events Updated: RS (Initials)

Register information to: **DA** or **CC** or **CDA** (please circle)

Received by: RS Date: 16.06.16.

☐ **Original and Spare Copies are Separated by a Blue Sheet**

RECORDS

Received: _____

Registered: _____



TO ASSESSING OFFICER / INSPECTOR

CLAUSE 4.6 REPORT

REQUEST TO VARY LEP HEIGHT STANDARD



Mixed Use Development

**10 Little Church & 3-7 St Annes Streets
+
723 - 731 Victoria Road, Ryde.**

14 June, 2016



TABLE OF CONTENTS

| | |
|-------------------------------|----|
| 1. INTRODUCTION..... | 1 |
| 2. SITE AND LOCATION | 3 |
| 3. CLAUSE 4.6 VARIATION | 6 |
| 4. CONCLUSION | 18 |

LIST OF ILLUSTRATIONS

Figure 1 – Height Variation

Figure 2 – Site Survey

Figure 3 - Location Map

Figure 4 – Aerial Photo

Figure 5 – Height Map

1. INTRODUCTION

This report has been prepared to support the submission of a Development Application (DA) to be lodged with Ryde City Council. The proposal seeks approval for a mixed - use development at 10 Little Church & 3-7 St Annes Streets and 723 - 731 Victoria Road, Ryde.

The application as recently amended and now proposes to demolish the existing buildings and associated structures on the site and construct a new multi level building incorporating the following:

- Two full and one part basement level car parks containing 144 spaces + a car wash bay.
- 255 m² of commercial space fronting Victoria Road and Little Church Street.
- 105 residential units within 4 building pods (A – 3 storeys, B – 6 storeys, C – 5 storeys & D – 6 storeys)
- Ground level common open space of 323m², roof top common open space area of 189m² at level 3 of Building A and a second roof top common open space area of 562m² at level 6 of building B.

Under the Ryde LEP 2014 the site is subject to a maximum building height limit of 20m with the majority of the proposed structure falling within that maximum height limit. However, a variation occurs in relation to part of the upper habitable level and the roof top open space on Building B including its associated access facilities.

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

Figure 1 on the following page shows provides a three - dimensional view as to the height of Building B and the area of proposed variation.

