

Our Ref: M210062

26 March 2021

Hornsby Shire Council
PO Box 37,
Hornsby NSW 1630

Attn: Matthew Miles

Dear Matthew,

**REPLACEMENT APPLICATION FOR DA65/2019
22-32 PARK AVENUE, WAITARA**

We act as town planning consultants to the applicant, Statewide Planning Pty Ltd and have been recently engaged to provide a peer review of the proposal and advise on design changes prior to the submission of a replacement application for DA65/2019. Specifically, we have been instructed to provide a cover letter to accompany the replacement application documentation that addresses the reasons for refusal and other notable planning issues raised in the Sydney North Planning Panel (SNPP) assessment report dated 15 October 2020.

This cover letter is accompanied by the following documents:

- Amended architectural plans prepared by Aleksandar Projects (Issue C dated 12/02/2021);
- Updated Landscape Plan prepared by Geoscapes (Issue J dated 26 March 2021);
- Updated BASIX Certificate (Certificate 818809M_05) dated 26 March 2021;
- Updated Clause 4.6 Variation Request to Clause 4.3 – Height of Buildings under Hornsby LEP 2013;
- Updated Flood Report prepared by GRC Hydro dated March 2021;
- Updated Stormwater Plans prepared by SGC Consulting Engineers (Issue G dated 26 March 2021);
- Solar Access Assessment prepared by SLR Consulting Australia dated March 2021; and
- Natural Ventilation Report prepared by SLR Consulting Australia dated March 2021.

The revised architectural plans and supporting documentation replace the plans originally submitted with the development application under Section 55 of the Environmental Planning and Assessment Regulations 2000.

A summary of the proposed changes for the revised amended architectural plans include the following from the previous scheme:

Basement Changes

- Amended layout to provide min 6m setback for deep soil to north and south (previously 4m)
- Reduced car parking numbers due to reduction of apartment numbers and reconfiguration of basement space
- Re-configured ramps due to relocated entry at street level

Level 01-04

- Buildings C + E floor plan reconfigured to accommodate ramp to basement change
- Buildings C + E amended to provide a min 6m setback / deep soil to side boundaries (previously part 4.5m)



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- Building A reduced in length to provide average 9m setback to building B as well as 6m setback to the northern boundary
- Apartments in buildings A and B reconfigured at northern and southern end of the building
- Building B reduced in length to provide average 9m setback to building A as well as 6m setback to the southern boundary
- Building D reduced in width by 6M to provide 9m gaps to building C and E
- Apartments in Building D reconfigured at northern and southern end to accommodate greater setbacks
- Landscaping amended due to reduced buildings footprint and paths added

Levels 05-06

- Buildings A + B floor plans amended to reduce number of apartments from 9 to 7 and provide mezzanine type apartments with only one open bedroom and bathroom per apartment
- Buildings C + E floor plans amended to reduce number of apartments from 6 to 5 and provide mezzanine type apartments with only one open bedroom and bathroom per apartment
- Building D floor plans amended to reduce number of apartments from 6 to 5 and provide mezzanine type apartments with only one open bedroom and bathroom per apartment

Other and external changes

- Changes to the design and appearance of the proposed elevations including the provision of facebrick to the materials selection;
- Increased landscaped and tree selection around the periphery of the site
- Provision of linked pathways throughout the site
- Additional deep soil landscaped area and communal open space area due to the reduced building footprint
- Ground floor level private open space provided

The evolution of the project data is detailed in Table 1 below:

Table 1 Project Data			
	Original DA	Amended DA	Second Amendment
Site Area	6977.6sqm		
Height (m)	Building A = 17.5m Building B = 17.5m	Building A = 18.16m Building B = 17.9m Building C = 18.58m Building D = 18.8m Building E = 18.67m	Building A = 17.91m Building B = 17.66m Building C = 18.43m Building D = 18.42m Building E = 18.42m
Buildings	2	5	5
Building Height	6 storeys	Part 5, part 6 storeys	5 storeys with mezzanines
Number of apartments	200 apartments 40 x 1 bedroom 152 x 2 bedroom 8 x 3+ bedroom	181 apartments 36 x 1 bedroom 127 x 2 bedroom 18 x 3+ bedroom	168 apartments 58 x 1 bedroom 102 x 2 bedroom 8 x 3+ bedroom





Table 1 Project Data

Residential Parking	286 cars over 2 basement levels	219 cars over 2 basement levels	198 cars over 2 basement levels
Setbacks	Front = 6-12.5m Rear = 4.5-9m Side = 4.5-9m	Front = 8-13.7m Rear = 6-9m Side = 4.5-9m	Front = 8-13.7m Rear = 6-9m Side = 6-9m

As detailed above, since the intimal lodgement of the application, our client has undertaken significant amendments which has resulted in the current form and now seeks Council's support for the development application. We are of the opinion that whilst the proposal results in non-compliances with the relevant planning controls, the proposed development satisfies the objectives of those non-compliant planning controls and results in a size and scale that is entirely compatible with that of surrounding properties (noting compatible does not mean sameness in *Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*), will result in a high level of amenity for the occupants and will not have an adverse impact on the amenity of adjoining properties. In particular, despite minor variations for the height of buildings development standard, these can be attributed to the topography and flooding and are discussed in the amended Clause 4.6 variation request at Annexure 1.

The revised architectural plans (Issue C) do not alter the conclusions of the original or amended SEE prepared by Boston Blyth Fleming, except where specifically discussed below. Therefore, this submission should be read in conjunction with those documents. The revised architectural plans (Issue C) will reduce the height of the buildings by providing a mezzanine style level rather than a full level for the upper level apartments. In addition, the changes to the setbacks and built form will also result in positive changes to the proposal with the increased side boundary setbacks allowing greater separation distances and the provision of large canopy trees in 6m wide deep soil zones around the entire periphery of the site. The changes to the built form also allows changes to the configuration and layout of apartments to ensure compliance with the ADG requirements and maximise the internal amenity for the occupants.

The Record for Deferral of the SNPP on 15 October 2020 states the following:

With regard to the Clause 4.6 Variation to Height request, the Panel concurs with Council that the request is inadequate and accordingly the Panel could not approve the proposal in its current form.

The Panel considered refusing the application. However, based upon the Panel's review of the plans, documentation and Applicant and Council responses at the briefing on 15 October 2020, the Panel was of the view that with substantial design changes the proposal may be acceptable.

The Panel requests the Applicant and the Council meet, as a matter of urgency, to discuss all reasons for refusal listed in the Assessment Report. The Panel appreciates that resolution of these matters will require substantial changes to the building design and layout but believes such an outcome is achievable and should be pursued as soon as possible.

