

# Amended Clause 4.6 Variation Height of Buildings

Clause 4.3 – HOB  
Canada Bay Local Environmental  
Plan 2013

Proposed Mixed Use Development  
227 and 231 Victoria Road  
Drummoyne

Project 15-030  
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Revision D

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## Executive Summary

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This request is part of the Statement of Environmental Effects supporting the proposed shoptop housing development at 227-231 Victoria Road, Drummoyne.

The proposed design utilises an Architectural Roof Feature as defined under Clause 5.6 of Canada Bay Local Environmental Plan 2013 which allows the feature and those service areas masked by it to be excluded from the building height when determining the height of buildings under Clause 4.3 of the LEP. The Architectural Roof Feature masks the lift and stair overrun which extend above the roof level to provide access to the proposed rooftop communal open space. The Architectural Roof Feature's maximum height is 22.56 m.

The maximum building height under Clause 4.3 of the LEP is 20.63 m, measured at the top edge of the rooftop garden planter. This is a 0.63 m non-compliance and represents a 3.15% variation to the 20 m development standard. This occurs at the northern side of the roof garden. The majority of the garden planter forms are under the height limit. The non-compliance arises from the site topography which slopes down towards the eastern and northern portions of the site. The planter edge of the roof garden has been designed to be setback from the building roof edge to ensure it does not have an adverse visual impact on surrounding sites and the public domain and that there is no additional overshadowing from the non-compliant portion of the planter structure.

The maximum height of the building excluding rooftop garden related structures occurs over a small portion of the roof parapet at the far north-eastern corner of the building. The height of the parapet at its corner is 20.12 m, which is a 0.12 m non-compliance representing a 0.6% variation to the height limit standard. The length of the parapet form which rises above the 20 m height limit is approximately 4 m which is minor. The remainder of the building is under the 20 metre height limit.

If the Architectural Roof Feature is disregarded and overrun height considered, the proposed development's maximum non-compliance to the height of buildings (HOB) development standard of 20 m is 2.56 m. It is noted that if the lift and stair overrun was considered as part of the building height the overrun constitutes only approximately 20m<sup>2</sup>.

The exceedance in HOB relating to the lift overrun and stairs screened by the Architectural Roof Feature is directly linked to achieving a high level of amenity. The height sought allows for a universally accessible common open space at roof level. The planter/balustrades that exceed the height limit are for safety and to allow soil depths to sustain the proposed landscape.

The proposed mixed-use building adopts setbacks from the northern side boundary and rear boundary to achieve a transition to the lower density sites outside of the Village Centre. The proposed setbacks at the roof level makes the roof garden a recessive element mitigating its visual impact when viewed from Victoria Road proximate to the site.

The height of the proposed development is similar to other prominent buildings in the Village Centre including 1 Lyons Road (parapet height RL 54.04) and 2 Marlborough Street (52 Lyons Road, parapet RL 54.27). The maximum parapet height of the proposed development is RL 50.90 at the north-east corner of the site and 53.62 at the roof garden planters which are below both of 1 Lyons Road and 2 Marlborough Street.

The proposed additional height allows for a floor-to-floor height of 4 m for the ground level, 3.1 m for residential levels and sufficient tolerance for a well-insulated roof which can also carry the weight of the proposed roof garden elements.

The proposal meets the key Apartment Design Guide design solar access and cross ventilation design criteria. Further, it also provides privacy to neighbouring properties with ADG compliant setbacks, a high amenity communal open space, ADG compliant balconies and appropriate apartment sizes. The proposed built form responds to the constraints particular to the site which include a narrow frontage and sloping topography.

It is considered acceptable and logical that a building of this type in this area achieves a better residential amenity than a complying building without increased environmental impacts, while achieving significant metropolitan strategic planning goals because:

- The site is in a mixed-use zone where a roof garden solution for common open space is appropriate.
- The site is near to other buildings in the Village Centre which are 6-7 storeys in height.
- The total number of storeys is consistent with Council's local plans;
- The site is highly accessible to the Sydney CBD, Western Sydney and Northern Points of Sydney given its prominent location on Victoria Road and proximity to Lyons Road and the A4/Anzac Bridge; and
- The proposal seeks to enhance the pedestrian amenity by creating an inviting ground floor retail space facing the street, a variety of materials/finishes to improve the visual amenity of Victoria Road, an important transport corridor; and
- The development provides a transition to lower scale areas nearby through setbacks.
- The height non-compliances are directly linked to the topography of the site and amenity provision with a roof top COS.

In the circumstances of the case a development proposal that is fully compliant with the HOB development standard would represent an under utilisation of a site or a poorer design outcome.

This written request is made pursuant to Clause 4.6 of Canada Bay LEP 2013, relevant judgements in the NSW Land and Environment Court, and justifies:

- Why compliance with the HOB development standard in LEP 2013 is unreasonable in the circumstances of the case; and
- Demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard.

This request also explains how the proposed development will be in the public interest and the objectives for development within the B4 Mixed Use zone in which the development is proposed to be carried out.

For the reasons set out in this report, contravention of the development standard is considered appropriate for the site and raises no matter of significance for State or regional environmental planning. As such, there is no public benefit in maintaining the development standard in this particular case. It is unreasonable and unnecessary in the circumstances of the case to comply with the standard.

# 1 Introduction

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## 1.1 Height of building standard being objected to

The height of buildings standard, Clause 4.3 in the LEP, is proposed to be varied. The clause is as follows:

**“4.3 Height of buildings**

- (1) *The objectives of this clause are as follows:*
- (a) *to ensure that buildings are compatible with the desired future character in terms of building height and roof forms,*
  - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.*
- (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.**”*

## 1.2 Environmental and built form considerations

The site exhibits the following features:

- The site is located within the special area known as the Drummoyne Village Centre;
- The site located on a major road transport corridor (Victoria Road) earmarked for further public transport improvements and possible light rail discussed in the Sydney CBD to Parramatta Strategic Transport Plan and Sydney’s Bus Future;
- *A Plan for Growing Sydney*, released in December 2014, is the NSW Government’s plan for the future of the Sydney Metropolitan Area over the next 20 years. Canada Bay is identified in the Central Subregion chapter and Victoria Road is identified in the plan as urban renewal investigation. Additional information and reports released since 2014 indicate that population growth and changing demographics require an acceleration of housing supply and that new houses should be located in areas well serviced by public transport and with proximity to jobs. The subject site is well located in both these regards.
- The site is surrounded by a combination of mixed use development and residential flat buildings with a diverse range of heights and characters; the lack of uniformity in surrounding built form means that the local area is more tolerant of built form diversity and thus there is an opportunity to create an interesting and unique built form that contributes to this eclecticism.
- The site is at the northern gateway of the village centre and thus there is an opportunity to create a gateway to the centre. At the same time, it is important to respond appropriate to the transition to lower scale areas outside of the centre.
- There are a number of existing instances of buildings which exceed the LEP height limit in the immediate locality.

- The scale of the proposed development is similar to other prominent buildings in the Village Centre including 1 Lyons Road (parapet height 54.04) and 2 Marlborough Street (52 Lyons Road, parapet RL 54.25). The roof parapet height of the proposed development is RL 50.90 and is below both of 1 Lyons Road and 2 Marlborough Street. The proposed development, at 6 storeys is also consistent with these adjoining buildings which are 6 and 7 storeys, respectively.
- The proposal must have regard to the *State Environmental Planning Policy No.65 – Design Quality for Residential Flat Development* (SEPP 65) guiding development principles, specifically solar access and natural ventilation.
- Existing strata titled residential flat buildings behind the site area unlikely to be redeveloped due to their current built form which is consistent with the applicable LEP controls for the sites.

### 1.3 Purpose and application of the Clause 4.6 request

The purpose of the clause 4.6 variation is to provide a degree of flexibility in the application of planning controls as established in clause 4.6 of the LEP, 'exceptions to development standards' in circumstances where strict compliance with those development standards, would, in any particular case, be unreasonable and unnecessary or tend to hinder the attainment of the objects set out in section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* (the Act). Section 5(a)(i) and (ii) of the Act states:

#### **"5 Objects**

*The objects of this Act are:*

(a) *to encourage:*

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

An assessment of the section 5(a)(i) and (ii) of the Act is provided in **Appendix 1** of this report. The assessment found that the proposed development and, in particular, the proposed non-compliance with the development standard, would not hinder the attainment of the Section 5(a)(i) and (ii) of the Act. The proposal would, inter alia, result in the promotion of an orderly and economic use of the land.

## 2 Clause 4.6 Assessment

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This section provides an assessment of the proposal against the relevant provisions under clause 4.6 of the LEP, as well the objectives of the relevant development standards and land use zone.

