

# **CLAUSE 4.6 VARIATION REQUEST: HEIGHT OF BUILDINGS**

## **NORTHERN PRECINCT, NEWMARKET RANDWICK**

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# 1. INTRODUCTION

This request has been prepared in support of a development application (DA) for a mixed-use commercial and residential development at 150-162 Barker Street, Randwick. The DA relates to Lots N1 and N2 in the approved Newmarket Green concept master plan and seeks Stage 2 development consent for:

- Demolition of the existing buildings and structures;
- Excavation, remediation and other site preparation works;
- Construction of three buildings (up to 8 storeys) over a single ground level podium on Lot N1 comprising commercial uses and parking on the ground level, 131 residential apartments and a single level of basement parking;
- Construction of a single building (up to 5 storeys) on Lot N2 comprising 30 residential apartments, 15 townhouses and a single level of basement parking; and
- Associated infrastructure and landscaping works.

This request seeks to vary the maximum height of building development standard prescribed for the subject site under Clause 4.3 of the *Randwick Local Environmental Plan (LEP) 2012* (RLEP). The variation request is made pursuant to Clause 4.6 of the RLEP.

This request should be read in conjunction with the Statement of Environmental Effects, Architectural Drawings prepared by SJB Architects, and other supporting documentation submitted with the DA.

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF RLEP

Clause 4.6 of RLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that 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, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a Clause 4.6 written request to justify the contravention of the height development standard in Clause 4.3. The assessment of the proposed variation has been undertaken in accordance with the requirements of the RLEP Clause 4.6 Exceptions to Development Standards.

### 2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales 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 correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

- [13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

- [14] *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
- [15] *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
- [16] *As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*
- [17] *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
- [18] *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- [19] *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
- [20] *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
- [21] *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
- [22] *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*
- [23] *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty*

*Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

- [24] *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]*. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]*.*
- [25] *The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd at [39]*, the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council at [38]*.*
- [26] *The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).*
- [27] *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*
- [28] *The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.*
- [29] *On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41]*.*

## 3. PROPOSED DEVELOPMENT

### 3.1. OVERVIEW

This Clause 4.6 request accompanies a DA for the development of Lots N1 and N2 within the Newmarket Green, Randwick site. Collectively, these lots form the Northern Precinct as approved in the Stage 1 concept master plan.

The DA seeks Stage 2 consent for the mixed-use development of the site including:

- Demolition of the existing buildings and structures;
- Excavation, remediation and other site preparation works;
- Construction of three buildings (up to 8 storeys) over a single ground level podium on Lot N1 comprising commercial uses and parking on the ground level, 131 residential apartments and a single level of basement parking;
- Construction of a single building (up to 5 storeys) on Lot N2 comprising 30 residential apartments, 15 townhouses and a single level of basement parking; and
- Associated infrastructure and landscaping works.

An overview of the key proposed development components is provided in Table 1.

Table 1 – Proposed Development Overview

Component	Lot N1	Lot N2	Total
Lot Area	5,170m <sup>2</sup>	2,967m <sup>2</sup>	8,137m <sup>2</sup>
Gross Floor Area (Residential)	10,733m <sup>2</sup>	5,021m <sup>2</sup>	15,754m <sup>2</sup>
Gross Floor Area (Commercial)	1,329m <sup>2</sup>	N/A	1,329m <sup>2</sup>
Dwellings	131	45	176
One-bedroom apartments	63	5	68
Two-bedroom apartments	60	22	82
Three-bedroom apartments	8	7	15
Three-bedroom townhouses	N/A	11	11
Car Parking	129	57	186
Bicycle Parking	164	49	213

## 3.2. LOT N1

The proposed development on Lot N1 comprises three residential buildings over a ground floor podium level containing commercial uses and car parking. The proposal also includes a single level basement car park.

The proposed residential buildings are summarised as:

- N1.1, an 8-storey building containing 52 apartments (24 x 1-bedroom apartments and 28 x 2-bedroom apartments);
- N1.2, an 8-storey building containing 58 apartments (24 x 1-bedroom apartments, 26 x 2-bedroom apartments and 8 x 3-bedroom apartments); and
- N1.3, a 3-storey building containing 21 apartments (15 x 1-bedroom apartments and 6 x 2-bedroom apartments).

The ground level addresses and activates all four street frontages of the site with commercial land uses. A minimum 5 metre setback is proposed to the Barker Street frontage with capacity for outdoor seating areas associated with the adjoining commercial tenancies. A minimum 3 metre setback is proposed to Young Street, a minimum 2 metre setback proposed to the proposed new street ST2 along the N1 site's southern boundary and a 5-metre setback proposed to the section of the development fronting Jane Street.