In addition to addressing Council's reasons for refusal, the amended design should ensure the proposal:

- *Complies with the height standard;*



- *Very substantially increases the amount and configuration of the communal open spaces to provide opportunities for a range of recreational activities with good solar access, landscaping and demonstrated accessibility for residents;*
- *Resolves the flood / stormwater issue;*
- *Clearly identifies all areas of private open space;*
- *Meets the urban design standards of both the Apartment Design Guide and Hornsby Development Control Plan 2013, both quantitatively and qualitatively, with particular reference to setbacks, solar access, articulation (façade presentation), privacy (separation distances), landscaping and deep soil areas for trees; and*
- *Amends the design to have regard to the future character of the Precinct and the development's street presentation should respect its highly visible presence when viewed from the public domain and adjacent park.*

The Panel resolved to defer the determination of the matter to allow the Applicant to urgently resolve the above concerns and submit amended plans and information.

The issues raised in the reasons for deferral by SNPP are considered in turn below.

1. Complies with the height standard;

The revised architectural plans (Issue C) result in variations to the design, particularly the upper levels of the five (5) buildings, to create two storey apartments with mezzanine style additions linked to the lower level for the upper two levels. These mezzanine style additions will provide a bedroom or bathroom on the upper levels that is significantly less than floor area of the apartment below and is predominantly open typical of a mezzanine. It is noted that HDCP specifically contemplates mezzanine style additions as Table 3.45a stipulates additional setbacks for mezzanine levels. Notwithstanding this, the design changes to the upper levels facilitate a reduction in the overall height of the building from the previous iteration of the plans but still result in following maximum height variations per building:

- Building A would be 17.91m high and breaches the height standard by a maximum of 410mm or 2.3%,
- Building B would be 17.66m high breaches the height standard by a maximum of 160mm or 0.9%,
- Building C would be 18.45m high and breaches the height standard by a maximum of 955mm or 5.4%,
- Building D would be 18.59m high and breaches the height standard by a maximum of 1090mm or 6.2%,
- Building E would be 18.49m high and breaches the height standard by a maximum of 995mm or 5.6%.

Figure 1 provides a detailed Building Height Blanket for the proposed development and also provides consideration of surrounding development in terms of the height limit.

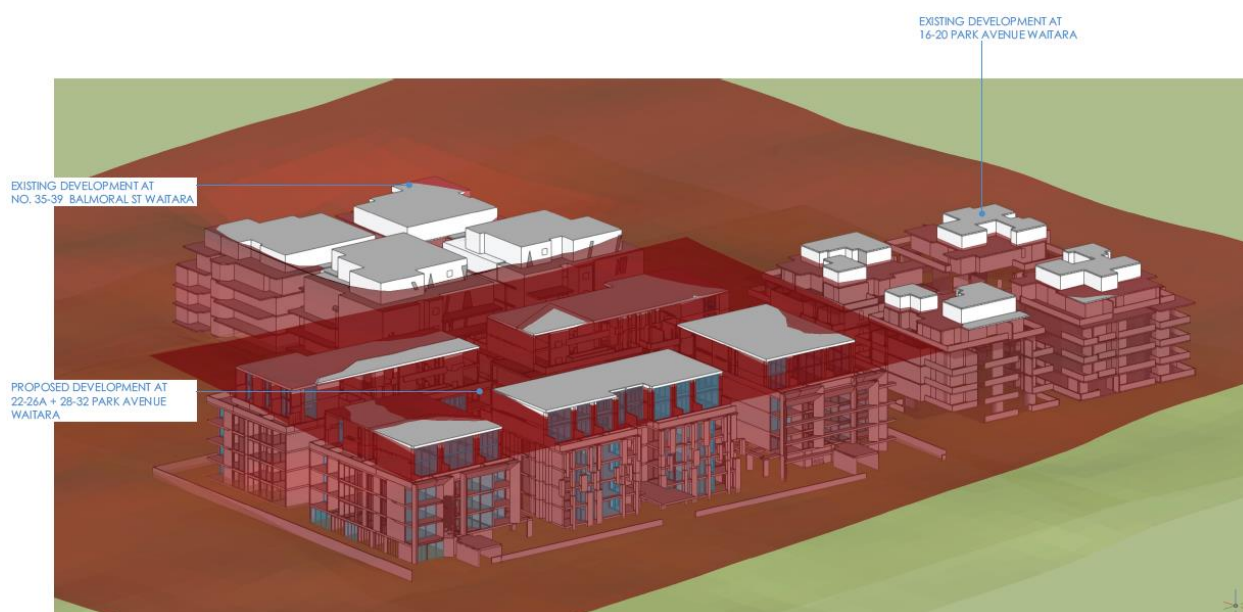


Figure 1 Height Blanket Diagram

A revised Clause 4.6 Variation Request has been provided to Clause 4.3 – Height of Buildings under HLEP 2013 in Annexure 1. As discussed in the revised Clause 4.6 Variation Request, the proposed variations to the height can be attributed to the flooding and topography.

In terms of flooding, the Flood Planning Levels (FPL) necessitate a minimum RL level for each building and does not permit excavation to “nestle” the building into the site to achieve the five storey plus mezzanine style levels that is characterised by residential flat buildings to the south at Nos. 4-6a, 8-10, 12-14 and 16-20 Park Avenue. Whilst some of these buildings were approved under previous planning controls, the previous Hornsby Shire Local Environmental Plan 1994 (HSLEP) and Housing Strategy Development Control Plan (HSDCP) had almost identical numerical controls to the current planning controls, yet variations to the built form were permitted. Therefore, the actions of Council in allowing five storeys plus mezzanine style residential flat buildings for whatever merit based reasons sets a character that is different to that outlined in the Balmoral Street, Waitara precinct and must be considered in any assessment of Clause 4.6 (discussed in detail below).

In terms of topography, it is clear there is a gradual fall in the topography from south to north which is followed by existing development on the eastern side of Park Avenue. A table of the maximum RL heights for each of the existing and proposed residential flat buildings is provided below:

Address	RL Height
4-6a Park Avenue	RL 191.6
8-10 Park Avenue	RL 190.99
12-14 Park Avenue	RL 190.64
16-18 Park Avenue	RL 190.47
Building E	RL 190.15
Building D	RL 189.45
Building C	RL 189.05



34-38 Park Avenue	subject to future redevelopment
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As detailed above, there is a clear and gradual transition in building height that follows the topography. Despite the height variation for the proposed development, the above table demonstrates that the proposed development will continue to step with the change in topography and transition to the currently underdeveloped sites at Nos 34-38 Park Avenue. Insistence on compliance with the height control would put the development out of step with the gradual fall of building heights with the topography. Figure 2 has been prepared which provides a visual presentation of the built form and topography and how the proposed development, despite the variation, will sit in its context and appear from pedestrian level on Park Avenue.

