

Stage 2 Development Application

Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.3 – Height of Buildings

Address: 147-153 Hunter Street, 15 Wolfe Street, 14 Thorn Street, 98-104 and 108-110 King Street, Newcastle

1.0 Introduction

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

1.1 Overview of the Proposal

Redevelopment of the site for a mixed use development incorporating retail uses, shop-top housing, multi dwelling housing apartments, basement car parking, a through-site link, and associated works.

The site occupies the majority of properties within the street block bound by Hunter, King, Wolfe and Thorn Streets. The site slopes steeply from King Street to Hunter Street.

The site is subject to a Concept Approval application (Reference 2017/00701) which applies to most of properties located across four (4) city blocks within the Newcastle East End. The Concept Approval identifies land uses, indicative dwelling and car parking numbers, floor space ratio (FSR) distribution across each block, heritage elements to be retained, and building envelopes. It does not allow for any building works as this is subject to successive Development Applications (DAs) for each stage. This proposal represents Stage 2 of the four (4) stages of the Concept Approval.

The proposal retains the following heritage buildings and elements consistent with the Concept Approval, and includes alterations and additions to the elements, and their adaptive reuse:

- The heritage listed former Lyrique Theatre and Masonic Hall;
- The heritage listed building at 98-100 King Street;
- Terraces at 104, and 108-110 King Street. These buildings are not heritage listed, but have been identified as contributory buildings within the heritage conservation area; and
- The façades of the former Soul Pattinson building and former Royal Exchange Building. These buildings are not heritage listed but have been identified as contributory buildings within the conservation area.

The proposal incorporates three (3) built form elements: A Northern Building which incorporates the facades of the former Royal Exchange and Soul Pattinson buildings; a Southern Building which incorporates the adaptively reused former Lyrique Theatre and Masonic Hall, and the King Street dwellings

including the existing terrace buildings on King Street. The proposal includes the introduction of a new east-west laneway between the Northern and Southern Building, linking Wolfe and Thorn Streets. The proposed non-compliances with the height standard only apply to portions of the Northern and Southern Buildings.

2.0 Description of the planning instrument, development standard and proposed variation

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

The Newcastle Local Environmental Plan (NLEP) 2012.

2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

2.3 What are the Objectives of the zone?

The objectives of the zone are:

- 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; and
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

2.4 What is the development standard being varied?

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

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

No, the height of buildings development standard is a numerical control.

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

The development standard is listed under Clause 4.3 of NLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in Subclause 4.3(1)(a) and (b), and are:

- “(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
- (b) to allow reasonable daylight access to all developments and the public domain.”*

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

Maximum building heights are variable across the site are:

- A height limit of RL26 applies to northern portion of the site fronting Hunter, Wolfe and Thorn Streets;
- A height limit of RL30 applies to the central portion of the site fronting Wolfe Street and Thorn Streets;
- A 24m height control applies to the south of RL30 height limit, in the general location of the proposed through-site link between Wolfe and Thorn Streets; and
- A height limit of RL24 applies to the southern part of the site fronting Wolfe, Thorn and King Streets.