### 2.1 The proposed variation

The development application proposes a mixed-use development on the subject site that seeks a variation to the maximum building height between 0.63m (3.15% variation) and 0.12 m (0.6% variation). The variations are a result of the following:

- The roof level structures, including fire stairs, lift overrun and lobby area for access to the roof are proposed to be located above the maximum building height plane but are masked by an Architectural Roof Feature as per LEP Clause 5.6 and as such do not contribute to reportable building height;
- Due to the interpretation of the existing ground levels and design response of the proposal to the site's constraints, part of the roof garden planter/balustrade exceeds the HOB development standard;
- The key elements that form the overall height profile of the development include:
  - The lift overrun at a maximum height of RL54.66, 2.56 m above the LEP height limit (masked by Architectural Roof Feature)
  - The roof top planter/balustrade at a height of RL51.80, 0.63 m (maximum) above the height limit;
  - Top of roof parapet at a height of RL50.90, 0.12 m (maximum) above the height limit;

Refer to the Figures below.



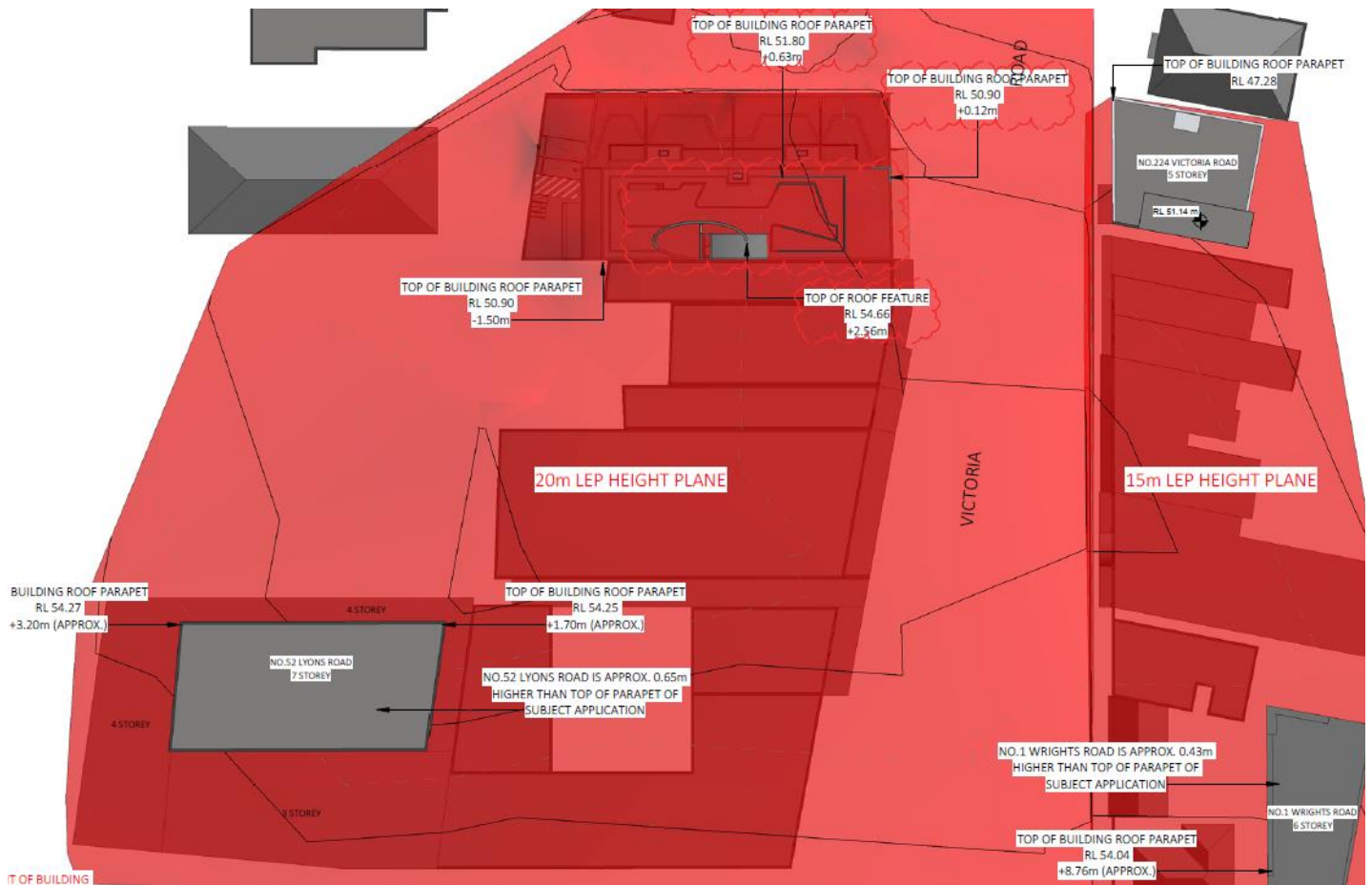


Figure 1: Height Plane Diagram (DA-0-911 Rev C)

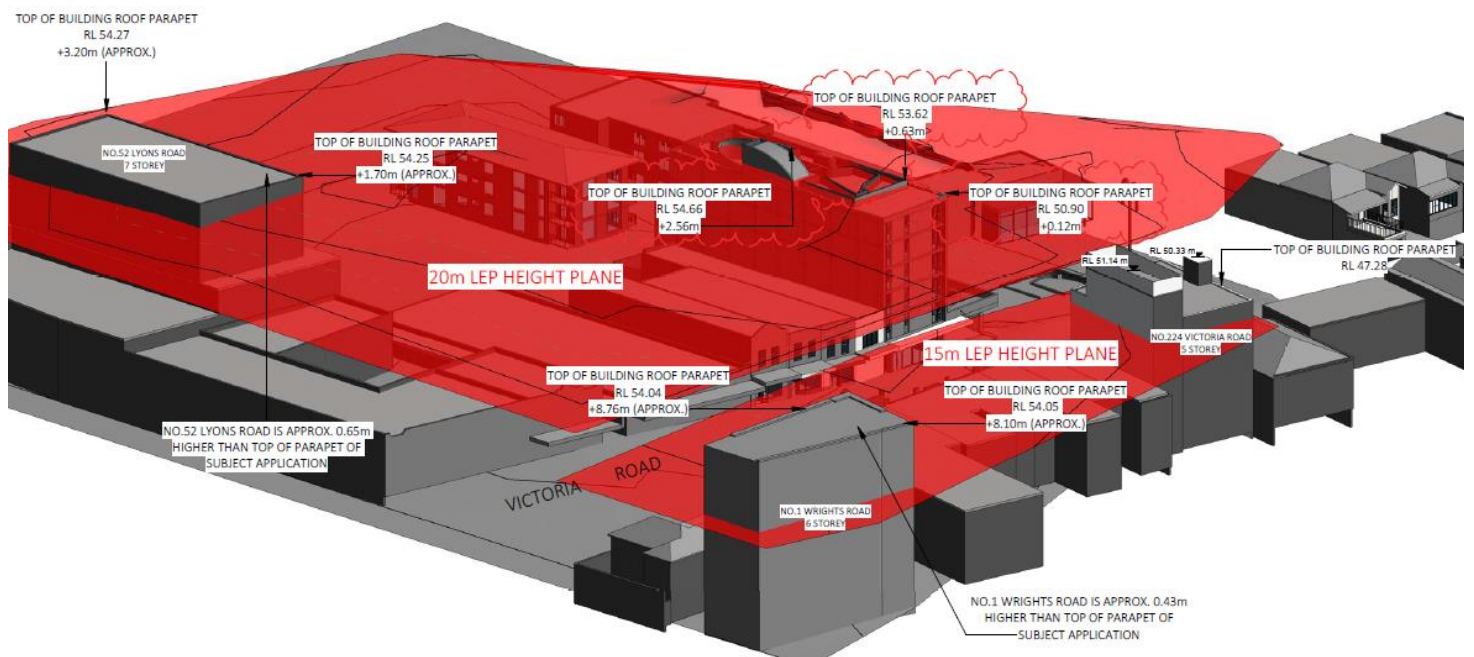


Figure 2: 3D view of height non-compliance (DA-0-912 Rev B)