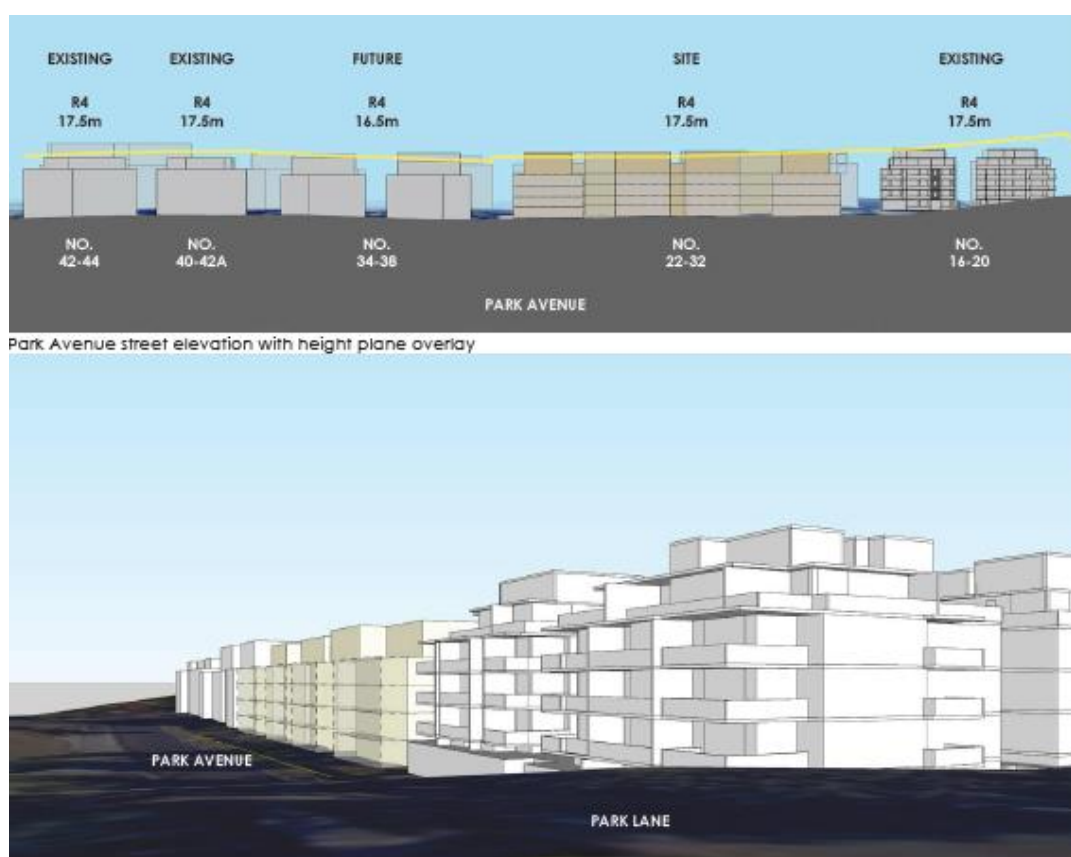


Figure 2 Visual representation of the proposal within in context

The height of the proposed development, including the variation, will be entirely compatible with the height and character of surrounding development. As demonstrated in Figure 1, Nos. 16-20 Park Avenue and 35-39 Balmoral Street do not comply with Clause 4.3 of HLEP 2013. As discussed above, whilst these variations in themselves are not a sufficient reason to vary the development standard, it is Council's actions in approving height variations in the Balmoral Street, Waitara Precinct that sets a different context to one that is governed by the permissible planning controls. Whilst it cannot be said that the planning controls have been thrown away, it is clear that the Balmoral Street, Waitara precinct does not demonstrate a high level of compliance with the height of buildings development standard and therefore height variations can be considered in the context of existing and approved buildings. This is considered in the Clause 4.6 Variation Request in Annexure 1.

Turning to the Council assessment of the Clause 4.6 Variation Request, whilst the SNPP's comments on the previous Clause 4.6 Variation Request by Boston Blyth Fleming are noted, it is considered that Pages 9-13 of the SNPP Assessment Report has applied the wrong test in the assessment of the Clause 4.6 Variation Request. Specifically, the following points are noted:

- Dot Points 1 & 4 – Council contends that site is an overdevelopment given the proposal does not comply with a number of HDCP and ADG requirements but raises specific reference to the “3.1m floor to floor height control”. Despite the fact that there is no “3.1m floor to floor height control” under Part 4C-1 of the ADG (only a 2.4-2.7m floor to ceiling height control), in considering other aspects of the development in lieu of a Floor Space Ratio (FSR) development standard such as setbacks, deep soil landscaped areas, communal open space and building separation, Council has applied the wrong test and examines aspects of the entire development rather than the aspect breaching the development standard.
- Dot Points 2 -4 – Council has considered the requirements of a planning proposal, DCP and the desired future character in the assessment of Clause 4.3 which is contrary to the judgement by Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

In relation to the application of a DCP and the desired future character within the context of a consideration under Clause 4.6 of the HLEP 2013, Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 found the following at Para 54:

In circumstances where the term “desired future character” is undefined and unconfined in WLEP, the matters that may be taken into account in evaluating what is the desired future character of a particular neighbourhood or area at any point in time will similarly be unconfined, except insofar as there may be found in the subject matter, scope and purpose of WLEP some implied limitation on the matters that may legitimately be considered. There is no limitation found in the subject matter, scope and purpose of WLEP which would preclude consideration of developments that have been approved and constructed in the neighbourhood or area.

That is, the desired future character of the locality is not defined under HLEP 2013 and is subjective. Preston CJ goes onto state at Para 62-63:

Construction of the term “desired future character” that would confine its meaning to being defined and fixed by the development standards only would make forming the opinion of satisfaction under cl 4.4(4)(a)(ii) that the proposed development is consistent with these objectives difficult, if not impossible. On this construction, the height and FSR development standards define and fixed the desired future character. A development that contravenes the height and FSR development standards needs to demonstrate that it will be consistent with the desired future character. It cannot do this because, contravening the development standards, it is inconsistent with the desired future character that is defined and fixed by those development standards.

This circularity is avoided if the term “desired future character” is construed as permitting regard to be had to matters other than only the development standard. On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

It is therefore considered that the desired future character of the neighbourhood can be set by the existing, recently approved and proposed buildings within the neighbourhood. The subject site is zoned R4 – High Density Residential

within a streetscape with varied building typologies and heights. As discussed above, the recently approved developments at Nos. 16-20 Park Avenue, 35-39 Balmoral Street and 40-44 Edgeworth David Avenue were all approved with a variation to the height of buildings development standard that sets a different character consideration then that established by the HDCP. This existing character must be acknowledged and cannot be ignored and the revised architectural plans (Issue C) responds to the existing and recently approved character of the locality which makes it compatible with the desired future character of the locality. A montage of existing buildings to the south is provided in Figure 3 below.