The proposed built form is generally consistent with the building envelope approved in the Stage 1 master plan consent with variations to the maximum building height proposed at the upper levels. The proposal includes Buildings N1.1 and N1.2 containing 8 storeys each with maximum proposed height of RL 72.05m AHD. Setbacks from the site boundary as well as upper level setbacks are consistent with the approved master plan building envelopes. A minimum separation of 12m between the buildings is proposed except for the separation between Building N1.1 and N1.2 which is reduced to 7.1m. An artist's impression showing the proposed built form on Lot N1 is provided in Figure 1.

Figure 1 - Perspective View – Lot N1



### 3.3. LOT N2

The proposed development on Lot N2 comprises a 6-storey residential flat building with basement car park and ground level communal open space area. The built form is primarily oriented along the Young Street frontage of the site and towards the adjoining park area with 2 storey structural elements along the northern and southern boundaries of the site containing townhouse style residential accommodation.

The proposed residential flat building on Lot N2 comprises the following:

- 6 storey residential flat building containing entry lobbies and servicing areas on the ground floor;
- 15 two storey townhouse style apartments accessed from the ground level; and
- A mix of 1, 2 and 3-bedroom apartments on Levels 1 – 5.

The proposed development addresses each of the three street frontages of the site with a minimum 3 metre setback from the site boundaries. An increased setback is proposed from the southern boundary (Middle Street frontage) to accommodate the existing trees on the site which are to be retained.

The proposed built form is generally consistent with the building envelope approved in the Stage 1 master plan consent with the 6-storey building not exceeding the approved maximum building height of RL 63.5 AHD. Along the southern and western edges of the site a 2-storey built form is maintained with height not exceeding RL 50.95m AHD. An artist's impression showing the perspective view of the proposed built form on Lot N2 is provided in Figure 2.

Figure 2 – Perspective View – Lot N2



## 4. EXTENT OF CONTRAVENTION

Note: this Clause 4.6 variation request relates to buildings **N1.1** and **N1.2** only. Buildings N1.3 and N2 comply with the approved building heights under the concept master plan (DA-88/2016).

### 4.1. BACKGROUND

The Newmarket Green concept master plan (DA-88/2016) approved an alternative solution to that envisaged in the 'Indicative Concept Plan' contained within the Randwick Development Control Plan (DCP) 2013. The alternative solution achieved the overall vision, objectives, and development principles outlined in the DCP but also provided a more appropriate transition in building bulk and scale, street layout, and public open space arrangement while reducing impacts on adjoining properties.

The key variances from the DCP's 'Indicative Concept Plan' include:

- **Eastern Road:** In order to accommodate the new street on the eastern boundary as recommended by the Design Review Panel, the building proposed to the east of the park has been deleted.
- **Reduced height at the centre of the site:** In the centre of the site, the masterplan proposes lower building heights than those envisaged by the DCP in order to provide a better transition in scale to existing properties in the Struggletown Conservation Area.
- **Additional height fronting Barker Street:** In order to provide greater built form balance with the adjoining hospital precinct and to provide a built form that responds to the required flooding levels, the proposed buildings fronting Barker Street project above the LEP maximum height of 25 metres.
- **Widening of DV1:** In order to provide a greater setback to Paine Reserve and additional on-street visitor parking, the proposed DV1 road has been widened.

To reduce the building bulk and scale at the centre of the Newmarket Green site, adjacent to the Struggletown Heritage Conservation Area and heritage listed Newmarket House and Big Stable building, the concept master plan proposed to exceed the maximum height of building development standard in two locations. These included:

- **Barker Street:** Four eight-storey buildings are proposed fronting Barker Street on Lots E1 and N1; and
- **Lot S3:** Two five-storey buildings are proposed on Lot S3 fronting the new road, ST3.

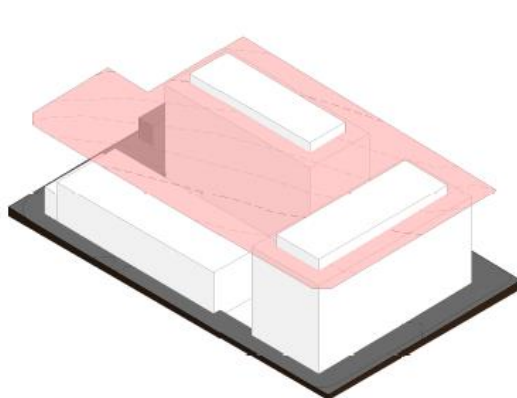
These minor exceedances were complemented by significant reductions in the maximum height of buildings within the centre of the site on Lot N2, E3 and S1, adjacent to the Struggletown Conservation Area, Newmarket House, and the Big Stable buildings.