Height of Buildings Map -
Sheet HOB_004G

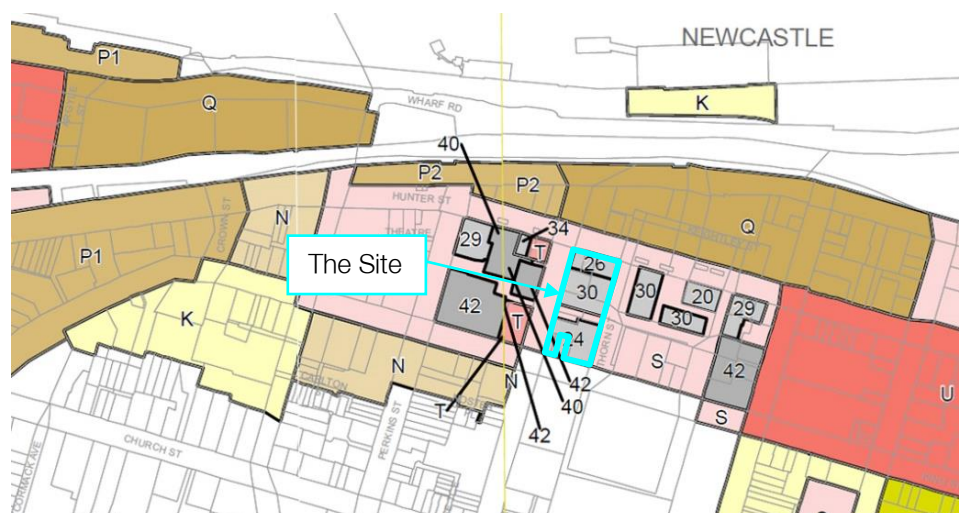


Figure 1: Extract of NLEP 2012 Height of Building Map

The height of building standards came into effect on 28 March 2018. These height standards enshrined the building envelopes in the approved Concept Plan into a statutory framework, effectively abandoning the height controls that historically applied to the site, which came into effect as a result of a detailed Newcastle Urban Renewal Strategy

Importantly a 10% height bonus is available under Subclause 7.5(6) of the NLEP 2012 City Centre design excellence provisions, where the building has been reviewed by a design review panel. While the proposal has not expressly been reviewed by a design panel specifically formed for the purposes of Subclause 7.5(6), the DA has been the subject of a rigorous design excellence process, and was reviewed by Newcastle Council's Urban Design Consultative Group (UDCG). The proposal was presented to the UDCG on five (5) separate occasions in accordance with the Design Excellence Strategy adopted for the site. In essence, for all intents and purpose, the proposal qualifies for the 10% height bonus.

2.9 What is the proposed numeric value of the development standard in the development application and what is the percentage variation (between the proposal and the environmental planning instrument)?

Table 1 illustrates the proposed numeric breaches and the percentage of variation to the development standards.

The height standards and the extent of the breach are identified in relation to each of the built form elements. In addition, if a 10% height bonus is applied, the applicable standards and extent of breaches are shown in brackets.

Diagrams illustrating the proposed height non-compliances, as well as the approved Concept DA envelopes, are included at Attachment 1.

Proposed Building	Control	Proposed Height	Compliance	Variation	% Variation	Variation + 10% bonus
Northern Building	RL26 (RL28.6)	RL29.2m (parapet)	No	3.2m (0.6m)	12%	2%
	RL26 (RL28.6)	Above Royal Exchange: RL26.1	No	0.1m	0.4%	N/A (complies)
	RL26 (RL28.6)	Above Soul Pattinson: RL26.925	No	0.925m	3.6%	N/A (complies)

Proposed Building	Control	Proposed Height	Compliance	Variation	% Variation	Variation + 10% bonus
	RL26 (RL28.6)	RL29.734 roof terrace edge RL31.620 rooftop terrace canopy	No	3.734m – 5.62m (1.134 – 3.02m)	14% – 22%	4% – 11%
	RL26 (RL28.6)	RL33.600 rooftop terrace lift overrun	No	7.6m (5m)	29%	17.5%
	RL30	RL29.2m parapet	Yes	N/A	N/A	N/A (complies)
	RL30 (RL33.0)	RL30.70 roof plant screens and lift overrun to Level 7	No	0.70m (-2.3m)	2%	N/A (complies)
	RL30 (RL33.0)	RL30.650 Lift overrun to Level 7	No	0.650m (-2.35m)	2%	N/A (complies)
	RL30 (RL33.0)	RL31.450 Rooftop plant	No	1.45m (-1.45m)	5%	N/A (complies)
Southern Building (Lyrique Masonic)	24m (26.4m)	RL27.101 Parapet 19.925m to Wolfe St (max.) 21.78m Thorn St (max.)	Yes	N/A	N/A	N/A (complies)
	RL24 (RL26.4)	RL27.101 To parapet (Level 6)	No	3.101m (0.7m)	13%	3%
	RL24 (RL26.4)	RL29.335 Ridge Level 7	No	5.335m (2.935)	22%	11%
	RL24 (RL26.4)	RL30.100 Lift overrun and rooftop plant	No	6.1m (3.7m)	25%	14%
King Street Dwellings	RL24	RL20.309 – RL24.00 (existing ridge height)	Yes	N/A	N/A	N/A

Table1: Numeric variation to development standard

For the Northern Building, the most significant breaches are attributed to the rooftop communal terrace, lift overrun to the roof terrace, plant areas and associated screening located within the RL26 height control plane. Likewise, for the Southern Building, the greatest variations to the RL24 height plane are attributed to the rooftop plant and lift overrun.

