

20 September 2018



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Clause 4.6 Variation to Development Standard Statement

RE: Development Application for Concept Masterplan for staged Mixed Use Development at 854 Hunter Street, Newcastle West NSW 2302

1 Introduction

The development to which this submission relates is for the Concept Plan for the redevelopment of the site located at 854 Hunter Street in Newcastle West NSW 2302.

The overall Concept Development Application proposes:

- Retail premises, located at ground level of the Mixed-Use Building and ground floor of the commercial building, with total combined GFA of approximately 1,100m²;
- Commercial premises within the podium of the Mixed-Use Building with a total combined GFA of approximately 6,000m²;
- Five-level carpark providing 678 car spaces;
- Two (2) x 30 storey residential towers with a combined GFA of approximately 35,000m² including 343 apartments; and
- 12 storey commercial tower with a GFA of approximately 16,500m².

The development control sought to be varied is contained in Clause 4.6 of the *Newcastle Local Environmental Plan 2012* (NLEP 2012) which relate to building height.

An assessment of the variation is provided in the following pages in accordance the requirements of Clause 4.6 of the LEP 2012. This variation has been prepared generally in accordance with the NSW Department of Planning and Infrastructure's publication "*Varying Development Standards: A Guide*" (August 2011), which identifies matters to be addressed in an application to vary a development standard.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying the development standards to achieve better outcomes for, and from, development.

The proposed variation is considered reasonable to the basis that:

- The proposal meets the underlying intent of the controls and is compatible form of development that does not result in unreasonable environmental amenity impact;
- The proposed development will further reinforce the long-term viability of the West End of Newcastle providing high quality residential accommodation close to public transport;
- The development and will have an acceptable level of impact on the heritage value of nearby heritage items and the general heritage conservation area;

- The proposed development has been architecturally designed to present as a family of forms and minimise the overall bulk of the buildings with slender residential towers and smaller floorplates;
- The additional building height resulting from the exceedance does not result in any significant impacts on adjoining properties, particularly with respect to overshadowing, loss of privacy and loss of views; and
- The application satisfies other LEP numerical controls, including those pertaining to the city centre, which results in a high-quality development proposal.

2 Site Details

2.1 Site Location and Context

The site currently supports existing buildings and improvements, most notably including the former Co-Operative Store and a multi-level carpark; which have been approved by TfNSW to be demolished under the Part 5 Approval. The site is immediately adjacent to the Newcastle Transport Interchange (NTI) and encompasses the recently approved Newcastle Bus Interchange (NBI).

The existing character of the immediate locality is mixed and includes predominantly commercial buildings in the vicinity of the site. It is noted that the site is within Newcastle City Council's West End Precinct which is to be developed as a future CBD in close proximity to the NTI and will feature predominantly commercial and mixed-use development taking advantage of the location.

The immediate north of the site supports the rail corridor, on which the NTI has been constructed. This Transport Interchange is the termination point for heavy rail and the starting point for light rail into the City Centre. To the west of the site exist generally older style two-storey commercial buildings.

Hunter Street forms the southern boundary of the site, near the main intersection of Hunter Street and Stewart Ave. Land to the south of Hunter Street is zoned for a far greater density of commercial or mixed-use development than currently exists. The heritage-listed Cambridge Hotel; and Quest Apartments within the heritage-listed former brewery site, are each located opposite the site in Hunter Street.

Figure 1 – Aerial View of the site (Source: Dept. Planning SIX Maps)



3 Exception to Development Standards

The Department of Planning and Environment's publication "*Varying Development Standards: A Guide*" (August 2011), states that:

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- *Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and*
- *State Environment Planning Policy No 1 – Development Standards (SEPP1).*

In this instance, SEPP 1 does not apply as the NLEP 2012 is a Standard Instrument LEP. It is noted that the Guidelines do not identify any other mechanisms (such as a Planning Proposal) to vary a development standard.

3.1 Clause 4.6

Clause 4.6 of the NLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes.

(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.