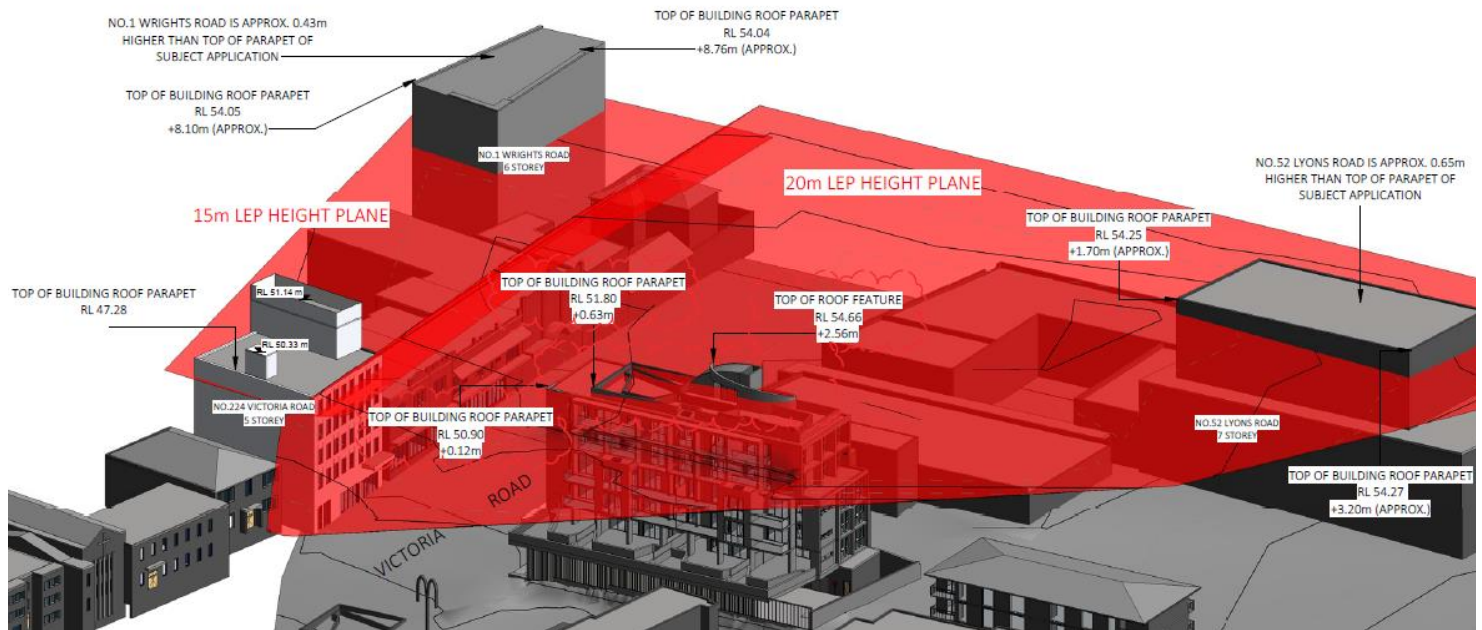


Figure 3 – 3D view of height non compliance (DA-0-913 Rev B)

## 2.2 Strategic value of site (Clause 4.6(5))

The proposed development meets key local, State and Regional strategic planning objectives. The key State and Regional strategic planning policy that the proposal adheres to includes:

- A Plan for Growing Sydney, published by the NSW Government December 2014.

The above policy is discussed in detail below.

### 2.2.1 Housing and Transport

The **A Plan for Growing Sydney** strategic policy document identifies many goals for accommodating the growth of Sydney to 2014. The first key goal is:

*‘Goal 2: A city of housing choice, with homes that meet our needs and lifestyle’*

This goal sets out key directions and actions by the NSW Government to achieve housing choice, including:

- Accelerate urban renewal across Sydney – providing homes closer to jobs; and
- Improve housing choice to suit different needs and lifestyles.

The NSW Government identifies through this strategic policy document that a key principle to guiding the growth of Sydney is through:

- Principle 1: Increasing housing choice around all centres through urban renewal in established areas;
- Principle 2: Stronger economic development in strategic centres and transport gateways; and
- Principle 3: Connecting centres with a networked transport system.

*'Action 2.2.2: Undertake urban renewal in transport corridors which are being transformed by investment and around strategic centres'*. The reason is that Victoria Road has been flagged for improved public transport and the site is located within Drummoyne Village Centre in proximity to retail, civic uses, open space other amenities. *Sydney's Bus Future* identifies Victoria Road as a strategic corridor for investigation for light rail and BRT. Also 'A Plan for Growing Sydney' identifies Victoria Road as zoned urban renewal investigation. There would be unreasonable to develop a building on the site which complied with the height limit and still achieved the level of amenity sought because that building would be significantly below the applicable FSR control for the site.

## 2.3 Relationship to Statutory Documents

The planning controls and plans which relate to the site are the Canada Bay LEP 2013. Council's local planning strategy is dated 2010 and based on population growth rates and statistics from 2006. The site specific DCP for Drummoyne Village Centre is from September 2007 which is almost a decade old. The built form contemplated by the DCP for the site is 6 storeys but the DCP pre-dates the Apartment Design Guide which strengthens recommendations around provision of rooftop gardens in mixed-use areas (ADG Page 55 Design Guidance 5 and 6), suggests larger floor-to-floor heights (ADG Page 86-87) and seeks a high level of accessibility (ADG Page 55 and 118). Furthermore, the site-specific controls for the subject site set out in the DCP allow nil side setbacks up to 3 storeys (plus above ground car park) and only a 4.5 m side setback for upper levels. This conflicts with ADG criteria for visual privacy while allowing for more floor space within a lower building. These three key amenity aspects make achieving a 6-storey shoptop housing building with a rooftop garden within a height of 20 m impractical on the site.

The proposed development has been designed as a true infill design with a blank wall to the south east. This arrangement allows the neighboring site to be "tacked on" to the proposal to create a perimeter block form and thus the additional height sought does not thwart achieving the built form vision for the village centre set out in the DCP.

It is also noted that built form in the area has a diverse range of heights which includes several buildings which are 6-7 storeys. The proposed height of 6 storeys is reasonable within built form context of the site. The lift overrun, architectural roof feature and green roof elements do not have an adverse visual impact on the centre but do contribute to a high-quality roof line when the site is viewed from a distance. Towards the rear of the site where the building interfaces with residential properties to the west, there are no non-compliances with the building height.

Thus, although the proposed development departs from the 20m height limit, the non compliances relating to the balustrade/planter and parapet are marginal and reasonable.

## 2.4 Discrepancy between DCP and LEP

Although the prescribed 20 metres is issued in the LEP it is noted that within the Drummoyne Village DCP 2007 under the section titled 3.2.2 'Specific Strategies for the Drummoyne Village Site' a height limit of 22m is suggested for the whole site. If 22 m was the applicable height limit as per the DCP, there would be no technical height non-compliance.

The Drummoyne Village DCP 2007 is indicative of a potential flexibility towards the 4.3 Height of Buildings Clause. It is also an example of scale of development supportable within the Drummoyne Village area of which this application site is a part.



Figure 4: Drummoyne Village Site identified by red boundary (pg. 6 of DCP).

## 2.4.1 Existing Built Form Context

There are examples of buildings in the vicinity which are of a height not dissimilar to the proposed development for instance, the 7 storey 12 Marlborough Street and 6 storey 1 Wrights Road at 23.88 metres. Directly opposite the site is 224 Victoria Road which is 5 storeys.

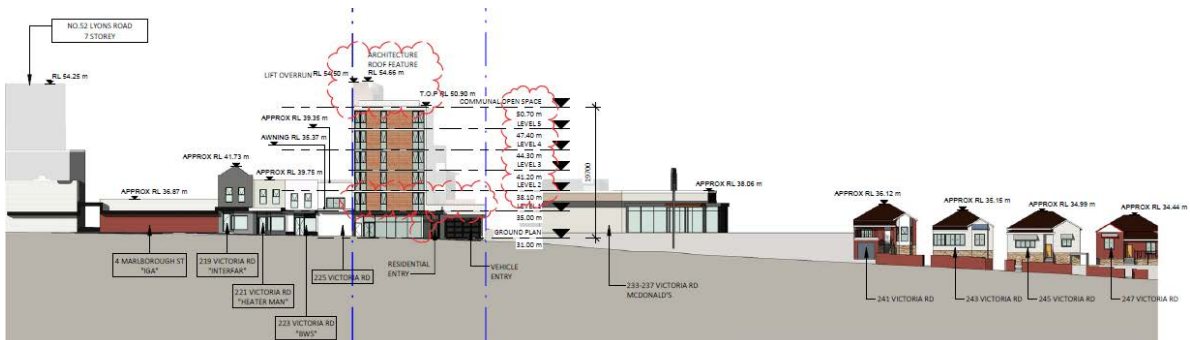


Figure 5: Victoria Road South Western Side Elevation (DA-0-305 Rev D)

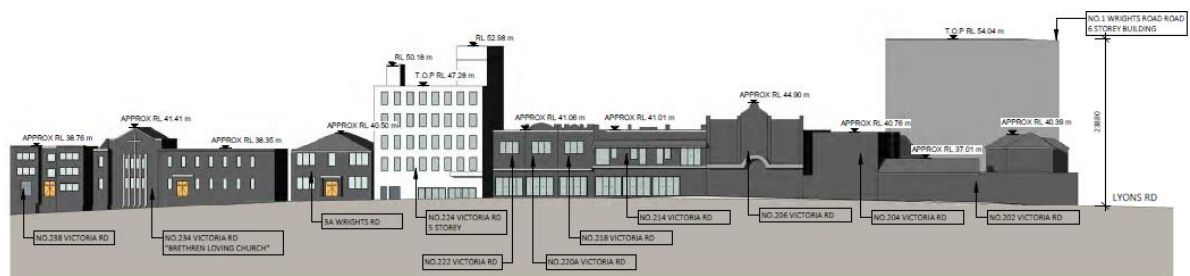


Figure 6: Victoria Road North Eastern Side Elevation (DA-0-305 Rev D)

It is also noted that 121 Victoria Road, Drummoyne (DA number: 411/2011) was determined for approval in 2012. The project was similar to the current application with a ground floor commercial and residential



premises above plus basement parking. It is an example of Canada Bay granting approval by delegated authority despite a height non-compliance. It is noted that the height non-compliance at the time was 1-1.5 storeys over the limit and the areas of the building which did not comply with the height limit included habitable spaces.