The King Street Dwellings maintain the two (2) storey scale of the existing terrace buildings, and are significantly under the RL24 height plane.

It is apparent that the extent of the height variations is significantly reduced if a 10% height bonus is applied.

3.0 Assessment of the Proposed Variation

3.1 Overview

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

“4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:*
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the consent authority is satisfied that:*
 - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.”*

This request has been prepared having regard to the authorities on clause 4.6, contained in the following guideline judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1');*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ('Four2Five No 2');*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3').*
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*

- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*; and
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*.

3.2 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

3.2.1 *The objectives of the development standard can be achieved notwithstanding non-compliance with the development standard*

“(a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,”

The site is within the Newcastle City Centre and is an appropriate location for increased height. The heights proposed remain consistent with the desired built form and are compatible with the scale and form of development in the Newcastle East End. The overall development will result in a positive contribution towards the built form as it provides a mechanism to adapt and reuse important heritage buildings and introduce appropriate scaled buildings to the centre. The protection of the King Street group of buildings and the retention of the original scale to King Street results in a positive contribution to the King Street streetscape.

The protection of views to and from the Cathedral, and maintaining the prominence of the Cathedral in the city skyline, also represents a positive contribution to the built form.

The development provides for the reintroduction of the fine grain of building that was evident in the earlier development of Newcastle. This is achieved through the introduction of a laneway between the North and South Buildings and through the retention of buildings facades that contribute to the streetscape and heritage conservation area.

“(b) to allow reasonable daylight access to all developments and the public domain.”

The proposed variation in height does not result in unreasonable shadow impacts to the important public domain of the Hunter Street Mall or Cathedral Park. The built form locations have been carefully considered to maximise daylight access. Solar access to future development has been demonstrated as capable of complying with State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65).

As detailed in the statement supporting the amended DA, the proposal allows reasonable levels of daylight to the adjacent development and to the buildings within the proposal.

3.2.2 *Is the underlying objective or purpose of the standard not relevant to the development?*

The underlying objective or purpose of the building height standard is to control building height in order to ensure development makes a positive contribution to the desired built form and is consistent with the hierarchy of centres across the Newcastle local government area (LGA). The other objective is to ensure reasonable daylight access to all development and the public domain within and around the site. The underlying objective or purpose of the standard are relevant to the proposal and addressed above.

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

The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

However, the proposed building height maintains the following planning outcomes:

- Facilitates the delivery of a finer pedestrian grain;
- Respects the heritage buildings and the heritage elements that need to be protected;

- Maintains key view corridors to and from the Cathedral and is subservient to the Cathedral, and does not dominate the views available from public places;
- Delivers a mix of land uses; and
- Facilitates the adaptive reuse of challenging heritage buildings.

The proposed built form results in a compatible scale relationship to the existing and emerging character of the Newcastle East End. The non-compliances of Stage 2 result in a built form that better responds to the heritage fabric and streetscape context, particularly in the adaptive reuse of a significant heritage listed former Lyrique Theatre/Masonic Hall.

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

The development standard has not been abandoned.

3.2.5 *Is the zoning of the land unreasonable or inappropriate?*

The recent amendments to NLEP 2012 resulted in height controls being substantially reduced over the Lyrique Theatre/Masonic Hall buildings and the King Street streetscape.

These amendments essentially enshrined, in a statutory sense, the envelopes included in a Staged Concept DA approved in December 2017.

This approach to strategic planning and imposition of heights in this regard, is contrary to sound planning practice and has failed to recognise the fluidity of a Concept DA that will be delivered over a five (5) to 10 year period.

Importantly, the circumstances of the Concept DA did not, at that point in time, contemplate development above the heritage buildings, principally as the conservation management plans were not completed and the height controls that were in place at that time, could reasonably facilitate some development with any future application.