## 4.2. VARIATION TO HEIGHT

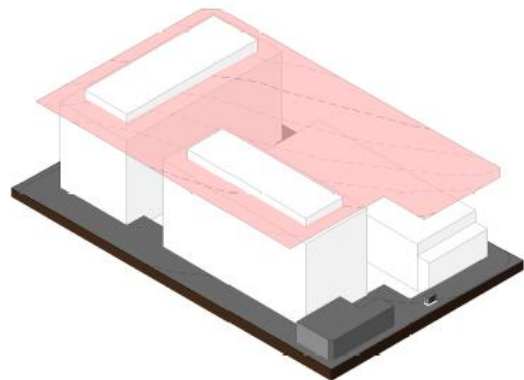
The proposal for Lot N1 is generally consistent with the built form approved under the Newmarket Green concept master plan, which authorises a maximum building height of up to RL 71.35 AHD for Building N1.1 and RL 70.90 metres AHD for building N1.2. These approved building heights are between 2.2 metres and 3.0 metres above the RLEP maximum building height of 25 metres (above existing ground level) applicable to the site.

While the proposal is generally consistent with the approved built form for the site, there are building elements on Level 7 and the roof of the proposed design that protrude beyond the approved building envelopes in the concept master plan. Figure 3 provides a comparison of the proposed design, the approved master plan envelope and the RLEP 25 metre maximum height of building development standard.

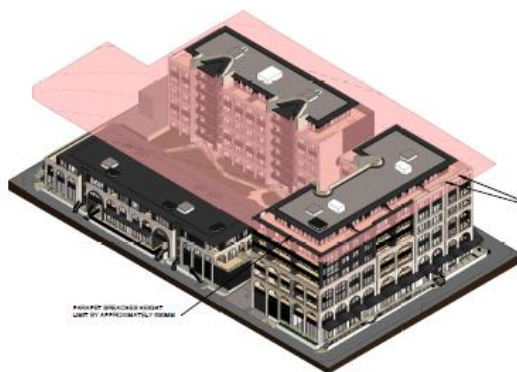
Figure 3 – Proposed Building Height Comparison



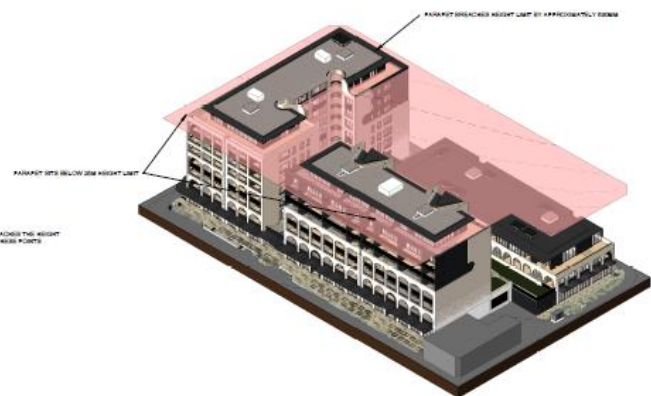
N1 - LEP 25m Height Plane -  
Masterplan - View 1



N1 - LEP 25m Height Plane -  
Masterplan - View 2



N1 - LEP 25m Height Plane -  
Proposed - View 1



N1 - LEP 25m Height Plane -  
Proposed - View 2

The specific elements of the proposed built form that protrude beyond the approved master plan building envelopes are detailed in Table 2.

Table 2 – Building Height Controls Comparison with Approved Master Plan and Subject DA

Building	Max. Height Of Buildings Permitted	Stage 1 Approved Height Of Buildings	Stage 2 Da Proposed Height	Difference	Maximum Height Exceedance
N1.1	25m	8 storeys RL 71.35m AHD ~ 27.05m (lift overrun)	8 storeys RL 72.05m AHD ~ 27.75m (rooftop plant)	700mm	~ 2.7m
N1.2	25m	8 storeys RL 70.9 AHD ~ 28.3m (lift overrun)	8 storeys RL 72.05m AHD ~ 29.45m (rooftop plant)	1.15m	~ 4.45m

The proposed buildings present as a seven-storey form to Barker Street and Young Street with the eighth storey setback. This is clearly depicted in the photomontages at Figure 1 and Figure 4, which demonstrate that the buildings are read as seven-storey forms when viewed from the public domain, due to the setback provided at the uppermost storey. This is consistent with the approach taken on the approved Lot E1 buildings.