Figure 7: Excerpt, North Elevation of 121 – 125 Victoria Road (A-020) – Drawing uploaded from Canada Bay DA Tracker.

The subject site is not immediately near or adjacent a heritage item which could determine the height of the building. The nearest heritage items being the Sutton Building shops is located at the junction of Lyons Road and Victoria Road. This heritage item is not affected by the development apart from the roof tops of the Sutton Buildings would be slightly overshadowed after 2 pm on 21<sup>st</sup> June. However, any impact from the development would be extinguished if 219-225 Victoria Road are developed as shown in the below figure which is similar to what is contemplated in the DCP.

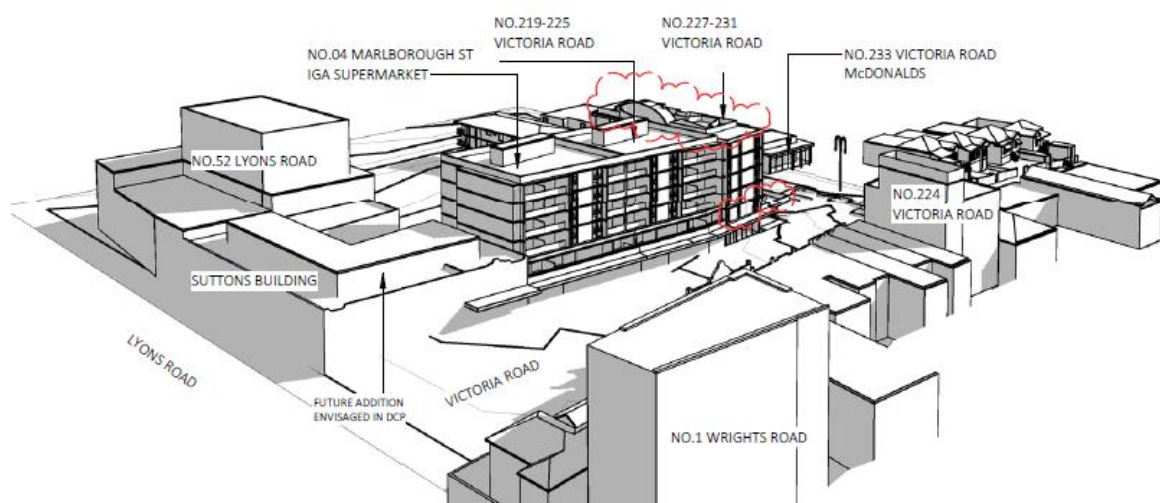


Figure 8 – 3D View – Future built form analysis (DA-0-934 Rev B)

In consideration of the proposed HOB exceedance it is evident that the vast bulk of the building is predominately under the 20m HOB. The sections and height plan diagrams shown in the following figures demonstrate minimal bulk of the building above the 20 metres height limit.

The height of the proposed development is similar to 1 Lyons Road (parapet height 54.04) and 2 Marlborough Street (52 Lyons Road, parapet RL 54.27). The parapet height of the proposed development is RL 53.62 and is below both of 1 Lyons Road and 2 Marlborough Street. The proposed common open space planter/balustrade height is RL 51.80, below the RL parapet heights of the nearby buildings at Lyons Road.

A building height plane analysis has been undertaken for the wider context of the site and demonstrates that the proposed development has a similar or less of a total height non-compliance than the other buildings in the area which exceed the height limit by one or more storeys. The proposal is generally compatible with the pattern of height in the area as it relates to the applicable controls and as it relates to the other buildings in the precinct which are 6-7 storeys in height. Refer to the figures below.

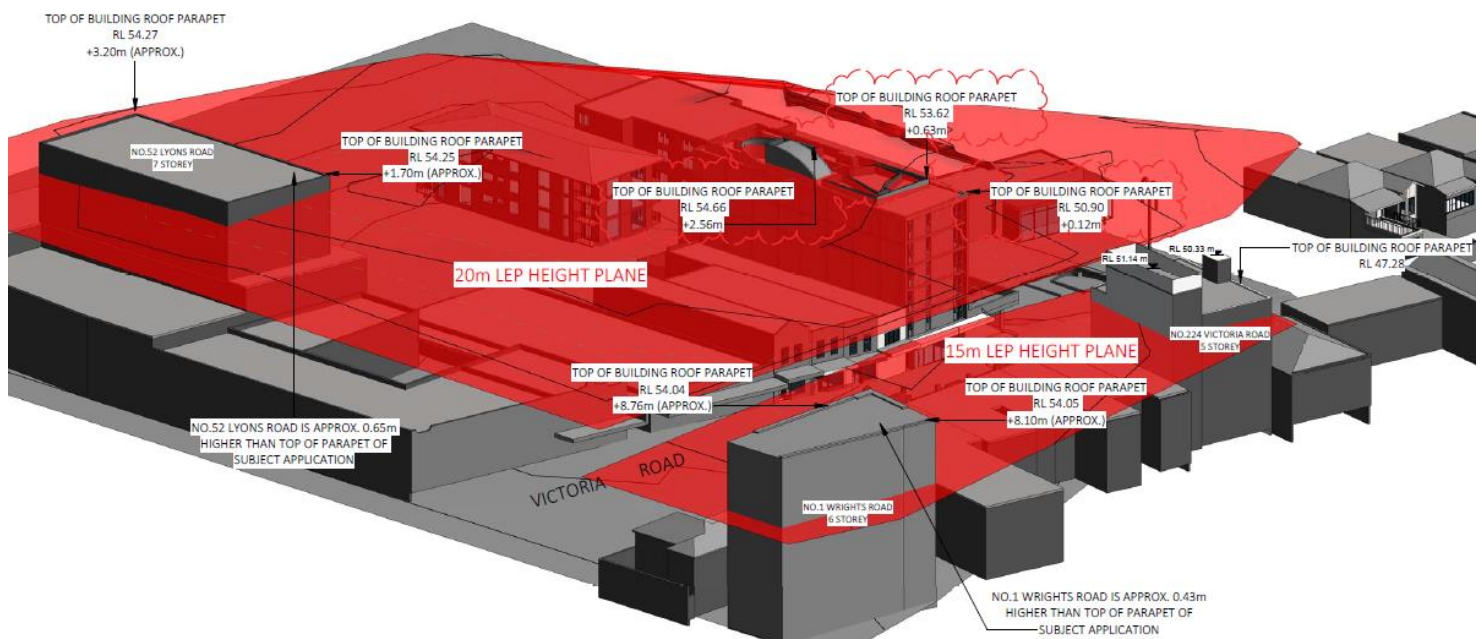


Figure 9: Height Plane Diagram (DA-0-912 Rev B)



Figure 10: Section AA (DA-0-401 Rev D)