While the zoning is appropriate, the controls as now adopted are inappropriate for the site as they have sought to straight jacket development of the site.

3.2.6 *Other reasons*

Consistency with the Objectives of the Zone

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

“(a) To provide a mixture of compatible land uses.”

The proposed development provides a mix and range of compatible land uses.

“(b) 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 provides for retail and residential uses in an integrated way in a highly accessible location. The proximity of residential uses to employment will assist in maximising walking and cycling opportunities.

“(c) To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.”

The mix of land use will support the vitality of the centre by providing opportunities for the centre to grow. The scale of offering is not of a magnitude that would impact upon the viability of other centres.

Impacts of the Proposal

As detailed below, the proposal does not result in unreasonable amenity impacts, notwithstanding the height breaches.

Privacy

The proposal does not give rise to unreasonable privacy impacts within the site itself or to surrounding development.

The living areas and balconies of all apartments within the Northern Building are orientated to the street. This provides adequate separation distances between the proposed balconies and living areas and adjacent development to ensure reasonable levels of privacy are maintained. Privacy impacts between the eastern and western wings of the Northern Building are mitigated by orientating the living areas and balconies of all apartments to Wolfe or Thorn Streets. In addition, full height angled screening is provided to the internal facing elevations to avoid direct views between the bedroom of opposing apartments.

Again, as the apartments within the Northern Building are orientated towards Wolfe and Thorn Street, there are no openings in the southern elevation facing the Southern Building, which eliminates opportunities for direct views or overlooking between the apartments of the two (2) buildings.

The opening within the southern elevation of Southern Building are limited to two bedroom windows with a sill height of 1.6m. This mitigates opportunities for overlooking and direct views between the Southern Building and the King Street terraces, as well as to 106 King Street, which does not form part of the site and is occupied by a medical practice.

Solar Access

As identified in the statement of Environmental Effects (SEE) and Amended Stage 2 DA Report and supporting shadow analysis prepared by CKDS, the proposal does not have unreasonable overshadowing impacts as a result of the breaches in height. In summary, the analysis of shadow impacts of the proposal indicates the following:

- The Cathedral Park is not currently impacted by the proposal. The additional overshadowing is limited to a small section of the footpath and road in front of the Cathedral park;
- There is no additional overshadowing to surrounding residential properties, from the approved Concept DA or the existing LEP controls.
- Hunter Street Mall, which is located to the north of the site, is not affected by the proposal and continues to be predominately overshadowed between 9:00am and 3:00pm; and
- The majority of additional overshadowing falls on the surrounding roads and on the site itself.

The following description of the overshadowing impacts on site associated with the height-non-compliances for each of the Northern and Southern Buildings is described below.

1. Northern Building

Height Control RL26 (RL28.6 including 10% Design Excellence Bonus)

The front section of the Northern Building exceeds the base RL26 height control. During the morning the shadows from the non-compliant part of the building fall on the roof of the level 6 addition above the former Royal Exchange. The overshadowing does not preclude the living areas

and balconies of the apartments on level 6 from receiving in excess of the 2 hours sunlight identified in the ADG design criteria.

Between midday and 3pm most of the overshadowing falls within the shadow cast by the taller elements of the building located within the RL30 height control. There is some additional overshadowing to Thorn Street and the commercial building on the opposite side of Thorn Street.

Height Control RL30 (RL33 including 10% Design Excellence Bonus)

Parts of the rear section of the Northern Building exceeds the base RL30 height control. These non-compliances are attributed to the roof-top plant and lift overrun. The analysis indicates that the additional shadows cast from the roof-top plant and lift overruns fall onto the roof or within the shadows cast by the compliant parts of the building. It is noted that these elements of the building comply with the design excellence building height control of RL33.

2. Southern Building

Parts of the Southern Building exceeds the RL24 height control. The breaches relate to parts of the additions above the former Lyrique Theatre and Masonic Hall.

The shadow diagrams indicate that the additional shadows from the existing and the approved Concept Plan fall onto the roof onto Wolfe Street, King Street and Thorn Street, the Council car park and the roof-tops of the King Street terraces.