The proposal seeks to vary the building height standards applicable to the site and does not introduce new controls across an area. The Clause 4.6 guidelines also express when this clause is not to be used, namely:

"...in Rural or Environmental zones to allow subdivision of land that will result in 2 or more lots less than the minimum area specified for such lots by a development standard, or the subdivision of land that will result in any lot less than 90% of the minimum area specified for such lots by a development standard in the following SI zones: Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living."

Neither the site nor the proposal is included within these criteria and therefore, the use of Clause 4.6 is appropriate to vary the height in this instance.

3.2 Legal Context to Varying Development Standards

This submission has been prepared having regard to the latest authority on Clause 4.6, contained in the following NSW Land and Environment Court (Court) 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)

- *Moskovich v Waverley Council* [2016] NSWLEC 1015
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7

In the decision of *Moskovich v Waverley Council* [2016] NSWLEC 1015 it was deemed consistent with the decision in *Four2Five* and the Court agreed that the public interest test (incl 4.6(4)(a)(ii)) is different to the “unreasonable or unnecessary in the circumstances of the case” test (incl 4.6(3)(a)). The Court said that “*the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in Wehbe at [70-76]*”.

Randwick City Council v Micaul Holding Pty Ltd [2016] NSWLEC 7 documents a decision of the Chief Judge of the Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the Randwick LEP 2012 to vary development standards relating to the height and FSR of a building.

The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the Standard Instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed those matters. This lessens the force of the Court’s earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger Residential Flat Buildings (RFBs) that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the Commissioner was satisfied that the variation was justified.

The objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* are outlined below:

- (1) *Is the planning control in question a development standard;*
- (2) *What is the underlying object or purpose of the standard;*
- (3) *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;*
- (4) *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- (5) *Is a development which complies with the development standard unreasonable or unnecessary; and*
- (6) *Is the objection well founded.*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston outlined the rationale for development standards, and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision Preston CJ noted:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Wehbe V Pittwater [2007] NSW LEC 827 also established the ‘five-part test’ to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- (1) *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;*
- (2) *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*

- (3) Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- (4) Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- (5) Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Of particular relevance in this instance is Part 1, that "the proposal, despite numerical non-compliance, [would] be consistent with the relevant environment or planning objectives".

4 Development standard to be varied

This section pertains to the "Application form to vary a development standard" by the Department of Planning and Environment.