Figure 4 – Photomontage of N1 looking south-west from the corner of Barker Street and Young Street



As illustrated on the elevations submitted, the proposed variation to the maximum height of building development standard primarily relates to the upper component of the eight-storey section and the associated plant, lift overruns and roof lights of the building. Due to the topography of the site and its natural fall towards the south east, a small section of the parapet at the southern extremity of proposed Building N1.2 also protrudes beyond the approved building envelope and above the RLEP maximum 25m building height.

Images of the northern and eastern elevations of the proposed development highlighting the sections of the proposed built form that protrude beyond the approved building envelope and above the RLEP maximum 25m building height are provided in Figure 5.

Figure 5 – Elevations showing proposed height breaches



Picture 1 – North Elevation



Picture 2 – East Elevation

To minimise visual impacts of the bulk and scale of the proposed buildings, the eight-storey built form has been deliberately setback in accordance with the approved master plan building envelopes. The additional building elements above the approved envelope that exceed the 25 metre maximum building height do not contribute to any additional, unreasonable overshadowing impacts with the non-compliant portions largely confined to the centre of the buildings. The additional building height proposed will not result in any unreasonable loss of solar access to the adjoining public open space.

As identified in Table 2, Building N1.1 exceeds the 25-metre maximum height of building standard by 2.7m. Building E1.2 exceeds the 25-metre maximum height of building standard by 4.45m. However, it is noted that the additional building height proposed is only 700mm and 1.15m higher than the approved concept master plan building envelope heights for each building respectively.

The exceedance on Buildings N1.1 and N1.2 does not relate to an entire residential level. Rather it primarily relates to the upper section of the centralised eighth residential level, the building parapet, plant and lift overrun. The eighth level is setback from the building parapet which reduces the perceived height of the buildings from the street level and surrounding vantage points.

Strict compliance with the maximum height of building development standard would result in a seven-storey built form fronting Barker Street and Young Street. This would result in a built form that is inconsistent with the existing and future desired character of Barker Street. Importantly, it would result in a built form that is inconsistent with the approved built form on Lot E1 within the Newmarket Green site to the east, which has an approved maximum building height of 71.4m (refer Figure 6).

Figure 6 – Streetscape elevation showing N1 in the context of the approved E1 development



Further, it is noted the adjacent Neuroscience Research Precinct (to the north of the site on the opposite side of Barker Street) contains buildings up to 31.7 metres in height or RL 76.2. The proposed Barker Street buildings will have a maximum RL of 72.05 which is considerably less than the nearby Neuroscience Research Centre building.

## 5. CLAUSE 4.6 VARIATION REQUEST

The following sections of the report provide an assessment of the request to vary the development standard relating to the maximum height of buildings in accordance with Clause 4.6 of RLEP.

### 5.1. KEY QUESTIONS

#### 5.1.1. Is the Planning Control a Development Standard?

The height of buildings prescribed under Clause 4.3 of the RLEP is a development standard capable of being varied under Clause 4.6 of RLEP.

#### 5.1.2. Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6.

#### 5.1.3. What is the Underlying Object or Purpose of the Standard?

The objectives of the height of buildings development standard are as follows:

*(a) to ensure that the size and scale of development is compatible with the desired future character of the locality,*

*(b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,*

*(c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.*

### 5.2. CONSIDERATION

#### 5.2.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater* [2007] NSWLEC 827. These tests are outlined in Section 2.2 of this report (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against the first of the Wehbe tests as set out below.

***Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard***

The proposed development achieves the objectives of the height of buildings standard as outlined in clause 4.3(1) of the RLEP as detailed in Table 3 below.

Table 3 – Demonstrated achievement of the objectives of Clause 4.3 height of buildings standard.