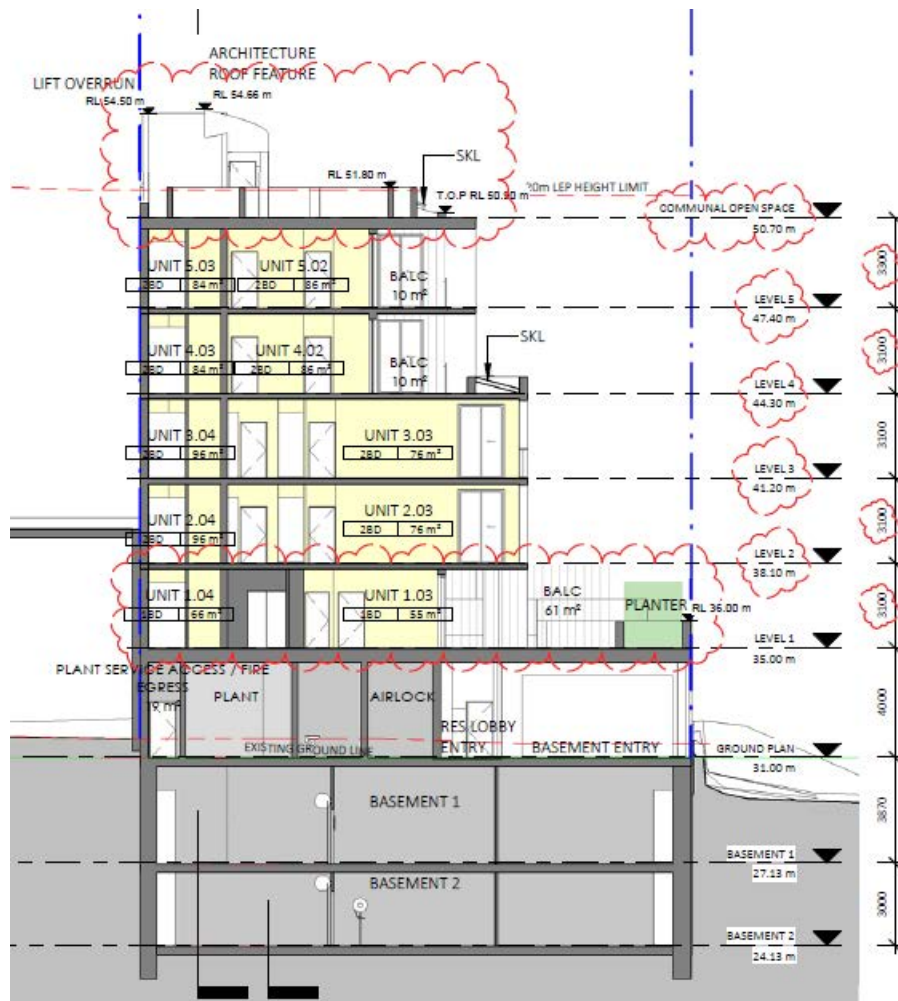


Figure 11: Section BB (DA-0-402 Rev D)

## 2.5 Assessment of each land use zone objective

The LEP identifies that the land use zone on the site is Zone B4 Mixed Use. The objectives of this zone are:

### *"1 Objectives of zone*

- 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.

An assessment against the objectives is provided below.

### **First Objective**

*"To provide a mixture of compatible land uses."*

The proposal meets this objective as it includes retail ground floor uses with residential accommodation above. These uses are compatible with the surrounding uses in this area with commercial and mixed-use development in the village centre and mostly residential development outside of the village centre.

The proposed development, through its additional height achieves high quality housing with good residential amenity and locates homes where they benefit from good transport accessibility and proximity to jobs. The exceedance in height to provide rooftop common open space is compatible with the mixed use zoning and building typology envisaged by the DCP (shoptop housing) which is indeed what is proposed.

The proposed development therefore meets the objective regardless of the proposed height non-compliance.

### **Second Objective**

*"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 meets this objective as it provides retail and residential land uses in an accessible location to public transport and adjacent to a major arterial road within an existing centre. The location of the site within the Drummoyne Village adjoining Victoria Road and in proximity to public transport encourages a high level of patronage of public transport since public transport is a real and viable option. In addition, the level of transport accessibility will only increase over time since Victoria Road is designated as a transport renewal corridor.

The ADG suggests floor heights for mixed use buildings which when considered in the context of the site's narrow frontage and sloping topography, makes achieving a 6 storey shoptop housing building with adequate communal open space which is both landscaped and accessible unachievable.

Further, the location of the site is accessible by foot or bicycle and the scheme provides dedicated bicycle parking to serve the proposed residential units on site (26 bicycle parking and or storage



facilities). Non-residential uses are also provided with bicycle parking at Ground Level to the rear of the site.

The proposal is well serviced by a variety of recreational and retail uses to meet the daily needs of the future residents.

The additional height sought achieves high amenity on a site that is in an accessible location ideal for maximising public transport patronage, therefore, the proposed development meets the objective and the non-compliance contributes to ensuring that mix of uses provided achieves good amenity. It is also noted that the extent of the height non-compliance is also related to the specific topography of the site which is lower at the northern portions of the site near to Victoria Road.

## 2.6 Assessment of objectives in relevant development standard

This section assesses the relevant objectives within the maximum building height development standard to which a variation is being sought.

Clause 4.3 of the LEP establishes the maximum permissible building height on the site. The objectives of this development standard are:

*“4.3 Height of buildings*

- (a) to ensure that buildings are compatible with the desired future character in terms of building height and roof forms,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.”*

An assessment against the objectives is provided below.

### **First Objective**

- “(a) to ensure that buildings are compatible with the desired future character in terms of building height and roof forms,”*

The proposal is surrounded by a variety of eclectic buildings of varying heights, setbacks and relationships to the street. The only reoccurring element in relation to the streetscape is that at least one storey is built to the street alignment with a nil setback. For many buildings in the area upper level setbacks are not employed, although in a few instances, such as 2 Marlborough Street (52 Lyons Road), varying upper level setbacks are employed.

The height of the proposed development is similar to other prominent buildings in the Village Centre including 1 Lyons Road (parapet height 54.04) and 2 Marlborough Street (52 Lyons Road, parapet RL 54.25). The parapet height of the proposed development is RL 53.62 and is below both of 1 Lyons Road and 2 Marlborough Street. The height plan analysis at DA-911-913 demonstrates that the proposed development fits within the larger context of other substantial buildings in the precinct. This is also detailed earlier in this report.

Council's DCP for the area, which is from 2007 contemplates heights in the order of six to seven storeys (depending on the position of basement car parking in relation to site topography changes) with the

subject site functioning at the northern gateway to the village centre. It is noted that the subject site is at the edge of the centre, away from the heritage buildings in the precinct. It is also noted that in almost a decade only one development has been realised in the centre, that is No. 52 Lyons Road which is seven storeys in height. No. 52 Lyons Road is also in a gateway position but the gateway is of a lower order than the subject site given the subject site is on Victoria Road while No. 52 Lyons Road is on Lyons Road. To respond to the objectives of the DCP. The 6-storey building is therefore fully consistent with the existing built form context and the desired future built form context as set out in the DCP. The provision of a party wall configuration to the southern boundary allows the proposal to be seamlessly stitched into the future built form suggested in the DCP. The party wall is proposed with patterned panels to provide visual interest in the shorter term until such a time the adjoining sites redevelop in accordance with the DCP.

In summary, the proposed development uses scale to contribute to the quality of built form in the area and achieves compatibility with the existing and desired future character of the area. If and when other sites in the centre redevelop, the proposed development will fit seamlessly into the urban fabric of the centre. This is demonstrated in the future built form analysis which forms part of the architectural set at DA-933-936.

The DCP does not address the relationship between the centre and the surrounding lower scale areas in detail. The subject site's relationship to its surrounding built form is unique. It is at the northern gateway to the centre and adjoins sites which are envisioned for redevelopment in the DCP (to the south), but the site is also adjacent to the existing McDonalds and low and medium scale residential areas to the north west. Although the McDonalds site is provided with an FSR control of 2:1, it is only afforded a height of 8.5 m. To address this unique transitional setting, the proposed development announces arrival into the centre through building height and alignments to the street. The proposed establishes a party wall to the side boundary with upper levels setback to not impact on future redevelopment potential of the McDonald's site.

The proposal transitions to the lower scale areas to the north west by pushing built form to the south, employing a side setback of 6 m from Level 2 and a 9 m setback from Level 4 along with a very high level of articulation to the north western façade using a modular grid pattern.

To address the current condition while anticipating a future redevelopment of the McDonald's site, the podium wall is provided with an open screen element to the driveway and a protected edge condition. This approach provides relief to the exposed wall in the short term but allows for a party wall configuration in the future of a scale compatible with the 8.5 m height limit on the McDonald's site.

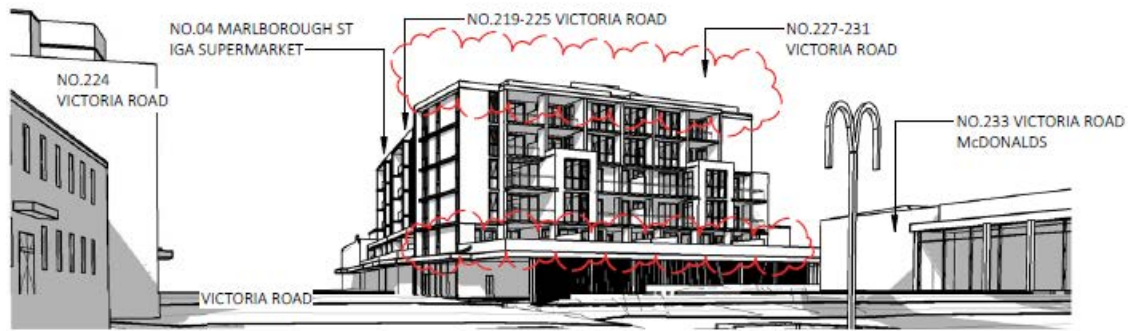


Figure 15: Future Built Form Analysis – Victoria Road View to South (DA-0-934 Rev B)

Pushing built form to the southern boundary also anticipates the building envelopes of the DCP and allows the sites adjoining the subject site to the south to redevelop as per the DCP. Refer to the figure below which outlines the potential future built form of 219-225 alongside 227-231 Victoria Road.