Figure 1 – Height Variation

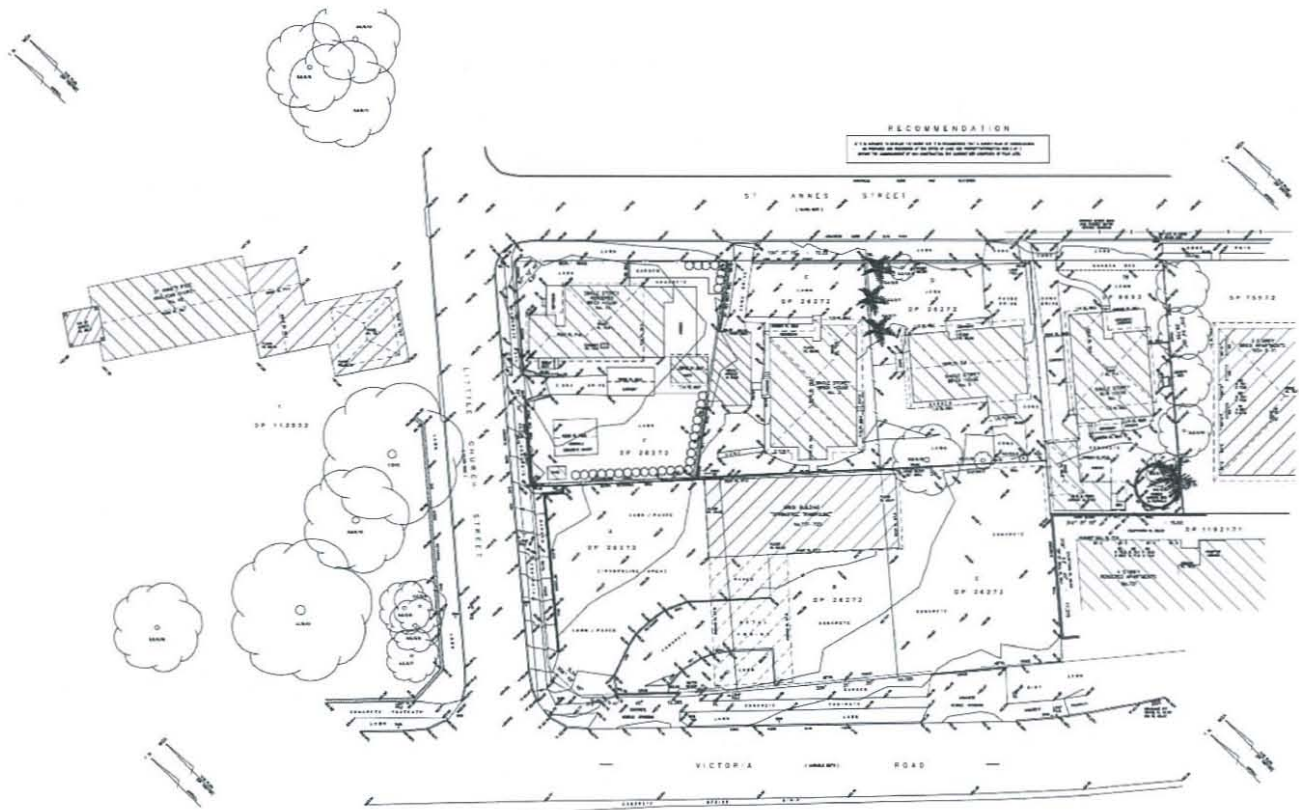


2. SITE AND LOCATION

The site that is the subject of this report comprises Lot B, DP 26272; Lot C, DP 26272; Lot D, DP 26272; Lot E, DP 26272; Lot F, DP 26272; and Lot 78, DP 9692 and is known as 10 Little Church & 3-7 St Annes Streets and 723 - 731 Victoria Road, Ryde. The site has an overall area of 3436 square metres (m²) and is located on the corner of Victoria Road, Little Church and St Annes Streets.

The site is generally rectilinear in shape with the St Annes Street frontage longer than that of Victoria Road (see survey in [figure 2](#) below). It has a frontage to Victoria Road of 61.88m, (including the splay corner), 44.025m to Little Church Street, 77.19m to St Annes Street, including the splay corner and 47.13m along its eastern boundary which is shared between 9 – 11 St Annes Street and 721 Victoria Road.