CKDS have provided a detailed analysis of the overshadowing impacts of the Southern Building on the King Street terraces within the development, which are to be adaptively reused for residential purposes. The shadow analysis includes 106 King Street, which does not form part of the site, and is currently occupied by a doctor's surgery. A detailed discussion of the existing and proposed shadow impacts is provided in the Amended DA Report. In summary, the analysis undertaken by CKDS demonstrates the following:

- The courtyard and northern elevation of 106 King Street is over shadowed by the existing development on site. The site continues to be overshadowed by the proposal.
- The proposal has a negligible impact on the solar access to 104 and 108 King Street as the windows and rear courtyards to the properties are largely in shadow.
- The proposal reduces solar access to 98-100 King Street. The increased overshadowing is attributed to the infill addition to the north, which complies with the height controls applying under the NLEP. It is not attributed to the height non-compliances of the additions over the former Lyrique and Masonic Theatre.
- Solar access to 110 King Street will be improved under the proposal a result increased windows on the western elevation.

Overall the height non-compliances on the Southern Building does not generate unreasonable additional overshadowing impacts on site or to the adjacent development.

Heritage Impacts

The site is located within a heritage conservation area and accommodated heritage items as well as contributory buildings. As outlined in Section 3.3.1 below, the proposal provides for the retention, restoration and adaptive reuse of significant heritage buildings and fabric across the site.

The Heritage Impact Statement (HIS) submitted with the DA and the Heritage Response provided within the amended DA submission, both prepared by City Plan Heritage, conclude that the proposal does not have any adverse heritage impacts on the significance of the heritage fabric on site or the conservation area.

Views

As detailed in the view impact assessment included in the SEE and Amended DA report and supporting View Analysis – Stage 2 prepared by SJB Architects, the proposal does not have unreasonable view impacts.

The View Analysis provides a comparison of the view impacts resulting from the approved building envelopes under the approved Concept DA, which informed the height standards, and the additional or altered view impacts arising from this Stage 2 proposal.

Section 6.01 Locality Provisions of the NDCP identifies the following key public views and vistas within the city centre that are required to be protected. Several of the views will not be altered as a result of the proposal.

- Vistas towards the harbour;
 - Perkins Street corner of King Street;
 - Wolfe Street corner of King Street; and
 - King Street corner Newcomen Street.
- Vistas terminating at the Christ Church Cathedral:
 - Hunter Street Mall corner Morgan Street; and
 - Wharf Road corner of Market Street.
- Vistas terminating in built form/landmark:
 - From Stockton Ferry Wharf towards the city and Cathedral; and
 - From Fort Scratchley towards city centre and Cathedral.

The view impacts are summarised below.

Harbour Views

- Harbour views along Perkins and Newcomen Street will not be impacted by the proposal;
- The proposal will have a negligible impact on the views to the harbour along Wolfe Street. Importantly, the sections of both the Northern and Southern Buildings that breach the height controls are setback from Wolfe Street and do not reduce the view corridor towards the harbour; and
- There are no north-south views to the harbour from Thorn Street (near King Street) due to the obstruction by Hunter Mall Chambers building located at 175 Scott Street.

Views of the Christ Church Cathedral

- Distant vistas to the Cathedral from Stockton and Fort Scratchley will be preserved. The distant vistas from Stockton and Fort Scratchley included in the View Analysis show the proposed new buildings sit below the sight lines to the Cathedral, which remains the tallest and most prominent feature. The Northern building has a maximum of RL33.6 to the roof terrace lift overrun located on the Northern Building and a predominant roof height of RL29.7. The Southern Building sits below the Northern Building, with a maximum height of RL 30.100 to the lift overrun and ridge height of RL29.335. The proposed buildings are located well below the ridge of the Cathedral, which is at RL58.6 and sit comfortably within the existing city skyline view;
- Key views of the Cathedral identified in the DCP from street public spaces, including from Hunter Street Mall at corner of Morgan Street and the Wharf Road and Market Street, will not be impacted by the proposal; and
- There will be some additional view impacts on views towards Cathedral from parts of the foreshore park and Queen Street Jetty Wharf as illustrated within Figures 2 and 3. This is attributed to the front portion of the Northern Building of the building that exceeds the RL26 height control.