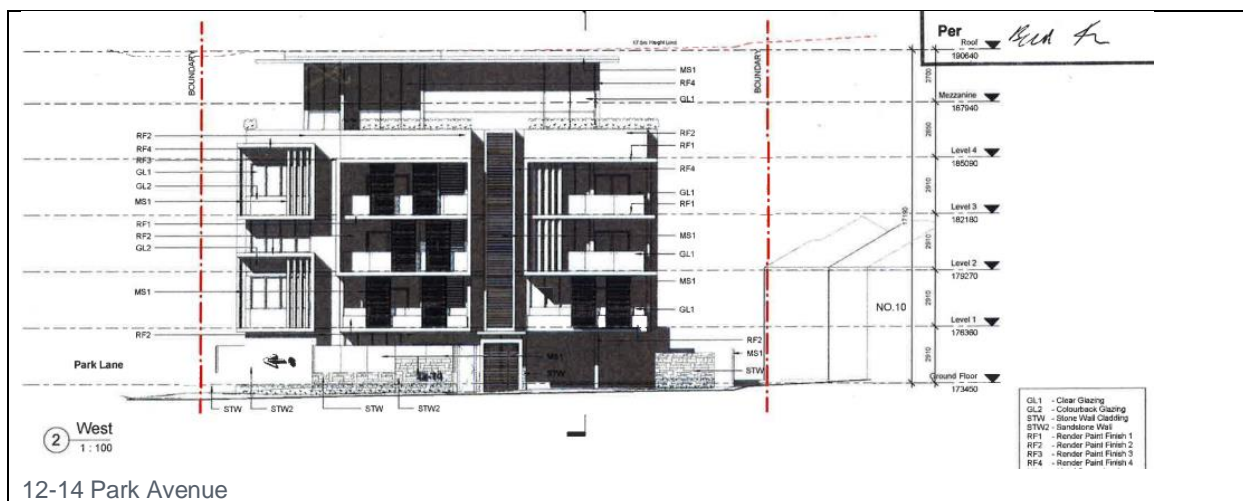


Figure 3 The three buildings to the south of the subject site with five storeys plus mezzanine designs

In light of the character established by surrounding development, the proposed development, despite the height variation cannot be said to be visually jarring or incompatible with the scale of surrounding development. In fact, the provision of a five storey plus mezzanine style residential flat building is entirely compatible with the height of surrounding buildings, steps with the topography of the site and Park Avenue and provides a form that sits comfortably in the context of surrounding development in the R4 – High Density Residential zone.

- 2. Very substantially increases the amount and configuration of the communal open spaces to provide opportunities for a range of recreational activities with good solar access, landscaping and demonstrated accessibility for residents;**

Design Criteria 1 of Part 3D-1 of the ADG does not require COS to provide a minimum dimension or contain or exclude specific elements but rather sets a lower bar to ensure compliance with 25% of the site area. Similarly, Design Criteria 2 does not set a minimum size for the principal area of COS to receive solar access but also sets a lower bar to ensure the principal area receives 2 hours of solar access between 9am and 3pm in midwinter. These are important considerations when considering the quality and quantity of COS provided by the proposed development.

The SNPP Assessment Report stated that 20% (1,540sqm) of Communal Open Space (COS) was provided on the site which excluded the side and rear landscaped areas. It also noted that the 6m wide narrow areas between buildings was included in the 20% calculations for COS. The revised architectural plans (Issue C) will provide 2,200sqm (31.5%) of COS on the subject site. This includes the areas designed as side and rear landscaped areas. The revised architectural plans (Issue C) provides interlinked pathways around the majority of the periphery or through the buildings to provide for active uses such as walking or running with the more passive COS located at the centre of the site. This will ensure all ground level COS is used by occupants of the building for passive or active uses.

The principal area of COS is provided at the centre of the site and was specifically chosen in this location so the level of solar access can be pre-determined and set in the proposed development rather than be affected by externalities such as redevelopment of surrounding properties. That is, if the principal area of COS was located at the rear of the building, whilst it would currently receive sufficient solar access, this location relies on the underdeveloped nature of buildings to the north. The redevelopment of adjoining properties would have unknown and unquantifiable impacts on the solar access to the COS and was not considered to be an appropriate solution in this instance.

The revised architectural plans (Issue C) and revised Landscape Plan (Issue J) detail that the principal area of COS at the centre of the site will contain seating, BBQ area and a variety of spaces that will receive solar access for more than 2 hours in midwinter. This is considered to be entirely appropriate given the principal COS areas of Nos. 16-20 Park Avenue and 35-39 Balmoral Street are located between buildings. In this instance, the location of the principal area of COS in the centre of the site will provide the following benefits for the occupants:

- allow the user the choice to follow the sun or shade, depending on the season and temperature, to maximise the amenity of the occupants;
- provide linkages around the site between active and passive COS areas;
- allow for casual surveillance of the principal area of COS from multiple balconies and windows on the upper levels; and
- allow direct access from the lobbies of Buildings A-E to the principal COS at the centre of the site which was not previously provided.

Therefore, the revised architectural plans (Issue C) will not only improve the quantity of the COS but also improve the quality and accessibility to the COS which will satisfy the only objective of Part 3D-1 of the ADG to provide *“an adequate area of communal open space is provided to enhance residential amenity and to provide opportunities for landscaping.”*

3. Resolves the flood / stormwater issue;

This submission is accompanied by a revised Flood Report prepared by GRC Hydro and revised Stormwater Plans prepared by SGC Consulting Engineers. We are instructed that the revised documentation will address the technical matters raised by Council's Referral Officers and therefore no further planning comments can be made in this regard.

4. Clearly identifies all areas of private open space;

Analysis of the SNPP Assessment Report indicates that the proposal complies with the private open space ADG requirements on the upper levels but did not provide 15sqm of private open space on the ground levels. The revised architectural plans (Issue C) clearly delineate both the size and location of all private open space areas for the proposed development to demonstrate compliance with the private open space requirements of 15sqm on the ground floor in Part 4E-1 of the ADG.

5. Meets the urban design standards of both the Apartment Design Guide and Hornsby Development Control Plan 2013, both quantitatively and qualitatively, with particular reference to setbacks, solar access, articulation (façade presentation), privacy (separation distances), landscaping and deep soil areas for trees;

The above requirements of the ADG and HDCP will be discussed in turn below.

Setbacks and Separation

The revised architectural plans (Issue C) detail meaningful changes to the proposed built form in order to increase the building separation and setbacks, especially from the side boundaries. The revised design will facilitate a minimum 6m wide deep soil landscaped area around the periphery of the site to cater for large canopy trees to ensure the proposed development sits within a landscaped setting and provide visual relief. Refer to the revised Landscape Plan (Issue J) prepared by Geoscapes.

In terms of the separation requirements under Part 3F-1 of the ADG, the original SNPP assessment report noted the proposal resulted in “*minor non-compliances are negligible and don’t cause privacy impacts*”. Despite this, the revised architectural plans (Issue C) have increased the minimum side setbacks from 4.5 to 6m on ground – level 3 in order to enhance the building to building separation distances and provide for meaningful (6m) wide deep soil landscaped areas between buildings. The separation distances between Buildings A-E will be retained at 6-9m which not only satisfies the separation requirements of Part 3F-1 of the ADG but also provides building to building separation to match or exceed the building to building separation of buildings at Nos. 16-20 Park Avenue and 35-39 Balmoral Street, both of which are separated by 6m. Importantly, the building to building separation between buildings C, D and E that front Park Avenue will be a minimum of 9m which provides greater separation between the built forms and allow for greater visual relief and landscaping than provided by surrounding buildings. This coupled with the fact that buildings C, D & E are all less than 35m in width and articulated will ensure the apparent bulk and scale is reduced to that anticipated by the planning controls.