Figure 2 – Site Survey

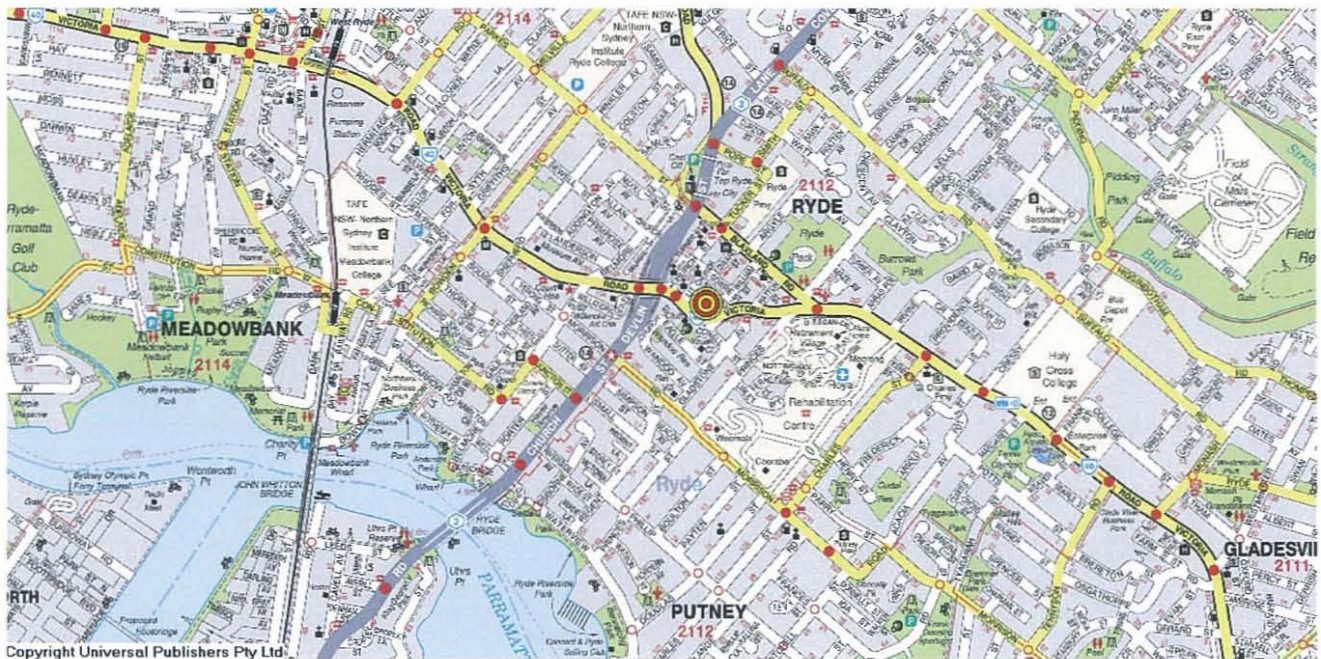


The site is conveniently located to the Top Ryde Town Centre being approximately two minutes walk away to the north. The centre provides a range of local shops in both its strip form and the “Top Ryde City” shopping centre beneath a major residential towers development. Direct bus services are available to nearby centres such as West Ryde and to the City from the Centre. Rivercat ferry services to the City are available from the nearby Meadowbank and Putney Wharfs,

The surrounding built form is an eclectic mix of commercial and residential buildings of varied style size and age and the heritage listed St Annes Anglican Church. The area has been recently re zoned with uplifts in both density and building height and is undergoing a transition including higher density residential outcomes.

The general location of the property and an indication of the surrounding built form are shown in *figures 3* and *4* below and on the following page

Figure 12 – Location Map



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

Figure 4 – Aerial Photo



Source: © DEPARTMENT OF LANDS SIX Portal www.lands.nsw.gov.au

3. CLAUSE 4.6 VARIATION

Part of level 5 of Building B and the access facilities to the roof top common open space on that building exceeds the LEP maximum Height of Building control, contained within the *Ryde LEP 2014*.

The habitable portion that is above the height limit derives from the substantial variation in the ground levels across the site, resulting in an uneven RL's per building pod. Secondly, the number of levels within Building A has been maximised at three to remove any impact on the nearby Heritage Item – St Anne's, resulting in the need to replace some of the permissible floor space elsewhere across the site. It is also worth noting that the breach is less than a whole floor.

The roof top common open spaces facilities provide greater amenity and recreational opportunities for residents. The required lift overrun and fire stairs to that communal open space exceed the maximum building height. These roof top structures are located in the centre of the building, take up a very small percentage of the roof area and at worse (the lift overrun) exceed the building height limit by less than 3m. They are unlikely to be seen from the nearby public domain due the substantial fall across the site.

Under the LEP the site is subject to a maximum building height of 14m as indicated in *figure 5* on the following page. However Clause 4.3(A) of the LEP is also applicable. That Clause provides opportunities to increase heights on certain lands, including the subject site and states relevantly in part as follows:

4.3A Exceptions to height of buildings

(1) The maximum height for a building on land in an area shown in Column 1 of the table to this subclause that is permitted by clause 4.3 is increased by the additional height specified opposite the area in Column 2, if the land and the development meet the specifications shown opposite the area in Column 3.

| <i>Column 1</i> | <i>Column 2</i> | <i>Column 3</i> |
|---|---------------------------------------|--|
| <i>Area identified on <u>Height of Buildings</u> <u>Map</u></i> | <i>Additional building height</i> | <i>Specifications relating to the Area</i> |
| <i>Area A....</i> | <i>6 metres.....</i> | <i>The lot on which the building is sited has an area of at least 800 square metres.....</i> |
| <i>Area E.....</i> | <i>6 metres....</i> | <i>The lot on which the building is sited has an area of at least 900 square metres and the proposed development is a mixed use development and provides laneway access.....</i> |

Figure 5 – Height Map



N2 14



Refer to Clause 4.3A(1)

Source: Ryde LEP 2014 – Height Map

The subject site has an area greater than 900m² and the proposal is for a mixed use development. The proposal also provides for a laneway access down its eastern boundary. This laneway can be publicly accessible and subject to the appropriate arrangements on the title will be available to adjoining properties to use. The applicant has obtained legal advice from the firm *Pikes & Verekers Lawyers*, confirming that the proposal meets the LEP requirements for a laneway.

A copy of the advice was submitted with the DA and the applicant understands that Council is in agreement with its position. Accordingly, all three requirements of *Clause 4.3A* have been met and the maximum permissible height for the proposal is 20m.