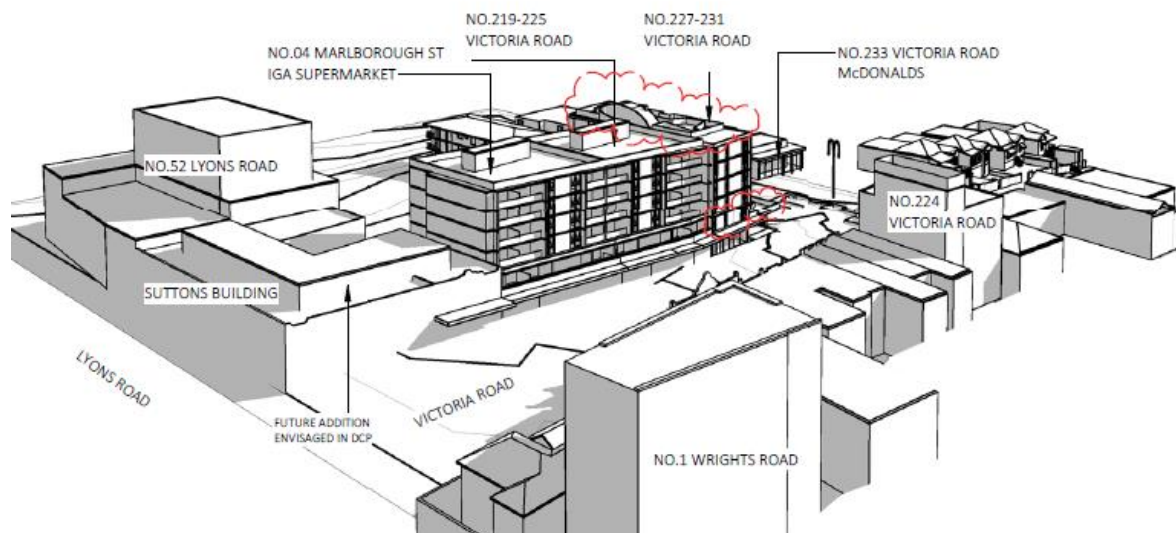


Figure 16: 3D View – Future Built Form Analysis (DA-0-934 Rev B)

The use of the roof top as a COS does not detract from the desired character of the centre.

Finally, the proposed development fits within the streetscape established across Victoria Road as well. The existing character at the eastern side of Victoria Road is eclectic and ranges from single storey buildings with nil setbacks to five storey street walls with very little relief. In this respect, there are several cases where the DCP controls do not reflect the reality of built form in the area.

The proposed development fits within this eclectic setting by creating a human scale base to the building, and an articulated tower element set off from the base of the building.

Overall, the proposed development fits within the desired character of the area by:

- Providing a retail base to the building with party walls to the side boundary to allow an adjoining built form to establish a party wall and continue built form in accordance with the DCP;

- Providing a 6-9 m setback to the rear;
- Providing a 6-9 m upper level setback to the north;

The main departure from the DCP is that the design consciously seeks to create a 'bookend' to the centre when the site is viewed from the north west on approach to the village. While this is not a design element expressed in the 2007 DCP it does fit well within the underlying objectives of the DCP which seeks to create a distinct mixed-use centre.

The proposed roof garden structures which exceed the height limit provide a green roof character which is compatible with the desired character of the area and provides a type of communal open space recommended in business centres.

Given the proposal's design response to the site and to surrounding context, the proposed variation to the HOB development standard is considered to be reasonable in the circumstances of the case.

## **Second Objective**

*"(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development."*

### **Visual Impact**

The proposed development has been designed to be slender incorporating setbacks and delivering a building with reasonable bulk and scale. The taller, slenderer tower is preferable to a lower bulkier building which would have a greater impact to adjoining properties in terms of visual bulk and scale, views, privacy and access to daylight. A lower building with added bulk near the ground level is reflected in the DCP building envelop which contemplates a nil setback to the western boundary up of 1 storeys + above ground car parking and a nil setback to the northern boundary of 3 storeys + above ground car parking. The proposed development removes the volume of built form from near the 3 storey RFBs to the west when compared to the DCP envelop.

The building achieves ADG building separation criteria to adjoining buildings. The proposed development achieves a high level of façade articulation which breaks down bulk and scale. The use of high quality materials contributes positively to the character of the local area. Upper levels of the proposed development are setback from the levels below to further reduce visual impacts. The proposed architectural roof feature integrates overruns and plant areas into the overall design of the building and forms part of the roof garden. The planter/balustrades of the roof garden are setback from the roof edge and allow for landscape to spill over, creating a green roof element visible from surrounding sites and the public domain.

As stated previously, the character of the built form in the area is eclectic with varying heights and different relationships to the street. There are buildings which are only 1 storey, there are buildings which are 5 and 6 storeys with no setback to the street and there is a building of 7 storeys with upper level setbacks. The scale of the proposed development is not inconsistent with the notably higher forms in the area such as 52 Lyons Road and No. 1 Wrights Road. At the same time, the proposal maintains a 1-2 storey scale to the clearly defined base of the building. Thus, the proposed development achieves an acceptable visual impact and responds appropriately to the existing character of the area.

As discussed under the first objective, the proposed development when viewed from medium to long distant views from the south fits within the existing streetscape, with the height of the building being similar to the horizon established by the existing built form along the Victoria Road corridor.

To comply with the LEP Height limits would require removal of the rooftop communal open space which would be detrimental to the amenity of the occupiers and inconsistent with criteria 3D Communal and public open space of the ADG. The elements of the roof garden have no adverse visual impact on the area. It is reasonable to provide open space at roof level in a mixed-use business zone where shoptop housing is proposed. In our opinion, the green roof elements and sculptural architectural roof feature contribute positively to the visual amenity of the skyline in this case.

## **Views**

Properties surrounding the application site are not afforded views as beyond the B4 Mixed Use Zone. The properties are 2 to 3 storeys and located in the R3 Zone. Properties to the south of the site such as 4 Marlborough Street – 225 Victoria Road have a close relationship with views to Victoria Road and are to be retained. Future built form view analysis drawings (DA-933-DA936) show the development with a potential future built form at 219-255 Victoria Road. This study indicates the height non-compliances in no way hinder the proposal achieving consistency with future desired character. This is also the case from medium distance views from the north, where the building appears in line with the roofs of buildings on the eastern site of Victoria Road.

## **Privacy**

The proposed additional height directly contributes to provision of a roof top common open space. The setbacks to 233 Victoria Street and 12 Marlborough Street boundaries are greater than 9 metres.

The common open space area has significant planting along the trafficable rooftop areas including a combination of shrubs and trees thus ensuring privacy for adjoining sites.

The subject site abuts the boundary of 219-225 Victoria Road. The roof top is designed for planting along every boundary of the subject site roof top. The use of the roof top achieves sufficient privacy for the adjoining site (219-225 Victoria Road) if the 219-225 were to be developed at a similar height with a roof top garden.

The proposal ensures generally that sufficient building separations and privacy measures are achieved to the existing residential flat buildings to the west. The proposal also setback habitable rooms from the northern boundary which is shared with McDonalds to protect privacy of the proposed development itself.

Overall, the proposed additional height allows for amenity provision meeting Apartment Design Guide criteria whilst better protecting privacy by allowing sufficient setbacks and providing planter/balustrades which are formed as privacy devices while allowing a density on the site which is commensurate with the LEP standards and the site's strategic location in proximity to public transport and jobs.

## Solar Access

The proposed development is accompanied by shadow analysis diagrams indicating no one property is affected from overshadowing or loss of solar access for a detrimental length of time. The small area of the roof parapet which exceeds the height limit occurs on the northern corner of the site such that it does not create overshadowing on adjoining sites. Similarly, the portions of the roof parapet/balustrade which exceeds the height limit is situated at the north-eastern half of the building and it is furthermore setback from each roof edge so that it too gives rise to no overshadowing impacts.

The property to the rear (12 Marlborough Street) is affected at mid-winter in the early morning hours and the majority of shadowing would occur over the rooftops of existing adjoining properties south of the application site in the afternoon. It is noted a building which complied with the envisaged DCP envelop would have greater impacts on the rear portion and some of the lower levels windows of No. 12 Marlborough Street than the proposed development. The proposed development, in limiting the volume of built form at the lower parts of the building and in effect transferring it to the higher parts of the building, improves solar access to crucial areas of the neighbouring site.