In terms of the front setback requirements under HDCP, the site is required to be setback 10m with less than 1/3 of the building setback 8m. Furthermore, private courtyards on ground floor may encroach to 7m. This blanket approach to front setbacks pays little regard to the prevailing setbacks on the street nor does it appear to have been consistently applied. The prevailing setback of other residential flat buildings from 4-20 Park Avenue appears to be predominantly 8m from the front boundary. Furthermore, an analysis of the built form of buildings to the south appears that considerably greater than 30% of the building (including balconies) encroaches to 8m of the front setback. Refer to Figure 4 below.



Figure 4 Front setbacks and built form of properties to the south

The proposed development will encroach into the front setback requirements to the extent that only the 1/3 width requirement is not achieved. The provision of recessed balconies and a heavily landscaped front setback area (8m wide deep soil zone) will reduce the visual prominence of the front setback and ensure the proposed buildings will be read in conjunction with the properties to the south. As demonstrated in Figure 4, the vast majority of balconies and built form elements would exceed the 1/3 building width for 8m requirement and therefore, the proposed development would be entirely compatible with the built form established in Park Avenue.

The revised architectural plans (Issue c) have incorporated the following design changes to ensure the front setback is entirely compatible with the prevailing pattern of development:

- Buildings C, D & E will comply with the side setback, separation and building width requirements of the ADG and HDCP to create a built form fronting Park Avenue that is anticipated by the planning controls;
- Buildings C and E will have a width of 21.8m and be setback 6m from the side boundaries with large canopy trees provided in the deep soil landscaped area to provide a visual buffer and minimise the bulk and scale;

- The proposed 9m building to building separation distances between Buildings C-D-E is greater than the 6m building to building separation distances of adjoining properties and provide landscaped area to provide visual relief between buildings;
- Building D will have a building width of 33.3m and provides a 4m wide articulation bay over the primary pedestrian entry to provide visual relief and interest;
- The architectural resolution, materiality and colours of Buildings C, D & E has been altered at the frontage to ensure that the buildings are no longer read as a consistent and unarticulated element but read as three independent buildings separated by landscaping; and
- The provision of recessed balconies coupled with architectural elements will break up the alleged bulk of the building and have a positive visual impact on the streetscape.

In terms of the upper level setbacks, HDCP stipulates that an additional 3m setback is required for the fifth storey and an additional 6m setback is required for mezzanines. Whilst it could be argued that Clause 6A(1)(a) of SEPP 65 would override the setback requirements under Part 3.4.5 of HDCP, the additional setbacks required under Part 3.4.5 of HDCP for mezzanine levels would create the ziggurat form (that is not desired by Part 3F of the ADG) and would certainly reduce the amenity benefits of the occupants by reducing the large void area above living areas synonymous with mezzanine style apartments. Therefore, the proposed development provides consistent 3-4.2m additional setbacks for the fifth and mezzanine levels not only complies with the ADG separation requirements under Part 3F-1 but importantly creates a unified top element that is compatible with the top elements of surrounding buildings.

Whilst no pergolas or planter boxes are provided, the additional setback and design of the building does not necessitate these additional ancillary elements which, in our opinion, have limited visual benefits due to the elevation and design of the levels below but will certainly have the effect of reducing solar access to the fifth level living rooms. Therefore, the proposed fifth level and mezzanine setbacks are considered entirely appropriate in this instance.

In terms of the rear setback, it is arguable that Clause 6A(1)(a) of SEPP 65 overrides the rear setback requirement of the HDCP which requires a 10m setback with less than 1/3 of the building setback 8m, similar to the front setback. The Ground – Level 3 of the proposal will be setback 6m from the rear boundary and 9m for the upper level which complies with the ADG separation requirements under Part 3F-1 of ADG.

As discussed in COS above, the design of the building with the principal area of COS at the centre of the site is a deliberate outcome to ensure the proposed principal area of COS receives a level of solar access that can be pre-determined rather than be affected by externalities such as redevelopment of surrounding properties. This outcome necessitates a redistribution of floor space that would otherwise be provided at the centre of the site (where the principal area of COS is currently located) towards the rear boundary.

Whilst this redistribution of floor space will encroach on the HDCP rear setback requirement, the proposed 6-9m separation distances will still ensure compliance with the ADG separation requirements, is entirely compatible with the setbacks of surrounding properties and will provide a better planning outcome which will enhance and protect the amenity of the occupants in terms of the location of COS. Furthermore, the revised architectural plans (Issue C) will introduce additional articulation elements into the rear (eastern) elevation to ensure the building does not read as a sheer wall and also provide a 6m wide deep soil landscaped area between the buildings and the rear boundary (clear of the basements) to ensure large canopy trees can be provided around the periphery of the site to create a visual buffer and reduce the alleged bulk and scale.

The objectives or “Desired Outcomes” of the setback controls under HDCP are as follows:

Desired Outcome

- a. Well articulated building forms that are setback to incorporate landscaping, open space and separation between buildings.*
- b. Well articulated building forms with a “pedestrian friendly” scale and provides for landscaping, open space and separation between buildings.*
- c. Setbacks that preserve and protect existing trees around the perimeter of sites and provide effective deep soil areas that are able to create a garden setting, including substantial tree canopy to all sides of the building.*

The revised architectural plans (Issue C) satisfies the above desired outcomes, despite the numerical variations for the following reasons:

- The proposal will provide well-articulated building forms that are a considerable improvement on the original scheme and present a built form that is entirely compatible with the form of surrounding residential flat buildings in Park Avenue and Balmoral Street;
- The site is surrounded by at least a 6m wide deep soil landscaped area (clear of basements) to ensure useable active and passive COS is enriched by low level landscaped area and large canopy trees that provide a visual buffer and relief in the built form;
- The proposed residential flat building satisfies the 6-9m separation requirements of the ADG and provides a built form that is compatible with surrounding buildings and presents a scale that responds to the pedestrian friendly location; and
- The minimum 6m deep soil landscaped setbacks to all boundaries will provide opportunities for large canopy trees to create a built form within a garden setting and provide visual relief when viewed from surrounding properties.

Solar Access

Part 4A-1 of the ADG requires that 70% of apartments receive solar access. The previous amended package submitted on 2 December 2018 provided a Solar Access Assessment prepared by SLR which demonstrated that the proposed development complies with the design criteria of 70% of apartments receiving solar access. The SNPP Assessment Report notes *“Notwithstanding a positive evaluation of solar access, the development cannot satisfy ADG requirements because ‘exterior’ east facing apartments barely meet the two hour minimum to living areas and balconies, and because interior apartments would be exposed to overshadowing by buildings within the development, it is not possible for 70% of apartments to receive the requisite sunlight”*. With the greatest of respect, the SNPP Assessment Report acknowledges that the proposed apartments receive a minimum of 2 hours of solar access and it is completely irrelevant if the proposal *“barely meets”* the requirements of the ADG, the only consideration is the proposal satisfies the numerical requirement. Furthermore, Council has not provided any evidence or specifically detailed where the proposal does not comply with the solar access requirements under Part 4A-1 of the ADG and therefore, it must be concluded the previous iteration of the plans complies with the ADG.