Clause 4.6 of the LEP outlines the matters to be considered by Council where a proposal seeks to vary a numerical standard contained within the LEP. The relevant parts of the clause and comments thereon in relation to the proposal are shown below

4.6 Exceptions to development standards

(1) The objectives of this clause are:

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

Comment

Objective (a) provides the impetus for the clause in confirming its intention for flexibility in the application of development standards. This integrates well with a number of the Aims of the LEP, contained within *Clause 1.2* as shown below:

- (a) to encourage a range of development, including housing, employment and recreation, that will accommodate the needs of the existing and future residents of Ryde,*
- (b) to provide opportunities for a range of housing types that are consistent with adjoining development and the existing environmental character of the locality,*
- (c) to foster the environmental, economic, social and physical development of Ryde so that it develops as an integrated, balanced and sustainable city,.....*
- (e) to improve access to the city, facilitate the maximum use of public transport and encourage walking and cycling,.....*
- (h) in relation to economic activities, to provide a hierarchy of retail, commercial and industrial activities that enable employment capacity targets to be met, provide employment diversity and are compatible with local amenity.*

In varying the LEP height standards these objectives are adhered to in that the proposal achieves a balanced development outcome between an acceptable built form within the applicable *B4 Mixed Use* zone and the surrounding mixed density neighbourhood. The built form outcome will be one of quality, with care taken in the design phase to ensure that any impacts to surrounding properties and the public domain are ameliorated. Finally, the location of the site promotes walking and public transport use.

The terms of objective (b) of *Clause 4.6* are particularly relevant as it introduces the desired achievement from objective (a) in providing a *better outcome*, from applying a flexible approach. In the circumstances of this proposal a better outcome is achieved by varying the relevant height standard through:

- The re invigoration of a low use site with a new vibrant modern building, that although marginally greater in height, respects its surroundings and reduces its impact on nearby residential properties.
- The increased height derives from the provision of access to the roof top communal open space, the fall of the land and the reallocation of permissible floor area away from the nearby Heritage Item.
- The roof top facilities are a benefit to the amenity of future residents and provide a better outcome in terms of liveability, with the central location of the lift and stairs reducing their visibility from the public domain
- When viewed in the round the majority of the visible portion of the structure is below the height limit and will therefore not dominate the streetscapes of Victoria Road, Little Church or St Annes Street.
- The provision of a development that maximises the opportunity for people to work within the community where they live and therefore reduce the impact on both private and public transport services.

A better planning outcome can also be considered in terms of the potential impact of the proposal from the increased height on the public domain and in an urban design sense. Any assessment of these issues must consider the proposal in terms of the context of the site, its built form, the need for residential development in the locality and the design parameters of SEPP 65 and the Ryde DCP. These matters are discussed within the Statement of Environmental Effects submitted with the DA, with the proposal performing well in regard thereto.

It may be suggested in certain submissions that all of the above benefits could be achieved by a smaller compliant development. However, to ensure that the additional roof top service structures meet the LEP standard would necessitate a reduction of a level within the building reducing its yield. Such a reduction would impact on the viability of the project to a level not commensurate with the minor nature of the proposed variation. In this regard it should be noted that the total FSR of the development as proposed is 2.36:1, well below the permissible 2.5:1.

In this context the orderly and economic use of the land as promoted by the objects of the EP&A Act, 1979 would be reduced, as would the site's capacity to provide increased commercial and residential variety and opportunities within the locality.

Subsection (3) of Clause 4.6 states as follows:

- (3) 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.....*

In assessing whether or not compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, it may be worth considering the principles laid down in the Land and Environment Court judgement of Cripps J. in *Hooker Corporation Pty Ltd v Hornsby Shire Council*

In that decision the Court was considering an objection to a development standard under SEPP 1 and his Honour set out a number of important principles for consideration of such an objection.

While an objection under SEPP 1 is not contemplated in this case, two of the principles set out in that judgement are relevant to the subject proposal. These are:

- *It must be assumed that a development standard has a purpose; and,*
- *It is not to be used as a means to affect general planning change*

Clause 4.3 of the LEP contains objectives that clearly indicate the purpose of the building height control. Those objectives relevant to this issue are outlined below together with comments on the proposal's performance against them.

(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,

Comment: The proposed building height is compliant with the LEP height control along the majority of the site's street frontages. As a result it will be in proportion and in keeping with the character of existing and future similar development.