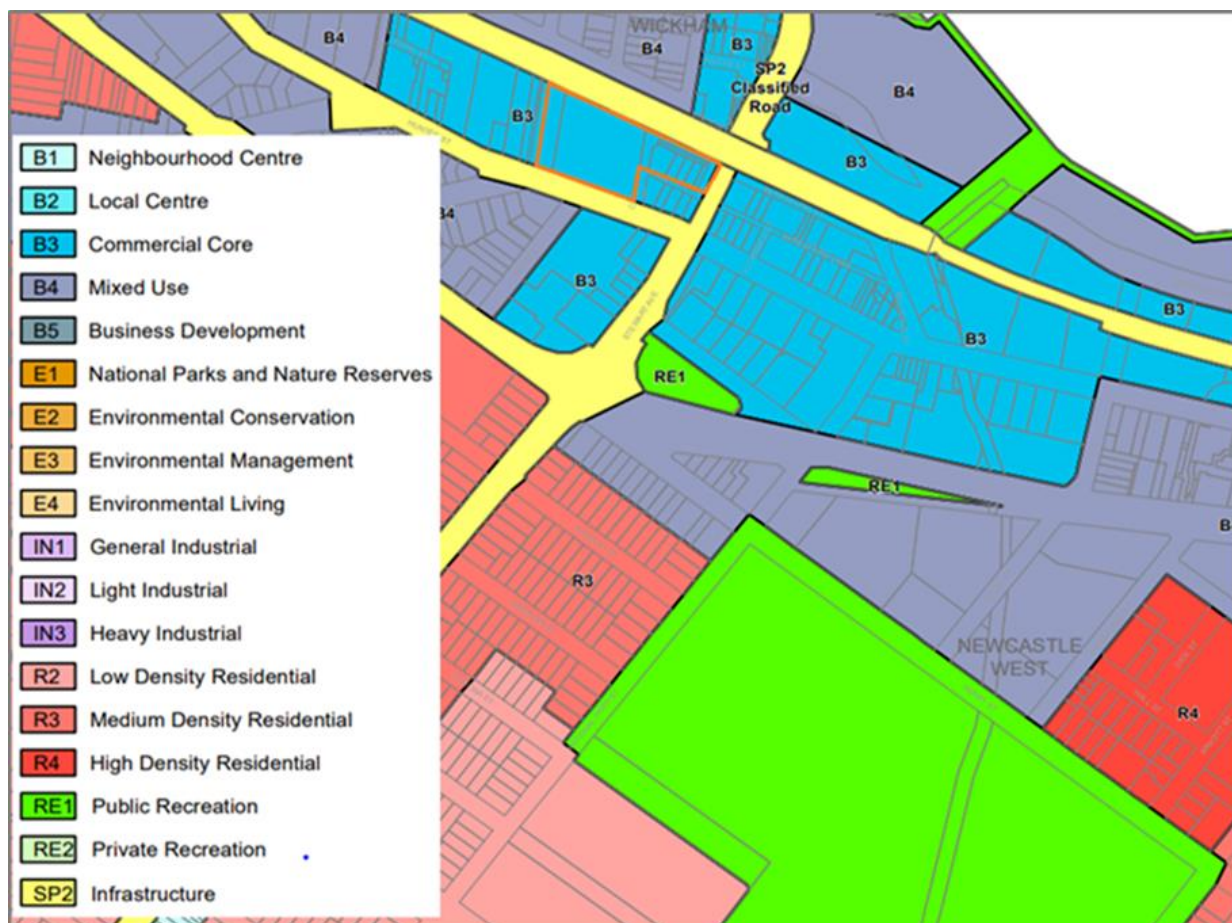
What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012.

What is the zoning of the land?

NLEP 2012 indicates that the site is within the B3 Commercial Core Zone, as illustrated in Figure 2.

Figure 1 – Land Zoning Map Extract (Map LZN_004G)



What are the objectives of the zone?

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide for commercial floor space within a mixed-use development.*
- *To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region.*
- *To provide for the retention and creation of view corridors.*

Comment: The Concept Plan will contribute to the redevelopment of the site to form a highly desirable mixed-use precinct in the West End of Newcastle, consistent with the zone objectives. The Concept Plan will provide quality commercial floor space for public and private tenant; supporting Newcastle City Centre as the regional business, retail and culture centre of the Hunter region as well as providing additional residential apartments to service the growing population.

The development will result in a wide range of employment generating uses; including construction jobs and jobs during the operational phase for both skilled and unskilled workers. The overall development will result a truly mixed-use precinct to live, work and play in close proximity to the many attractive features associated with Newcastle City Centre.

What are the development standards being varied?

The building height development standard contained in Clause 4.3 of the NLEP 2012.

Are the standards to be varied a development standard?

Yes, the standards are each considered to be a development standard in accordance with the definition contained in Section 4(1) of the *Environmental Planning and Assessment Act 1979*, and not a prohibition. Clause 4.3 is also not listed under Clause 4.6(8) as a development standard that is not able to be varied.

What are the objectives of the development standard?