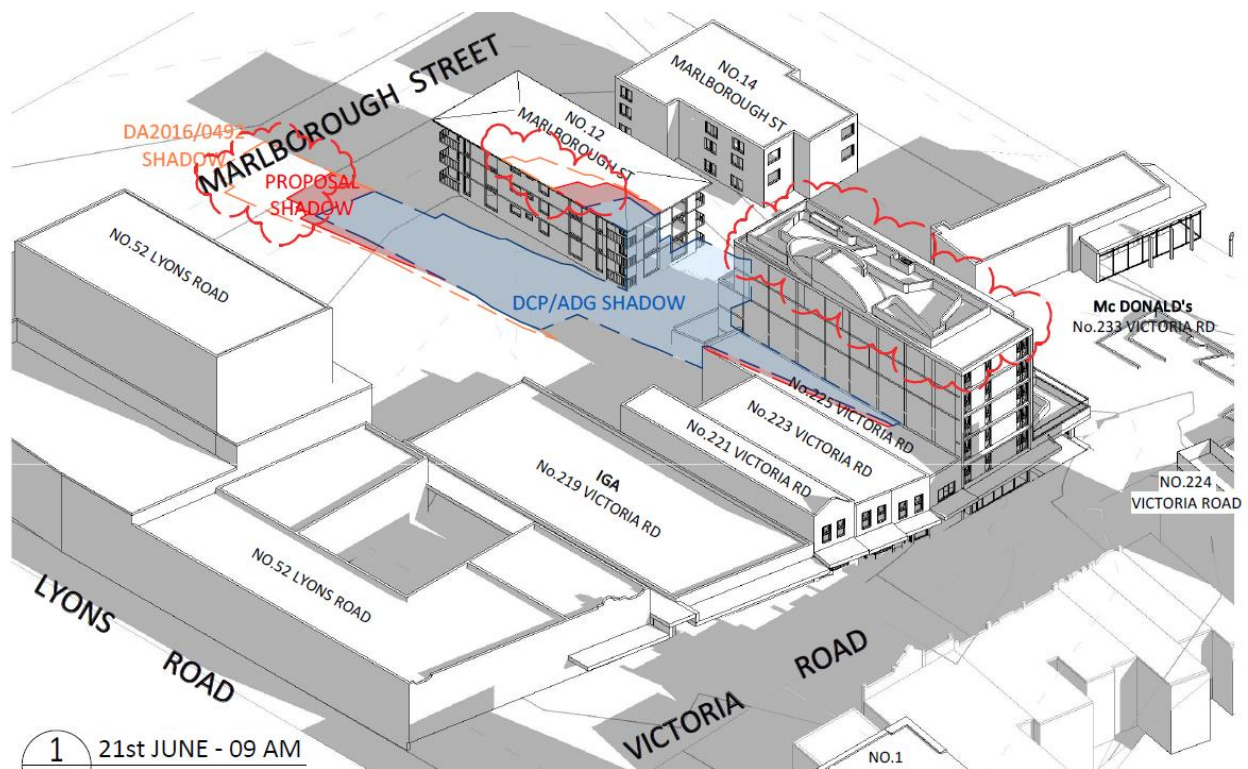


Figure 17: Shadow Diagram 9 a.m (DA-0-902 C)

It is noted that by 10 a.m., the proposed development's shadow is away from the RFB at No 12 and the east façade of No. 12 then enjoys direct solar access until approximately 2 p.m., or at least 4 hours.



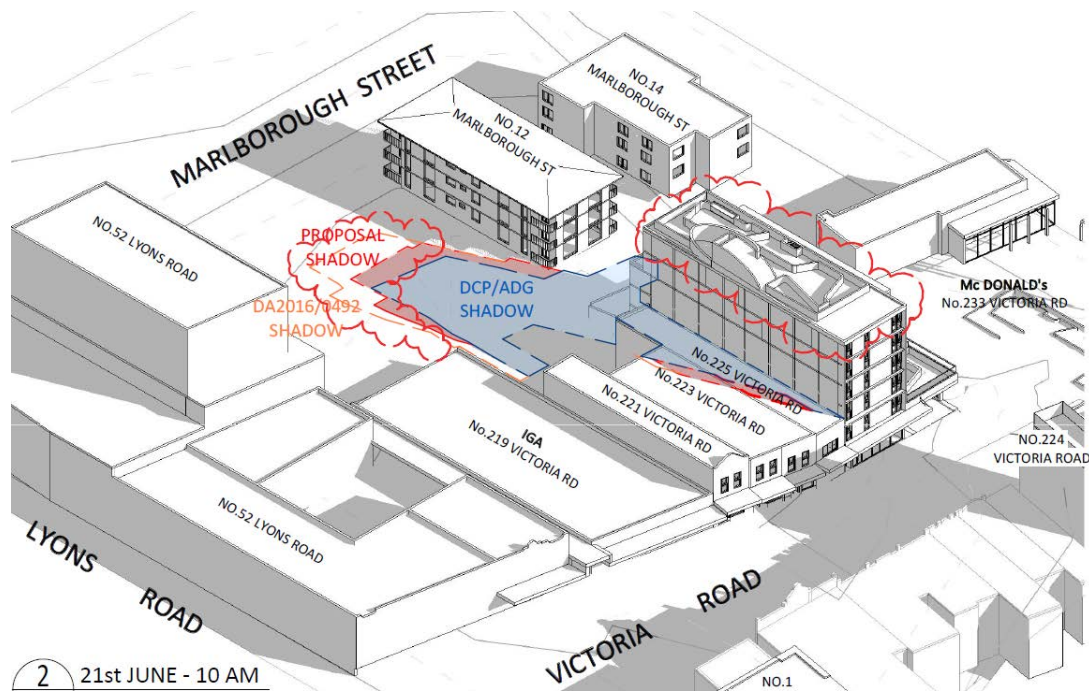


Figure 19: Shadow Diagram 10 a.m. (DA-0-902 C)

It is noted that due to the narrow profile of the building, the shadow cast in the morning hours is narrow and quick moving. For instance, the additional shadow which does occur at 9 a.m. in mid-winter due to increased building height is narrow and falls on the pedestrian footpath of Marlborough Street. The additional shadow at 10 a.m. falls on a surface parking lot but quickly moves away from the parking lot site. By noon., the shadow is largely absorbed into the existing buildings fronting Victoria Road and does not impact on amenity. At 2:00 p.m., the shadow arising from the proposed development falls almost entirely within the shadow cast by existing buildings.

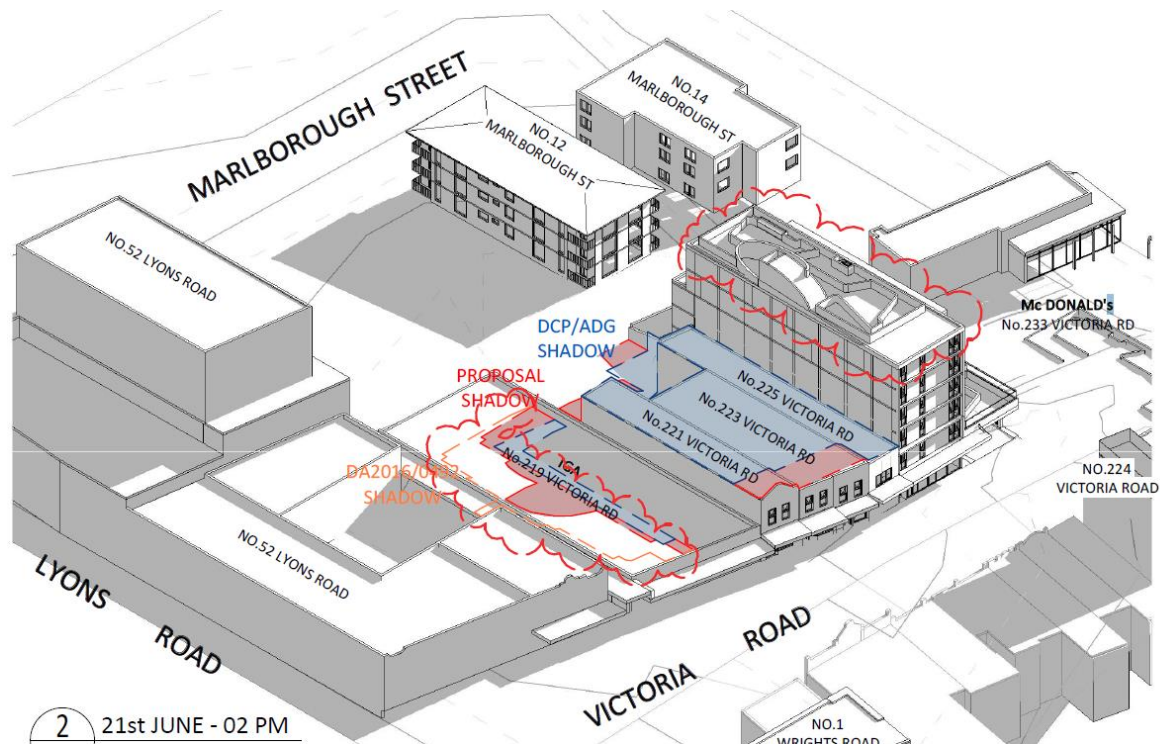


Figure 20: 2 p.m. midwinter shadow (DA-0-903 Rev C)

The height non compliances relating to the building parapets and roof balustrades are inconsequential and any shadow would be cast on the building itself. The architectural roof feature that obscures the lift overrun and stairs would have a marginal impact beyond a DCP/ADG shadow cast and at 10 am would create a minimal shadow over the car park and from 12pm onwards the shadow from the architectural roof feature would only impact the roof tops of low scale buildings to the south.