(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,

Comment: The upper eaves and parapets of the majority of the proposed building pods are all at a height below the maximum permissible under the LEP. It is these elements of the building, which will cast the shadow on to adjoining lands. As those elements are height compliant, any shadow impact will be the same as that anticipated by the relevant planning framework.

The overrun in terms of Building B is less than 1.5m in terms of its parapet, which will have a minimal impact on land across Victoria Road, The lift stair overrun, being located toward the centre of the building will not cast a shadow outside the roof top common open space.

(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,

Comment: The site consists of a number of properties to be consolidated in a location close to public transport, shops and services.

(d) to minimise the impact of development on the amenity of surrounding properties,

Comment: The amended design has been derived from the perspectives of general compliance with relevant controls and to ensure that adjoining sites retain their maximum development potential. The proposal will sit well within its surroundings and will not detrimentally impact on the amenity of the area.

In this context and in consideration of the nature of the variation sought, it cannot be argued that the proposal is seeking to *effect general planning change*. The development, in the main, remains compliant with the principles and general parameters of the built form controls and expectations within the planning framework.

A recent decision in the NSW Land & Environment Court provides further clarity in relation to the issues to be confirmed in deciding whether or not the application of the LEP standard is *unreasonable or unnecessary in the circumstances of the case*.

In the matter of Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 Pearson C has confirmed that the decision of Preston CJ in Wehbe v. Pittwater Council [2007] NSWLEC 827 provides indirect assistance only, in determining ways of establishing that compliance with a development standard in an environmental planning instrument might be seen as unreasonable or unnecessary.

At paragraphs 61 and 62 of the decision the Commissioner states:

61 The written request argues that compliance is unnecessary in the circumstances of the case because the proposed development meets the objectives of the standard and the zone objectives, and that insistence on strict compliance would be unreasonable. Achieving the objectives of the development standard

notwithstanding non-compliance with the standard was the most commonly invoked way of establishing that compliance with a development standard was “unreasonable or unnecessary in the circumstances of the case” under cl 6 of SEPP 1: Wehbe v Pittwater Council [2007] NSWLEC 827 at [42] per Preston CJ. In Wehbe at [44]-[48] Preston CJ identified other ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that the underlying objective or purpose is not relevant to the development; that the objective would be defeated or thwarted if compliance was required; that the development standard has been virtually abandoned or destroyed by the Council’s own actions in departing from the standard; or that the zoning of the land is unreasonable or inappropriate.

62 I agree with the submission of Four2Five that the wording of cl 4.6, being different to that in SEPP 1, requires the decision-maker to be faithful to the language of the clause rather than any stated principles developed in the application of SEPP 1, and that, subject to that caution, the case law developed in relation to the application of SEPP1 may be of assistance in applying cl 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under cl 4.6 where cl 4.6(3)(a) uses the same language as cl 6 of SEPP1. Consistency with the objectives of the development standard and the zone objectives is now addressed specifically in cl 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary, using the same expression as that in cl 6 of SEPP 1, in cl 4.6(3)(a) and 4.6(4)(a)(i) of the LEP.....

The Commissioner’s decision was confirmed in the decision of Pain J on judicial review.

In *North Shore Gas Company v North Sydney Municipal Council* (Land and Environment, New South Wales, 15 September 1986, unreported) Stein J similarly held that compliance with a development standard was not required where the standard has been virtually abandoned or destroyed by Council’s own action.

In the case of the subject proposal, the matter of roof top open space facilities breaching building height limits has been considered by Council in relation to a number of recent DA's (including recent proposals before the Sydney East Joint Regional Planning Panel) and accepted on the basis of the improved amenity these facilities provide for future residents. In this sense the control has been virtually abandoned by the Consent Authority where it relates to such components of a development. This context is considered to be the same in relation to the subject proposal.

The particular circumstance of this site that distinguishes it from others is the nearby Heritage Item being St Annes Church and grounds. The location of this site diagonally opposite the subject land requires a site specific response to ensure an appropriate curtilage.

The proposal provides a transition in scale from the corner of Little Church and St Annes Streets up to taller structures further to the east reducing any domination or overbearing impact on the heritage item. The overall FSR is below that permissible, with Building A reduced to three levels rather than the permissible six. Overall compliance with the height controls would result in an inferior heritage outcome.

In view of all of the above, compliance with the numerical LEP standard for building height is considered to be unreasonable and unnecessary in the circumstances, while the variation to the height results in a better planning outcome for the site and the adjoining Heritage Item. If approved, the proposal (when built) will not be out of place with, nor detrimental to the amenity of its surroundings.