The additional view impacts are considered acceptable given:

- The additional view impacts are confined to the north west of the site which is not identified as key views or vistas in the NDCP; and
- The site located directly to the north on the corner of Wolfe and Scott Streets, known as 1 Wolfe Street, is subject to a 20m building height limit under NLEP 2012. Views of the Cathedral from these locations would be obscured if the building at 1 Wolfe Street was redeveloped in accordance with the allowable 20m height limit applying. That is, the view loss arising from the proposal is commensurate with the view loss that would result from development of the adjacent sites under the current NLEP 20m controls.



Figure 1: View of Cathedral from Western End of Queens Wharf Ferry Jetty (yellow denotes 20m building height control applying to 1 Wolfe Street to the north)



Figure 2: View of Cathedral from within Foreshore Park (yellow denotes 20m building height control applying to 1 Wolfe Street to the north)

View from Christ Church Cathedral

The lower levels of the Cathedral Gardens feature views across the roofscape of the East End towards the harbour and Stockton. As illustrated in the view analysis the proposed Northern and Southern Buildings will be visible elements in the views from the gardens to the north and north west. The proposed buildings will also be viewed alongside and against the backdrop of the approved buildings on Stage 1.

Impacts on the views from the Cathedral Garden attributed to the non-compliances in the building height controls, include the minor obstruction of the sky and a reduction in the view of the harbour above the approved envelope of the Concept DA. The small reduction in the harbour view is attributed to the plant and lift overrun on the Northern Building.

While the proposed building will be visible from the Cathedral Gardens, when considered in the context of an evolving city scale, the buildings envelopes and height proposed are considered appropriate.

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

3.3.1 Circumstances of the Site

Heritage Items and Conservation

The variation to controls is directly influenced by the important restoration, retention and adaptive reuse of the heritage buildings and important heritage fabric.

The former Masonic Hall, Lyrique Theatre, and 98-100 (corner of King and Hunter Street) are listed heritage items under NLEP 2012.

The King Street terraces (104, 108-110) and the former Royal Exchange are identified as contributory buildings under the NDCP. In addition, the Concept Approval stipulates the retention of the façade of the former Soul Pattinsons building on Hunter Street.

The amount and complexity of heritage buildings and fabric requires a site specific response. In this regard the proposed development has been guided by a Conservation Management Plan (CMP) prepared by City Plan Heritage, and a design excellence process undertaken in close consultation with Newcastle Council's UDCG. This process had not been carried out as part of the Concept DA, and is further reason why the imposition of the envelopes from the Concept DA as development standards undermines the important evolution of design that has been pursued.

The alterations and additions to the heritage buildings and elements across the site responds to the qualities of the heritage fabric and buildings, and streetscape context, and the site specific outcomes of a CMP. While the height controls have been considered, they have not been solely relied on to inform the most appropriate outcomes for the heritage items and elements.

This is evident with the heritage listed 98-100 King Street and the contributory King Street terraces, the scale of which has been maintained in recognition of the importance of the group and their positive contribution to King Street. As such this part of the proposal complies with, and is less than the height controls as this provides an appropriate built form and massing that protects and enhances the heritage qualities and significance of these buildings and their setting within King Street.

Likewise, with the Northern Building a modest addition is proposed above the former Royal Exchange Hotel, to ensure the scale and landmark qualities of the building are maintained and the prominence of the splayed decorative corner detailing is retained. At RL26.1, the height of the addition is consistent with the Concept DA, but exceeds the height control by 0.1m.

The restoration, refurbishment and adaptive reuse of the former Lyrique Theatre/Masonic Hall and the opportunity for these buildings to again play an active role in the revitalisation and activation of the

Newcastle East End precinct, was one of the fundamental drivers in the design outcomes for the site. While the additions over these buildings exceed the height controls it provides an appropriate built form, that responds to the CMP and site context:

- Setting back the additions from the heritage elevation on Wolfe and Thorn Streets and reducing the footprint of the upper level, ensures the heritage buildings remain the dominant elements from both streets.
- The ground and mezzanine level of the Masonic Hall/Lyrique will be retained for non-residential purposes. The northern elevation will be exposed to provide an entrance from the new laneway to minimise intervention into the original entrance from Wolfe Street and maximise access to the original interiors of the theatre, which will be conserved and celebrated, including the stage.