The revised architectural plans (Issue C) are also accompanied by a Solar Access Assessment prepared by SLR which demonstrates that more than 70% of apartments receive solar access in accordance with the ADG.

Articulation (Façade Presentation)

Page 30 of the SNPP Assessment Report states the following in relation to the built form and presentation to the street *“The combined consistency of the proposed building forms of each building results in a development that is inconsistent with the DCP’s character controls which seek to avoid “the appearance of a continuous wall of development” and avoid*

repetitive rendered finishes as a minimum 30% of brickwork is not provided in accordance with the HDCP to break up the building mass.”

The revised architectural plans (Issue C) have made numerous design changes to the built form and façade presentation of the proposal to break up the built form and provide articulation that will enhance the visual appearance of the buildings. In this regard, the proposal has undergone the following changes to the facades:

- Buildings C, D and E comply with the 35m dimensions for buildings and provide articulation in the form of building design, recessed balconies, colours and materiality;
- Buildings C & E are less than 25m and therefore no 4m x 4m articulation bay is required under Part 3.4.6 of HDCP. Building D provides a 4m x 4m articulation bay over the pedestrian entrance to break up the built form;
- Only buildings A & B exceed the 35m dimension on its north-south axis with the built form broken up on the eastern (rear) elevation by a 4m x 4m recessive bay that is clear to the sky which will ensure no part of the building exceeds 25m without an articulation bay;
- The western (internal) elevations of Buildings A & B do not address adjoining properties or the public domain but provide articulation through building design that breaks the sheer wall, recessed balconies, colours and materiality;
- The provision of a 6m deep soil landscaped area around the perimeter of the site coupled with 6-9m wide landscaped sections between buildings will ensure large canopy trees can be provided around the periphery and built form is broken up by landscaping elements that permit the buildings to sit comfortably within a landscaped setting; and
- Facebrick materials will be incorporated into the facades of the proposed development.

A comparison of the front elevations of the previous iteration of the plans compared to the revised architectural plans (Issue C) is provided in Figure 5 below.





Figure 5: Comparison of the western (front) elevation of the previous design (top) and proposed design (bottom)

As detailed above, the increased setbacks from the side boundary, the increase building to building separation, redesign of the buildings with driveways internally and changes to design features, materiality and colours will mean that the proposal does not read as a continuous and unarticulated wall as alleged. As such, the proposed development will present a form to Park Avenue and adjoining properties that is generally anticipated by the planning controls, is highly articulated and the built form is broken up by landscaping, separation and materiality.

Landscaping and deep soil areas for trees

As discussed above, the revised architectural plans (Issue C) will increase the quantity and quality of landscaping and deep soil landscaped area in and around the site. The revised proposal will provide for 2,020sqm (29%) of deep soil landscaped area which complies with the minimum 6m dimension under Part 3E-1 of the ADG. Furthermore, the provision of this landscaped area around the periphery and in the centre of the site will allow for large canopy trees to be provided which will assist in maintaining the landscaped setting of the site and also provide visual relief and privacy between surrounding buildings. The revised architectural plans (Issue C) will ensure there is sufficient area to satisfy the only objective of the ADG to ensure “*Deep soil zones provide areas on the site that allow for and support healthy plant and tree growth. They improve residential amenity and promote management of water and air quality*”.

- 6. Amends the design to have regard to the future character of the Precinct and the development’s street presentation should respect its highly visible presence when viewed from the public domain and adjacent park.**

The revised architectural plans (Issue C) have proposed numerous changes to the built form and presentation to Park Avenue which are discussed above. The SNPP Assessment Report (Page 30) details an assessment of the Key Development Principles for the Balmoral Street, Waitara Precinct. Consideration of these Principles is provided in turn below.

Strategy - Redevelopment should be predominantly five storey residential flat buildings in garden settings, with parking in basements.

It is important to note that the above requirement does not mandate five storey residential flat buildings in the Balmoral Street, Waitara precinct but rather sets a lower bar and requires that redevelopment “*should be predominantly five storey residential flat building*”. It is noted that HDCP contemplates five storey and a mezzanine as the setback controls in Part 3.4.5 of HDCP require a greater setback for mezzanine levels. Therefore, the strict application of a five storey residential flat building is not specifically required in the above strategy for the Balmoral Street, Waitara precinct.

As discussed above, the height of the proposed development (both overall height and storey height) will be entirely compatible with the height and character of surrounding development. It has been demonstrated that there are numerous examples of surrounding buildings that do not comply with the HLEP or HDCP requirements (or previous iterations) which sets a different character to one that is governed by strict compliance with the current planning controls. Whilst it cannot be said that the planning controls have been thrown away, it is clear that the Balmoral Street, Waitara precinct does not demonstrate a high level of compliance with the height of buildings development standard and therefore height variations can be considered in the context of existing and approved buildings.

In this instance, the actual character of the locality does not reflect the “strategy” as there are numerous examples of residential flat buildings that provide a mezzanine style additions on the top element similar to the proposal. Examples include No. 16-20 Park Avenue with the top (mezzanine style addition) and street elevation detailed in Figure 6 below.



Figure 6: Approved Top level and elevation of 16-20 Park Avenue

In addition, No. 40-44 Edgeworth David Avenue also comprised of five storey with mezzanine development in Figure 7 below.



Figure 7: Upper floor plans for mezzanine style (top) and northern elevation fronting Edgeworth David Avenue (below)

Of interest, the Sydney West Joint Regional Planning Panel assessment report noted the following for the proposed development in Figure 7:

The subject site is situated within the 'Balmoral Street, Waitara Precinct', which has been nominated to deliver "predominantly five storey residential flat buildings in garden settings, with parking in basements". The proposed development for a five (5) storey residential flat building with basement car parking and associated landscaping is considered to be consistent with the desired future character of the Precinct.

It is considered that if the scale of the mezzanines for Nos. 16-20 Park Avenue and 40-44 Edgeworth David Avenue comprises of a five storey building and satisfies the strategy for the Balmoral Street, Waitara precinct, consistency in decision making would dictate that the proposed mezzanine level with less rooms and floor area per apartment would also satisfy the strategy for the Balmoral Street, Waitara precinct. A comparison of the proposed mezzanine and front elevation is detailed in Figure 8 below.