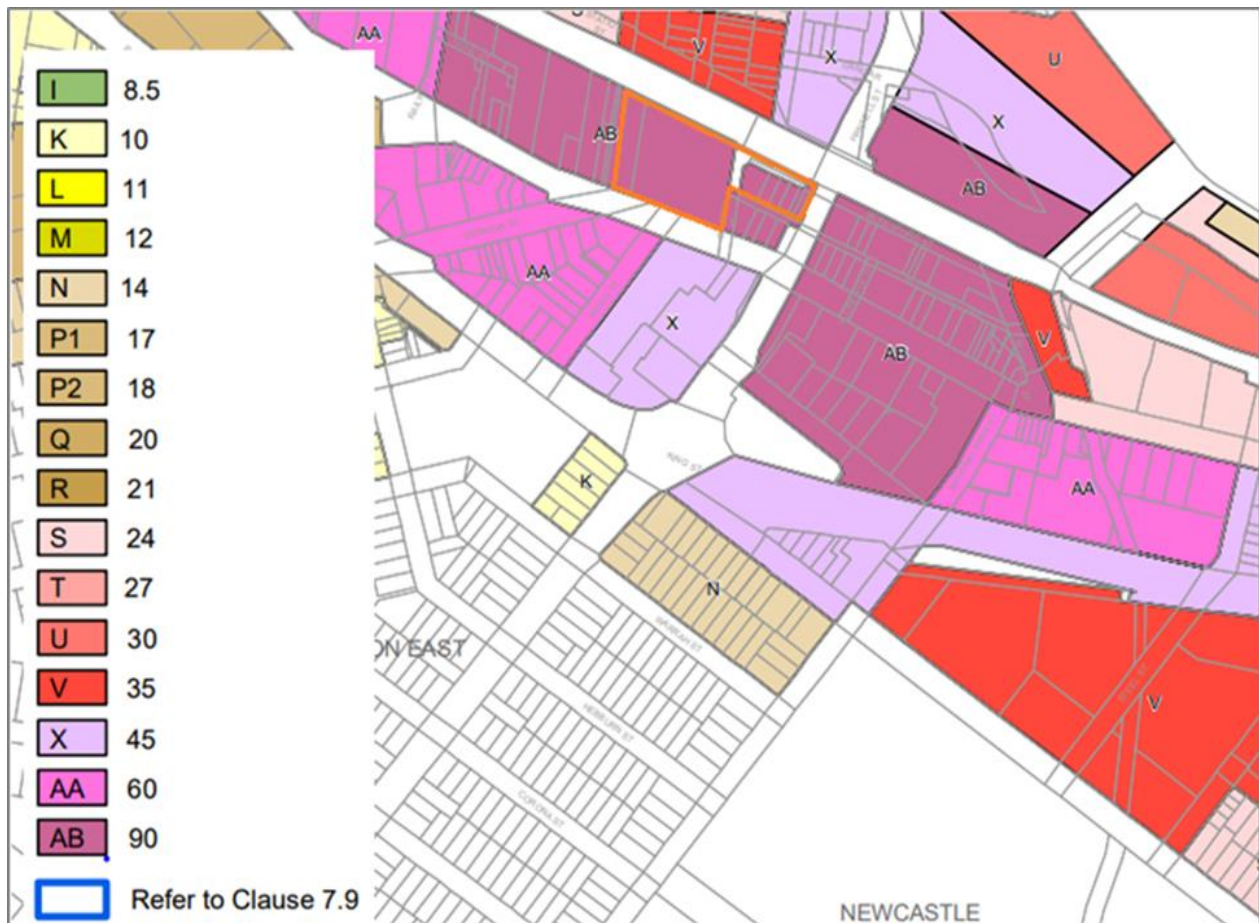
The objectives of Clause 4.3 – Height of Buildings are as follows:

- (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.*

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

The maximum height under the NLEP 2012 is 90 metres, as shown in Figure 2.

Figure 2 - Height of Building Map Extract (Map 004G)



What is the proposed numeric value of the development standard in your development application?

The numerical value of the proposed development and percentage variation is detail in the following table.

| Clause | Control | Proposal | Variation |
|------------------------------|-----------|---|-----------|
| Clause 4.3 – Building Height | 90 metres | 99 metres (residential tower west and residential tower east) | 10% |

Note: The proposed commercial tower will not exceed the building height limit. This clause 4.6 applies to the two residential towers only.

Newcastle LEP 2012 defines building height as the following:

building height (or height of building) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

The numerical values in the table above in relation to building height are the vertical distance from ground level (existing) to the highest point of the building, as opposed to the reduced level (RL) of the building.