In this case, the provision of Clause 5.10(10) of NLEP 2012 provides for a degree of flexibility and arguably should be given greater weight than development standards not informed by a detailed design and conservation process. In this respect:

- The conservation and adaptive reuse of the heritage items would be facilitated by the granting of a consent;
- The development is consistent with the CMP prepared for the site and the development includes the conservation works included in the CMP;
- As detailed in the Heritage Response prepared by City Plan, which supplements the Heritage Impact Statement submitted with the DA, the proposed development does not adversely impact on the heritage significance of the item or its setting and maintains and enhances the amenity of the surrounding area.

Siting and orientation

The extent, diversity and complexity of heritage fabric requiring retention and adaptive reuse, ultimately impacts on the potential siting and configuration of buildings on the site. This, coupled with the need to maximise the performance of the development against SEPP 65 and Apartment Design Guide (ADG), restricts the potential locations for massing across the site. This is one factor that has influenced the location of additional massing within the front portion of the Northern Building. While this exceeds the height controls, it was considered appropriate given it does not give rise to unreasonable impacts as outlined above.

The delivery of a new laneway/through-site link between Wolfe and Thorn Streets has also impacted on the siting of built form. The laneway is an integral part of the Concept Approval, which seeks to re-establish part of the historic, fine grain street network of Newcastle that has been lost with development over the years. The laneway, which includes a wider forecourt to the entry of the restored former Lyrique Theatre/Masonic Hall, further constrains opportunities to locate built form at grade. The laneway represents around 450m² of land which could reasonably accommodate a building to a height of 24m. However, the provision of the laneway and redistribution of this built form provide a more responsive urban outcome by reintroducing linkages and opening up the Lyrique Theatre to a public space.

Topography

The site slopes steeply from King Street to the south to Hunter Street in north. As a result of this slope the site sits within an important view corridors to and from the Cathedral. The slope of the site, and the protection of view corridors requires a site specific response to ensure appropriate scale relationships for the resultant built form. The location of the built form massing, an in part the height variations, are a response to the sloping topography.

3.3.2 Context and Character

The site is located within a B4 Mixed Use zone within the Newcastle East End. This requires that non-residential uses occupy most of the ground plane to facilitate the ongoing revitalisation and renewal of the East End as a shopping and entertainment destination. The provision of a secondary laneway, that is also activated by non-residential uses within adaptively reused heritage fabric, is integral to this revitalisation.

These factors restrict residential uses at ground level and necessities maximising opportunities for accommodating residential above ground.

The character and identity of the East End is tied closely to the quality and the intact nature of a range of heritage and contributory buildings. This is evidenced in the retention of the built form of the Lyrique Theatre/Masonic Hall building and the preservation of the King Street group of terraces and their streetscape presentation. Maintaining and reinforcing this character, constrains the manner in which development can occur over the site, as close to half the site is occupied by heritage or contributory buildings. Ensuring the proper retention and restoration of these elements that characterise the East End, requires appropriate additions above the heritage buildings themselves, as is the case of the former Lyrique/Masonic, as well as additional massing within the front portion of the Northern Building.

The scale of the proposed development, while in part exceeding the height controls, is consistent with the desired scale of the surrounding development and streetscape. The planning framework provides for a variety of building heights within a city centre as opposed to a uniform height. This means that there will be taller buildings juxtaposed against shorter buildings. This condition is typically seen in the evolution of an urban area over extended periods. It is a relationship that is evident within surrounding development, including the historic residential apartment block “Segenhoe”. The increased height of the Southern Building, alongside the lower scale King Street terraces is consistent with this character.

The height non-compliances over the front portion of the Northern Building, equates to an additional storey, plus lift overrun and rooftop terrace canopy. However, this height is not out of character with existing or desired future scale of development on the surrounding heights. The height variation is maintained as the building steps down over the Royal Exchange and Soul Pattison building façades.