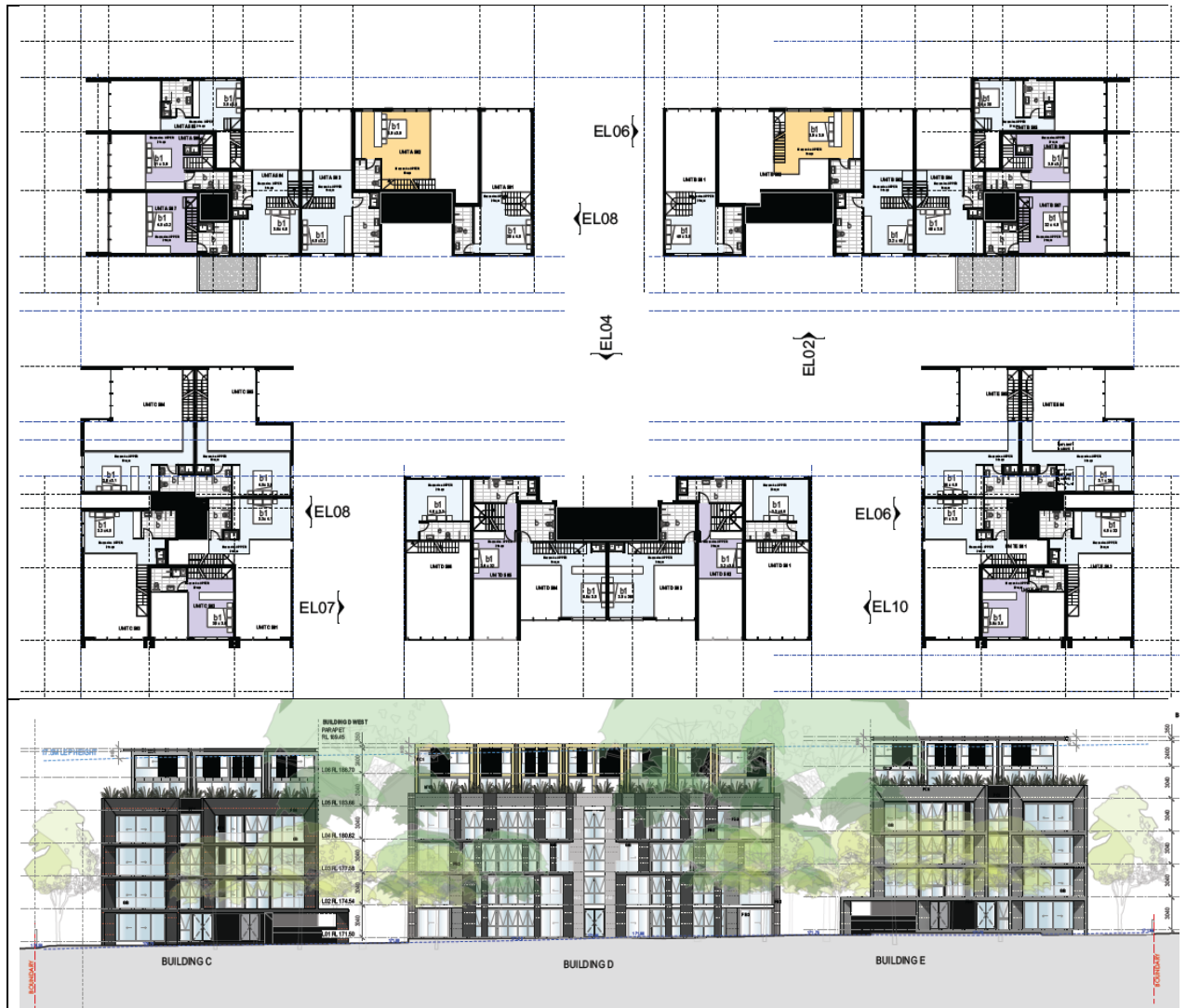


Figure 8: Upper floor plans for mezzanine style (top) and western elevation fronting Park Avenue (below)

Figure 8 details that the revised architectural plans (Issue C) will ensure the proposal is, at the very least, compatible with the mezzanine levels already approved and constructed in the precinct. Furthermore, it can be seen that the built form as it presents to Park Avenue is also, at the very least, compatible with the built form of surrounding buildings and presents a clear base and top element that is visually recessive and articulated. The top element will have the visual appearance of a five storey building with its 3-4.2m setback from the base elements and the provision of mezzanine style additions that provide a bedroom and bathroom that occupies 22-38sqm for each apartment (predominantly less than 30sqm). Therefore, the proposed development cannot be said to be visually jarring or incompatible with the built form of surrounding properties which exist in the Balmoral Road, Waitara Precinct.

In terms of the other elements of the “strategy”, the landscape setting is discussed throughout this submission and the proposal clearly provides two levels of basement parking.

Landscape setting - Provide broad setbacks along street frontages and rear boundaries and locate communal open spaces in order to retain remnants of Blue Gum High Forest and existing trees that are prominent streetscape features. Surround and screen new buildings with canopy trees and shrubs.



The revised architectural plans (Issue C) will provide 6m deep soil landscaped area setbacks from the side boundaries to complement the 6-8m deep soil landscaped areas in the front and rear setbacks. The provision of the periphery landscaped areas coupled with the deep soil landscaped area at the centre of the site will permit large canopy trees to be provided around the periphery or centre of the site which will enhance its visual appearance within a landscaped setting. The front and rear setback variations have been discussed above, as has the location of the COS at the centre of the site.

There are no remnants of the Blue Gum High Forest on the site and the proposed development will provide numerous large canopy trees underlain with shrubs and grass covers throughout the site to screen the proposed buildings and ensure the buildings are provided within a landscaped setting.

Built form - To reflect the established pattern of detached-dwellings: limit the width of new facades that would be visible from any street and divide the floorspace of every new building into well-articulated pavilion forms that are separated by courtyards with canopy trees.

Siting and design should provide at least two hours sunlight daily for living areas in 70% of new dwellings.

Design quality of facades should respond to visibility from all street and laneway frontages.

Immediately adjoining heritage items: ensure garden setbacks, heights, building forms + design features are compatible with values that are specified by the Hornsby Shire Heritage Inventory.

Employ setbacks and building forms that retain reasonable sunlight + privacy for existing neighbours.

The revised architectural plans (Issue C) has amended the built form of Buildings C, D and E to ensure the building dimensions comply with the HDCP requirements which will ensure the visual presentation of the site is, at the very least, anticipated by the planning controls and entirely compatible with the scale and form of surrounding development. The built form is highly articulated through building design, setbacks, recessed balconies, materials and colours and is considered to be entirely compatible with development to the south at Nos. 4-20 Park Avenue and surrounding properties in Edgeworth David Avenue and Balmoral Road. That is, well articulated development that is surrounded by landscaping elements.

The revised architectural plans (Issue C) will ensure more than 70% of the proposed apartments receive more than 2 hours of solar access in accordance with the ADG but also ensure that the extent of overshadowing to adjoining properties is minimised within the context of an R4 – High Density Residential zone and 17.5m height limit. Similarly, the setbacks and separation distances of the proposed development satisfy the requirements of Part 3F-1 of the ADG and will ensure privacy impacts are minimised between dwellings on the subject site and to neighbouring properties.

There are no heritage items in the vicinity of the site.