Clause 4.6 (3) then goes on to require:

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.....

The relevant zone objectives and the proposal's conformity with them was discussed in the Statement of Environmental Effects submitted with the DA and found to be acceptable. Rather than repeating the reasons why the proposal meets those environmental planning grounds, it may be appropriate (for the purposes of this question) to consider the variation to the height standard in terms of the *environmental amenity and aesthetic character of the area*.

In considering the *environmental amenity* one looks at impacts such as overshadowing, privacy/overlooking, view loss, visual domination etc. These provide an indication of a proposal's suitability and reflect the matters for consideration under Section 79C of the Act.

The proposed additional structures on the roof will not generate any additional overshadowing to adjoining lands, as they are located in the centre of the building well back from the parapet. Similarly, the minor increase in the parapet height of Building B will increase the shadow cast over Victoria Road by a minimal amount with no detrimental impacts to properties to the south beyond that anticipated by the LEP controls.

The potential for privacy loss and overlooking derive from a building's orientation and the internal layout. The roof - top communal open space is set back from the building facades, is well screened and its use will not diminish the privacy of occupants of nearby buildings (present and future). The building separation afforded to sites across Victoria Road will exceed that required by SEPP 65 and the Apartment Design Guide (ADG) and ensure no privacy impacts from the upper level to Building B.

The building when completed will provide view opportunities from its upper levels to the same degree as those on adjoining and nearby sites as envisaged within the controls. The size and nature of the roof top structures and the minimal component that breach the height limit are such that that they will not unreasonably impinge on views that may be enjoyed from existing or any future buildings on surrounding properties.

Visual domination is an issue more generally associated with perceptions from the public domain and from multi storey buildings. In this case, the proposed building up to its upper level eaves and parapet is generally compliant with the relevant height standards. The minor habitable floor component of the variation will not be perceptible from the public domain and the proposed building will retain its "fit" within its locality as envisaged by those controls. In that context the minor height overrun and the proposed relationship in bulk and scale terms is considered to be reasonable.

In determining the *aesthetic character of the area* it is reasonable to review the type and form of development existing in the near vicinity of the site and likely to occur in consideration of the future character of the area. Ryde LEP 2014 and the associated DCP provides for development uplift within the Ryde Town Centre, including this and surrounding lands. The controls permit buildings of a similar height and density to that proposed on the subject site.

The majority of the overall building envelope, complies with those controls, with the variant structures in the main being set well back. They facilitate access and useability of the roof top space and or simply complete the upper residential floor, in a manner that will not impact on surrounding properties. The availability of the roof top recreational facilities will enhance the amenity within the area, which due to the permissible densities, will become much more urban than suburban.

An area's desired future character is generally evident from reviewing any proposed changes to the relevant planning framework affecting a site. In this case the relevant LEP and DCP have only recently been adopted. As mentioned above these plans facilitate a much greater level of development within the precinct. The expected built form outcome is similar to that proposed for the subject land, whilst the land use intention is one of mixed use.

In this context the proposal will sit well within the expected development outcomes and be commensurate with the desired future character of the area.

In light of this detailed assessment it would appear that neither the *environmental amenity* nor the *aesthetic character of the area*, are detrimentally impacted by the proposal and the minor non compliance of the roof top structures with the LEP height standard. Is reasonable. In this sense it is fair to say that the underlying purpose of the standard has been met.

Clause 4.6 of the LEP goes on further to relevantly state:

(2) 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*
- (b) the concurrence of the Director-General has been obtained.*

Comment: These matters have previously been considered and are positively demonstrated by the proposal. The Director General has formally delegated his function to Council.

- (5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.....*

Comment: No matters of State or Regional Environment Planning significance are compromised, nor will the proposed development create any environmental impact as indicated throughout this report. The proposal will not generate any amenity impacts to neighbours, whilst its bulk and scale is satisfactory.

The integrity and longevity of the provisions of the LEP should the variation in the height standard be granted by Council is a correct and proper consideration in the assessment of any development proposal. As shown in this report the LEP itself provides for flexibility in appropriate circumstances, such as in the case of the subject proposal.

4. CONCLUSION

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

In the context of the site and the design proposed, it is considered that the proposal will result in a better planning outcome than one that complied with those standards.

David Furlong –BTP, MPIA

Director