It is noted that the density and built form anticipated by the FSR standard, would in fact result in a massing of building potentially greater than that proposed. Notably, the proposed FSR of 3.55:1 is below the maximum allowable FSR of 4:1.

3.3.3 Policy Context

Design Excellence Process

The site is identified as a Key Site under subclause 7.5(4) of NLEP 2012. This requires a design competition or an exemption to a design competition issued by the Director General (or their delegate). This design excellence process allows a consent authority to grant a 10% height or FSR bonus in accordance with Clause 7.5(6). The Office of the NSW Government Architect (GANSW) as the delegate of the Director General, granted an exemption to the requirement for a design competition for this DA, subject to an approved Design Excellence Strategy.

The GANSW nominated the Council’s UDCG as the Design Review Panel for design excellence process. Five (5) meetings were held with the UDCG in preparing the DA, and one meeting following the lodgement of the DA.

The design of the proposal evolved through this process in response to feedback from the UDCG, as well as ongoing review and analysis of the design team. This process involved consideration of a range of built form and massing options across the site, which ultimately culminated in a preferred option that formed the basis of the proposal. The height breaches were reviewed by the UDCG and were evaluated within the context of:

- The heritage significance and values of the site and heritage conversation area;
- The streetscape and built form setting of the site;
- The heritage buildings, and other site features that constrain the development of the site;
- Desired future character and the of the East End, in terms of built form, but also its revitalisation as retail and entertainment hub;
- Ensuring the residential development achieves a high level amenity in line with SEPP 65 and the ADG; and

- The potential impacts, including impacts on views to and from the Cathedral.

As a result of this process, the proposal is considered to exhibit design excellence and satisfies the design excellence criteria contained within Clause 7.5 of NLEP 2012. The breaches on Block 2 have arisen as part of the evolution of design through an endorsed design excellence framework.

3.3.4 The Public Interest

The proposal facilitates the protection, adaptation, and reuse of important heritage buildings and elements on site, which are significant individually, as well as for their contribution to the heritage conservation area, and more broadly, the history of Newcastle.

The proposal also delivers a publicly accessible laneway that seeks to reinstate part of the historic, finer grain of street network while at the same enhancing the activation of the ground plane to contribute to the revitalisation of the Hunter Street Mall and wider Newcastle East End precinct.

The provision of the laneway and the protection and adaptive reuse of heritage buildings and fabric are in the public interest, as they will benefit the wider community.

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

3.4 Matters for the Consent Authority to Consider

Subclause 4.6(4) sets out matters that the matters that the consent authority must be satisfied, in granting consent to a development that breaches a development standard. These matters are briefly outlined below.

3.4.1 Has the written request adequately addressed subclause 4.6(3)

The matters required to be addressed are detailed at Section 3.2 and 3.3. It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

3.4.2 The proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone

As detailed in Section 3.2 above, the proposal is considered to be in the public interest as it is consistent with the objectives of the building height standard and the objectives of the B4 Mixed Use zone.

3.4.3 Concurrence of the Secretary has been obtained

In granting concurrence, the consent authority is required to consider the following matters.

- “(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning*
- (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”*

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions.

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. For reasons outlined in Section 3.2 and 3.3 in the specific circumstances of this case, there is no public benefit in maintaining the development standard.

Regarding other matters required to be taken into consideration, it is noted that the concurrence of the Secretary has been assumed.

4.0 Conclusion

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

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

The Stage 2 DA results in an appropriate built form, at the street frontages and at the interface with adjoining development. The proposed buildings result in a height and scale relationship compatible with the existing and emerging character of the area.

In the circumstances of the case, the land:

- Includes a number of heritage items and elements and is within the vicinity of many more;
- Is located within important view corridors to and from the Cathedral; and
- Is steeply sloping.

The resultant built form configurations are a result of a design excellence process and recommendation from a CMP that has carefully considered the height and scale of the buildings, and the space between buildings, as well as the need to retain significant heritage buildings and building facades.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties. A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding development. In the context of the locality it would be unreasonable for strict compliance to be enforced.

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

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