5 Justification for the Contravention

This section addresses Section (3), (4) and (5) of Clause 4.6 and seeks to justify the contravention from development standards of Clauses 4.3 and 4.4.

(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.

5.1 Compliance is Unreasonable or Unnecessary

As mentioned above, compliance with a development standard might be shown as unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding noncompliance with the standard.

The proposed development achieves the objectives of Clause 4.3:

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

The proposed development has been designed by Bates Smart Architects and consists of a number of high quality, architecturally designed buildings that make a positive contribution to the West End of Newcastle, which respond to the heritage context. The proposed development will improve the vitality, identify and diversity of Newcastle City Centre by revitalising 'The Store' site which has fallen into disrepair and disuse.

The Store site is the gateway into Newcastle for people traveling to the City Centre via heavy rail; the redevelopment will transform the site into a Key Site for Newcastle. The proposal represents a compatible mixed-use development for the site and is consistent with the desired future vision for this area of the West End Precinct to emerge as a revitalised commercial and residential precinct. By providing a mix of retail and

office premises, located alongside the NTI, the proposal will enhance the economic success of the Newcastle City Centre.

Prior to lodgement of the development application for this Concept Plan, advice was sought from the Government Architects Office (GAO) in relation to achieving design excellence without the need for a design competition to be held, particularly given that the winning design for the site submitted by Bates Smart Architects for Doma Group has already undergone a design competition-like process through the Hunter Development Corporation's (HDC) competitive tender process. In February 2018 the GAO advised that a waiver had been granted and that there was no need for a design competition to be held for this redevelopment project.

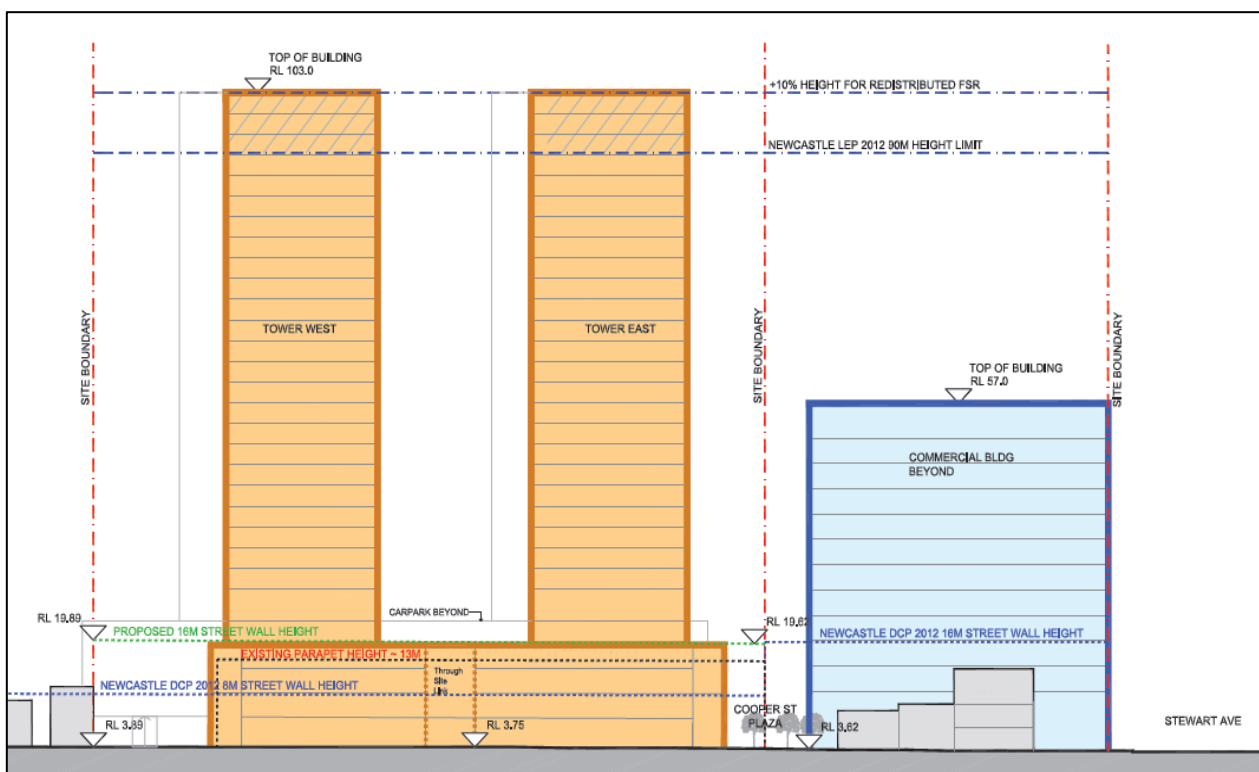
A process for design integrity was requested to be established by the GAO, involving continual review through design development by a Design Review Panel (DRP). The three elected members of this DRP are:

- Dr. Phillip Pollard – Newcastle UDCG
- Lee Hillam – NSW Government Architect
- Adam Haddow – SJB Architects

As stated above, the proposed design for the site was the winning entrant in a formal design competition held by HDC. Since its selection, the design has consistently evolved with input from the DRP. This ensures the massing and built form is appropriate for the site's locality and has due regard to relevant State and local planning legislation and controls.

Details of the façade treatment and articulation are provided in the Architectural plans provided at Appendix A. In this instance, strict application of the development standards for maximum height is unreasonable, unnecessary, and would not achieve a greater planning or urban design outcome. Figure 3 shows the extent of the exceedance of the building height.

Figure 3 – Building Massing (Source: Bates Smart)



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

Reasonable daylight access is provided to all surrounding developments. The proposed height variation will not result in any detrimental impact to any sensitive land uses, as illustrated in the shadow diagram analysis provided within Appendix A. The development will not unreasonably overshadow either of the private lands to the south or west; and does not cause unreasonable shadowing of the public domain in comparison to a fully compliant proposal on the site.

The proposed development achieves the objective of the clause and therefore strict compliance with the 90m height standards within the site would be unreasonable, unnecessary, and would not achieve a greater planning or urban design outcome.

5.2 Sufficient environmental planning grounds to justify contravention

This submission demonstrates that the resultant environmental impacts of the proposal are considered to be satisfactory. If made to strictly comply with Clause 4.3, there would be no additional benefit to the streetscape or public domain in the local area.

Whilst exceeding the building height standard for the site, the proposal still contributes positively to the locality incorporating through-site links which enable view sharing, pedestrian connectivity and built form relief. The exceedance will be visibly difficult to detect; and as demonstrated in the shadow diagram analysis (refer to Appendix A). These drawings illustrate that the proposed development does not cause an unreasonable amount of shadowing, particularly when compared with the shadowing that would be caused by a strictly compliant development with the residential towers built to 90 metres.

It is important to note, that an intensive design excellence process has ensued to arrive at the form and massing for the site; which is optimised to create a superior outcome for the public domain and for its appropriateness in context. The LEP envelope was tested and manipulated to arrive at the proposed massing.

Figure 4 and Figure 5 illustrates the rationale for the Concept Plan, demonstrating a strictly compliant DCP and LEP scheme and the proposed scheme, which does not comply with Clause 4.3 and certain elements of the DCP.

Figure 4 – Strictly Compliant Building Mass (Source: Bates Smart)