Objective	Assessment
<i>(a) to ensure that the size and scale of development is compatible with the desired future character of the locality.</i>	Chapter E5 of the Randwick DCP 2013 sets out the following vision for the ‘Newmarket Green’ site: <i>Newmarket Green will be a high quality, socially cohesive and sustainable development that celebrates the unique landscape and built heritage of the site, in a manner that supports the growth of Randwick’s Education and Health Specialised Centre, through the delivery of open space, diverse housing and complementary uses.</i>

	<p>Further, the DCP states the following in relation to the 'Barker Street Precinct':</p> <p><i>This is the most urban precinct reflecting the growth and scale of the Randwick Education and Health Specialised Centre.</i></p> <p><i>Focused on Barker Street, non-residential uses at the ground floor should create an active and vibrant interface along the street frontage. Active uses, with shop-fronts and outdoor seating, are encouraged on the ground floor.</i></p> <p><i>Along Barker Street, buildings to a maximum height of 25 metres will provide a balance to the adjacent Hospital and create a prominent building alignment along Barker Street.</i></p> <p>The proposed development has been designed to achieve the desired future character for the Barker Street precinct and will deliver the key elements through the proposed site layout, built form massing and open space provision.</p> <p>The increases in building height have been specifically located to ensure the precinct specific objectives will continue to be met through the response to the surrounding residential interface and the heritage significance of the site and surrounds.</p> <p>The height of buildings proposed are consistent with the adjacent Neuroscience Research Precinct, which contains buildings up to 31.7 metres in height or RL 76.2 AHD. The proposed Barker Street buildings will have a maximum RL of 72.05m AHD.</p> <p>Buildings N1.1 and N1.2 have been designed to reflect the scale of the adjacent development and create a prominent building alignment along Barker Street that is 'in balance' with the Neuroscience building and approved buildings on Lot E1. The urban scale of these buildings will contribute to the directions and expectations of the future of the Randwick Education and Health Specialised Centre.</p> <p>The street wall along Barker Street does not exceed 25 metres, with the built form on the eighth level setback 4 metres from the Barker Street frontage. The proposed building elements above the approved building envelope are located towards the centre of the site and well separated from the Barker Street frontage.</p>
<p><i>(b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item</i></p>	<p>The elements of the built form that exceed the maximum building height are located outside the curtilage of the heritage items and are contained in areas where the additional height will not adversely impact on the heritage values of specific items or conservation areas.</p>

	<p>A Heritage Impact Statement was prepared by OCP Architects in support of the Stage 1 concept master plan. The statement confirmed that the concept master plan had been sympathetically designed to address the significance of the area. OCP Architects have reviewed the Architectural Drawings for Lot N1 and have confirmed that the proposal is generally consistent with the concept master plan and will not impact on the heritage significance of the adjoining conservation area.</p>
<p><i>(c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.</i></p>	<p>The proposed built form, including the building elements that exceed the maximum building height, have been informed by a detailed site context analysis and design assessment. The proposal represents a site-specific design solution that has identified, on balance, the most appropriate development response across the wider Newmarket Green precinct.</p> <p>The scale of the development is complementary to and compatible with the existing and planned future development in the vicinity of the site. The proposed building heights present an appropriate response to the taller building forms on the opposite side of Barker Street, which have a height of approximately 32m. As well as the approved development at Lot E1.</p> <p>The proposed buildings have been designed to limit overshadowing to adjacent properties. The additional built form proposed will result in a minor, but not unreasonable, increase in afternoon overshadowing of the adjoining public open space. Shadow diagrams submitted with the DA identify the overshadowing resulting from the proposed additional built form. These shadow diagrams demonstrate that the additional built form proposed does not result in any unreasonable additional overshadowing when compared to a compliant built form. It is noted, there is a minor increase in overshadowing on the public open space to the south-east from 1-3pm. However, at least 50% of the public open space will continue to receive solar access from 8am to 2pm in mid-winter.</p> <p>The elevation drawings submitted with the DA identify the proposed built form against the approved building envelope and maximum 25m building height. These drawings demonstrate that the proposed increase in building height does not relate to an entire residential level. Rather, the exceedance primarily relates to the upper section of the centralised eighth residential level, the building parapet, plant and lift overrun. Further, the eighth level is setback from the building edges thus reducing the perceived height of the buildings from the street level and surrounding vantage points. Adequate separation distances are provided between buildings which reduces the potential for overlooking and loss of privacy.</p>

In summary, the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

***Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary***

Not relied upon.

***Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable***

Not relied upon.

***Test 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***

Not relied upon.

***Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary***

Not relied upon.