All in all, the proposed development meets the objective and thus strict compliance with the standard is unnecessary in the circumstances of the case.

## 2.7 Assessment of relevant clauses of Clause 4.6

### Clause 4.6(3)(a)

*“(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*

The planning principle set out in *Wehbe v Pittwater Council* (2007) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This method is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard (“...development standards are not ends in themselves but means of achieving ends”) is undertaken. A further planning principle established by the decision in *Four2Five Pty Ltd v Ashfield Council* (2015) means that merely showing that the proposed development achieves the objectives of the development standard is insufficient to justify that the proposal is unreasonable or unnecessary under an objection under Clause 4.6, (3)(a) specifically. The proposal is to demonstrate that the circumstances under which the variation is considered sufficient on environmental planning grounds is particular to the site. Succinctly, the proposal is to demonstrate that breach of the development standard outweighs compliance.

To this end, a description of how the proposed development meets the objectives of the HOB standard as well as the zone are provided under the assessment of Clause 4.6(3)(b). This also satisfies Clause 4.6 (4)(a)(ii).

### Clause 4.6(3)(b)

*“(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*

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

The proposal satisfies the relevant objectives, demonstrates minor environmental impacts, is suitable for the B4 Mixed Use site and is a project compatible with the future desired character of Drummoyne.



Further, it is evident that the proposed development exhibits a reasonable architectural resolution to the site, whereby the contravention to the HOB development standard achieves better residential amenity than a complying development. Importantly, a complying development would be significantly below the applicable FSR limit, or not be able to achieve SEPP 65/ADG design criteria for setbacks, solar access, cross ventilation and privacy. By establishing the bulk of the building on the southern boundary, outlook is towards the north maximizing mid-winter sun, forming acceptable ADG compliant setbacks and creating a slender building.

It is noted that the LEP is based on a DCP which was formulated before the ADG was in force and which based its envisaged density on smaller lower level and side setbacks (ex. nil side setback for the lower parts of the building and 4.5 m for the upper parts of the building), larger floor plates and lower floor to ceiling heights as well as not having regard to the topography of each particular development site.

The additional height proposed (roof parapet, planter/balustrade) are crucial to ensuring:

- Generous floor-to-floor heights in accordance with ADG guidance and recommendations
- Retail and residential entries which relate to the footpath levels (thus establishing the minimum ground floor level on a sloping site)
- Sufficient side setbacks are achieved to protect the privacy of neighbouring sites.
- A functional, secure, universally accessible common open space with sufficient planter heights to allow for robust on-structure landscape on a development site in a business zone.

Considering the above, the proposal meets the intent of this clause.

**Clause 4.6(4)(a)(i)**

*“(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”*

For the reasons outlined in this report it is considered that the consent authority would be satisfied that the clause 4.6 justification is well founded and satisfies the requirements of clause 4.6(3) as addressed in previous sections of this report.

**Clause 4.6(4)(a)(ii)**

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

*(a) the consent authority is satisfied that:*

*(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"*

For the reasons outlined in this report it is considered that the proposal is within the public interest and is consistent with the land use zone and development standards objectives.

**Clause 4.6(4)(b)**

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

*(b) the concurrence of the Secretary has been obtained.*

It has been assumed that the Secretary has issued the concurrence. In May 2008, the Department of Planning and Environment issued Planning Circular PS08-003 notifying Council's that concurrence should be assumed in respect of varying any development standards under clause 4.6.

Notwithstanding the assumed concurrence, for completeness an assessment of clause 4.6(5) has also been undertaken to demonstrate that all matters under Clause 4.6(5) could be addressed successfully. The assessment is provided below.

**Clause 4.6(5)(a)**

*"(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"*

Contravention of the development standards does not raise any matter of State and regional environmental planning significance except in so much that the proposed development is consistent with the underlying objectives of state and regional strategic planning pertaining to locating housing in areas well serviced by transport and in proximity to employment.

**Clause 4.6(5)(b)**

*"(5) In deciding whether to grant concurrence, the Secretary must consider:*

*(b) the public benefit of maintaining the development standard, and"*

As clearly demonstrated in this report, it is considered that there are sufficient environmental planning grounds for the contravention.

Further, for the reasons set out in this report it was found that in the circumstances of the case strict compliance with the development standards is considered unreasonable and unnecessary.

Moreover, it is clear that strict compliance with the development would not achieve any greater public benefit and that the contravention allows for a valuable common open space to the site adding to the amenity of site.

**Clause 4.6(5)(c)**

(5) In deciding whether to grant concurrence, the Secretary must consider:

*(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

We understand that there are no other matters that require Secretary concurrence.

### 3 Conclusion

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The proposed variation from the LEP HOB development standard of 20m is justified as the proposed development meets the objectives and requirements of Clause 4.6. The proposed development also meets the objectives of the Height of Buildings standard and the land use zone notwithstanding the non-compliance.

The proposed additional building height is directly related to achieving an improved urban outcome which achieves a density consistent with the LEP but also has regard to the Apartment Design Guide. This results in more skilful architectural design resolution and orderly and economic development of the land. The overall greatest height non-compliances are directly linked to the provision of a high amenity roof top common open space. Furthermore, to obscure the lift overrun and stairs an architectural roof feature is designed to obscure these elements and contribute to a high standard of architectural design. The balustrade/planter and parapet non-compliances are to the northern parts of the building and are not a representation of residential floor area but the topography of the site that leads to increased height towards Victoria Road.

The rooftop communal open space provides significant amenity and value to the residents by providing views of the Sydney CBD skyline, creating an outdoor area with good solar access and ensuring the rooftop can achieve sufficient soil depths to support quality landscape. Conversely the slim tall design forms a landmark building for Drummoyne creating a northern bookend to the strategic centre. At the same time, consideration has been given to avoid adverse impacts on neighbouring sites. As discussed, the increased height improves solar access and privacy to neighbouring sites in crucial areas by allowing for generous northern and western setbacks.

The proposal seeks to contribute to Drummoyne by achieving compatibility with the existing and future desired character of the area. It is also noted that the roof height of the proposed development remains below the roof height of other tall buildings in the centre, namely 1 Lyons Road and 2 Marlborough Street (a.k.a. 52 Lyons Road). The proposed number of storeys is less than 2 Marlborough Street.

The proposed building height exceedance accords with orderly and economic development of the land. The variation does not result in any unacceptable level of environmental impact; rather the variation is preferable to a development that would fully comply with the HOB development standard.

In this basis, we request that the consent authority should be satisfied that the request is justified and should approve the proposal.

## Appendix 1 – Assessment of EP&A Act 1979 Objects

Table A - Assessment of EP&A Act 1979 Objects	
Clause	Assessment
<p>"5 Objects</p> <p>The objects of this Act are:</p> <p>(a) to encourage:</p>	
<p>(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,</p>	<p>The proposed development is located in an existing urban area within the Sydney Metropolitan Area. The development would be on a site that is situated adjacent Victoria Road with transport connectivity on a strategic renewal corridor.</p> <p>The area provides a range of services to the surrounding suburbs and meets the NSW Government's strategic housing policy. A commercial element is proposed on the ground floor contributing to social and economic welfare of the area.</p> <p>The proposal would see a contemporary development that is a strategic advancement in line with the principles of the LEP and Drummoyne Village DCP with the built form also having regard to the Apartment Design Guide's rigorous recommendations around ceiling heights, communal open spaces, privacy and universal accessibility.</p> <p>The proposal also offers housing with a variety of Units and Unit sizes to cater to a diversity of residents.</p> <p>Given the above, the proposal is believed to promote a better environment for the area and an improved social and economic outcome for the community.</p>
<p>(ii) the promotion and co-ordination of the orderly and economic use and development of land</p>	<p>The proposal promotes an orderly and economic development of the land. Refer to detailed discussion in report.</p> <p>The proposal would result in a built form that is not inconsistent with the surrounding development context and which also responds to the particular site constraints and the site's unique position at the edge of the village centre.</p>