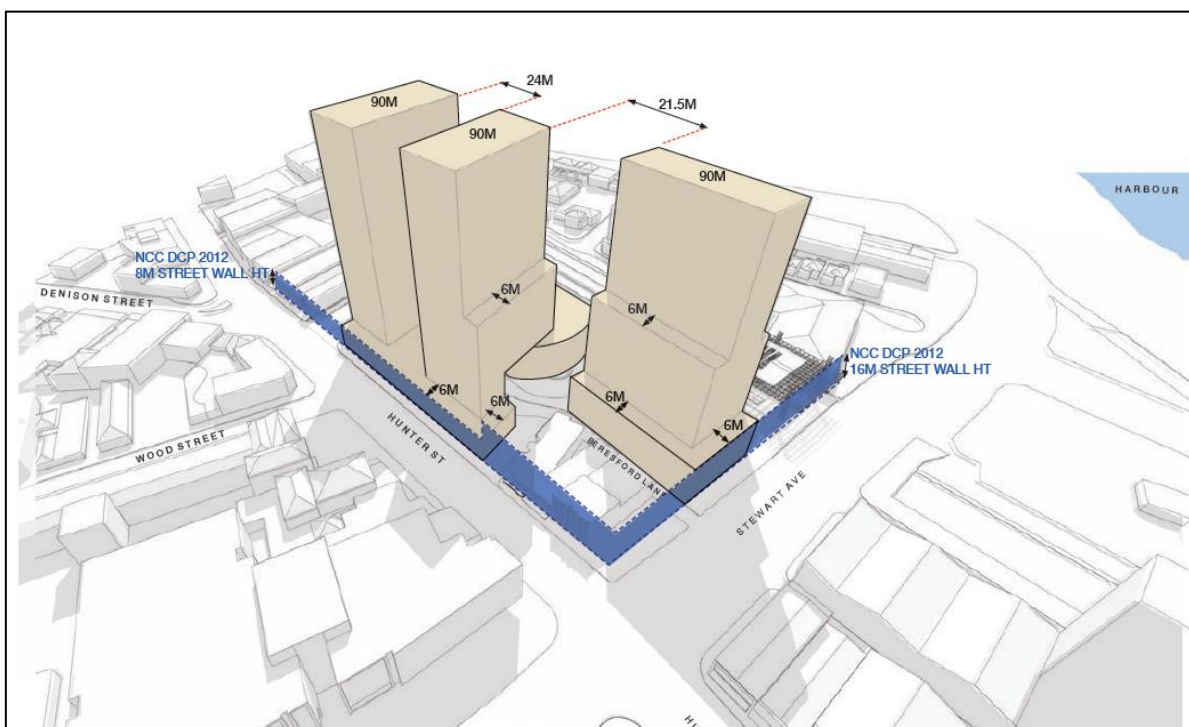
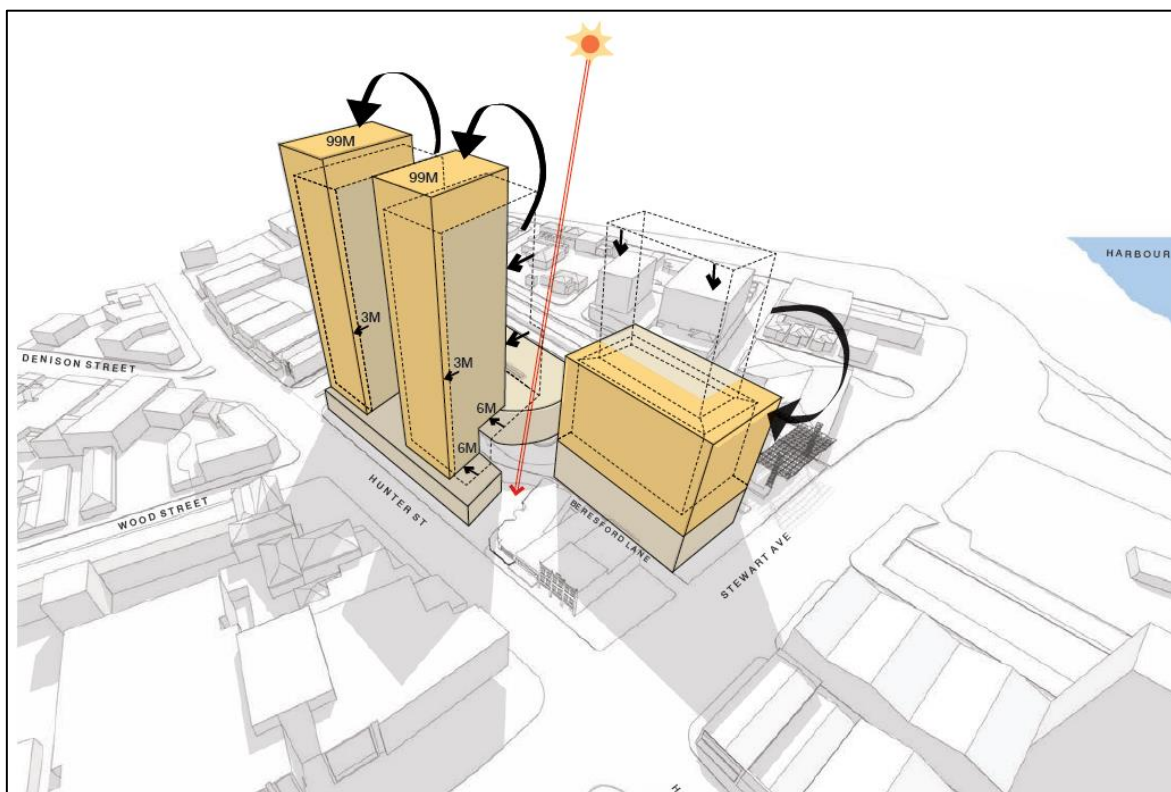