### **5.2.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?**

There are sufficient environmental planning grounds to justify the proposed variations to the development standard, including the following:

- A superior outcome for the community with a preferred built form arrangement that aligns with the vision for the wider Newmarket Green precinct.
- The Statement of Environmental Effects submitted with the DA demonstrates that any impacts associated with the proposed development are acceptable, particularly because there are no significant solar access impacts on neighbouring properties or the public domain resulting from the additional building height.
- The variation does not result in unreasonable adverse amenity impacts on adjacent land.
- The variation does not diminish the development potential of adjacent land.
- The development is compliant with the floor space ratio development standards.
- The scale of development is appropriate given the significance of the site and its context as part of the Randwick Specialised Health and Education Precinct.
- The proposed variation does not impact on the perceived bulk or scale of the development. The buildings have been designed to address the character of the site and the future surrounding land uses.

In conclusion, there are sufficient environmental planning grounds to justify convening the development standard.

### 5.2.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

As detailed in Table 3, the proposed development is consistent with the objectives of the height of buildings development standard. The proposal is also consistent with the B1 Neighbourhood Zone land use objectives that apply to the site under RLEP, as outlined within Table 4.

Table 4 – Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<i>To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.</i>	<p>The proposed development provides small-scale retail uses at the ground floor, originated towards the street frontages.</p> <p>The proposed built form above the specified maximum building height will not affect the proposal's consistency with this objective.</p>
<i>To enable residential development that is well-integrated with, and supports the primary business function of, the zone.</i>	<p>The proposal incorporates a range of apartment types and sizes located above the ground floor retail land uses. The proposed residential development is integrated with the proposed ground floor retail land uses.</p> <p>The proposed built form above the specified maximum building height will not affect the proposal's consistency with this objective.</p>
<i>To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.</i>	<p>The proposed built form has been designed to limit overshadowing to adjacent properties, as well as the future public open space to the south-east. The shadow diagrams submitted with the DA demonstrate that the eight-storey component and additional built form above the maximum building height does not create any discernible impact when compared to a built form that is compliant with the maximum building height or approved building envelope for the site.</p> <p>The proposed building elements above the maximum height of buildings are located towards the centre of the site and are setback from the boundaries of the site. As a result, there are no issues with overlooking or loss of privacy attributed to the non-compliance.</p> <p>The proposed built form above the specified maximum building height will not affect the proposal's consistency with this objective.</p>

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

#### **5.2.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?**

The proposed non-compliance with the height of buildings development standard will not raise any matter of significance for State or Regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

#### **5.2.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?**

The proposed development achieves the objectives of the height of buildings development standard and the land use zoning objectives despite the non-compliance. The strict application of the height control would prevent effective redevelopment of the site to the standard of design excellence which has been achieved through the current proposal.

The proposed variations to the maximum building height result from a revised building envelope as part of a refined design that is generally consistent with the approved concept master plan but includes minor additional building elements outside the approved envelope. These building elements are relatively minor, are located towards the centre of the built form and are well set back from the site boundaries.

Given the nature of the proposed variation and the justification of the impacts provided within this statement and accompanying SEE. The proposal is consistent with the public interest as it promotes the orderly and efficient use of land. Maintaining the development standard would not result in a public benefit.

#### **5.2.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 request prior to granting concurrence, should it be required.

## 6. SUMMARY

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of RLEP. Having regard for the significance of the site, its context, and the vision for the locality, strict compliance with the numerical standard in this instance is both unreasonable and unnecessary for the following reasons:

- The proposed built form has been designed in response to site constraints and provide a consistent built form and massing across the site. The concept master plan envisaged a precinct which achieves design excellence through built form and place making. This has been achieved through use of building scale and arrangement of the public realm as a key feature of the site.
- The proposed building heights within the approved concept master plan respond well to existing and future proposed adjoining properties, particularly those within the 'Struggletown' heritage conservation area and the adjacent Neuroscience Research Precinct. The future desired character of the wider Newmarket Green precinct is achieved through an enhanced pedestrian experience, social cohesion and conservation of the built heritage of the precinct.
- The additional height will not result in any detrimental amenity impacts (overshadowing, views or privacy) to surrounding development when compared to a complying design. Nor will the extent of the non-compliance result in any adverse visual impact in the locality.
- The non-compliance will not hinder the development's ability to satisfy the objectives of the B1 Neighbourhood Centre zone.
- The proposed built form and height is consistent with the desired future character of Newmarket Green as envisaged in the DCP. Furthermore, the proposal seeks to utilise the flexibility afforded to the Consent Authority by Clause 1.6 of DCP Chapter E5 by presenting a reasonable alternative solution that provides an improved public benefit and achieves greater design excellence.

Based on the reasons outlined, it is concluded the request is well founded and, in the circumstances of the case, warrants flexibility in the application of the height of buildings development standard.

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