Figure 5 – Proposed Building Mass (Source: Bates Smart)



The prescribed controls would result in a design of three 90m towers, with numerous setbacks upper level setbacks and street wall heights that are not truly appropriate for the current context. By distributing the building mass, more slender residential towers emerge and a shorter more appropriate commercial building. The slender tower forms act as markers for the major transport interchange and result in built form that allows for daylight access to key public domain areas as well as maximising key views and outlooks for future residential occupants.

The granting of development consent will enable a high quality, architecturally designed mixed use commercial and residential building to be constructed with an active ground floor presence for the benefit of the community and high amenity apartment living opportunity. The objectives of Clause 4.3 have been met by the proposed development. In light of this, there is considered to be sufficient environmental planning grounds to justify varying these two development standards in this instance.

5.3 Public interest

As demonstrated in this assessment, the proposed development will be in the public interest as it is consistent with the objectives of Clause 4.3 and the objectives of the B3 Commercial Core Zone in NLEP 2012.

The intent of the Commercial Core zone is to provide a wide range of retail, business, office, entertainment, community, and other suitable and compatible land uses within a mixed-use development. The proposal is a mixed-use development which incorporates retail, residential and office components. These uses are compatible with the objectives of the zone and will complement surrounding land uses and strengthen the Newcastle City Centre, particularly in the vicinity of the active West End and Honeysuckle Foreshore Precincts.

The proposed development will provide a number of significant public benefits including contributing to the mix of land uses in the locality, creating employment opportunities during construction and operational stages as well as providing office, residential and retail space close to public transport. The proposed development represents a high-quality urban design, which seeks to continue to redevelop and enhance the West End Precinct of Newcastle City Centre. The building separation non-compliance does not outweigh the merits of the proposal and its contribution to the social fabric and built form of West End.

6 Conclusion

This Clause 4.6 Variation to Development Standard submission has been prepared in response to numerical non-compliance with the development standard for Clause 4.3 – Height of Buildings in NLEP 2012. The extent of non-compliance is considered acceptable in the context of the site given the type, location and scale of the development proposed.

As demonstrated within this submission, the overall massing, scale, bulk and height of the proposed development is consistent with the desired future character envisioned for the West End Precinct.

The variations allow for the orderly and economic use of the land in an appropriate manner, whilst allowing for a better outcome based on planning merits and public benefit. Further, the proposal will not result in any unreasonable impact on amenity or any significant adverse environmental impacts as a result of the variations, which have been arrived at after a design excellence process that involved testing and amending the design to achieve the most appropriate massing of development for the site.

Council can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standards.

It is therefore requested that Council grant development consent for the proposed development.

Yours sincerely,



Naomi Weber
Town Planner
KDC Pty Ltd