Overall, it is considered that the development will positively contribute to the existing and desired future character of the Balmoral Street, Waitara precinct when viewed in context with the surrounding buildings. Therefore, the proposal will be compatible with surrounding properties and will not be visually “jarring” in the streetscape or as viewed from the surrounding properties.

Other Issues

Floor to Ceiling Heights

Page 24 of the SNPP Assessment report indicates that the proposed development complies with the requirements of 4C-1 of the ADG in terms of floor to ceiling heights but notes the floor to floor heights of each level do not achieve 3.1m





floor to floor heights in Figure 4C.5 of the ADG. Unlike Figure 4C.1 which is referenced in the design guidance of Objective 4C-3, Figure 4C.5 is not specifically referred to in the design criteria of design guidance. Notwithstanding this, it is widely accepted that lower floor to floor heights than 3.1m can be achieved whilst still complying with the 2.7m floor to ceiling height requirements of Part 4C-1 of the ADG.

In this instance, the revised architectural plans (Issue C) demonstrate that the floor to ceiling height requirements for each floor and the mezzanine level satisfy the design criteria of the ADG and this is achieved with a floor to floor height of 3.04m. A detailed section is provided as part of the architectural package to demonstrate that the proposal will not result in a non-compliance with the ADG with regard to Part 4C-1 of the ADG.

Application of Section 4.15(3A) of EPA Act 1979

The proposed development presents a number of design solutions to satisfy each of the objectives of the relevant planning controls under HLEP 2013 or HDCP. Section 4.15(3A)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) provides the Council (and the Court on appeal) with the power to be flexible in applying the provisions of the DCP and allow reasonable alternative solutions that achieve the objects of that standards for dealing with that aspect of the development,

The application of section 4.15(3A)(b) has now been considered on a number of occasions by the Court including by Acting Justice Moore in the decision of *Trinvass Pty Ltd and Anor v Council of the City of Sydney* [2015] NSWLEC 151 where His Honour correctly identified that the application of section 4.15(3A)(b) in fact now “mandates taking a flexible approach” to numerical controls in the DCP. His Honour’s approach in *Trinvass* has been further applied in a number of cases including *Kotronakis v Pittwater Council* [2015] NSWLEC 1508 where the Court observed at [35]:

“The task is to determine how the provisions of the DCP, which is a mandatory relevant consideration under s 79C(1)(a)(iii) of the Act, should be applied to the development the subject of this appeal. If, on the application of the numerical standards, there is a shortfall in the number of parking spaces provided, Zhang v Canterbury City Council [2001] NSWCA 167 would not require refusal simply because of that shortfall. Section 79C(3A)(b) would require a flexible application of those standards, allowing reasonable alternative solutions that would achieve the objects of the relevant standards”.

What is clear from the above decisions and case like *NFF at 410 Pitt Street Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1181 at [39]-[42] and *Bettar v Council of the City of Sydney* [2016] NSWLEC 1456 at [40], is that the introduction of section 4.15(3A)(b) of the EP&A Act requires a flexible approach to the provisions of the DCP and that non-compliance with a numeral control does not restrain the Council from proceeding to approve the development application.

The revised architectural plans (Issue C) and supporting documentation provide reasonable alternative solutions to strict compliance with the numerical planning controls that warrant a flexible approach in the assessment of the application. The proposed development is entirely compatible with the scale, form, height and setbacks of surrounding development and is entirely worthy of Council’s support.

Conclusion

Our clients are obviously eager to see this application progress and we thank SNPP for providing us with the opportunity address the concerns raised and work towards achieving a positive outcome for the site and locality. We commend the replacement application plans and documents to Council and consider the proposed development is entirely worthy of Council’s support.





We thank you for your time and if you have any questions or require further information please do not hesitate to contact the undersigned on 0409319230.

Yours faithfully,
Planning Ingenuity Pty Ltd

David Waghorn
ASSOCIATE DIRECTOR



Annexure 1

Clause 4.6 Variation – Height of Buildings



Clause 4.6 Variation Statement – Building Height (Clause 4.3)

1. Height of Buildings Standard

Clause 4.3 of HLEP 2012 relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 17.5m. Building height is defined as:

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 relevant map [sheet HOB_017] indicates that the maximum building height permitted at the subject site is 17.5m.

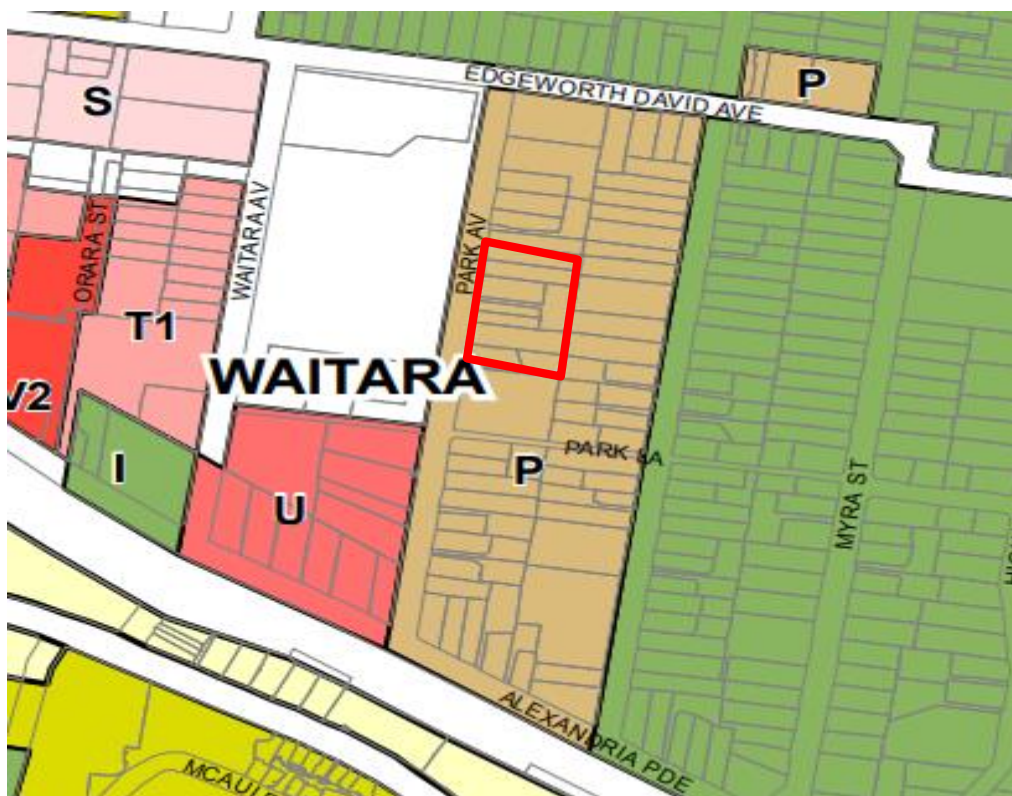


Figure 9 Extract from the Height of Buildings Map [P=17.5m]

2. Proposed variation to height of buildings development standard.

The revised architectural plans have reduced the height of the buildings by 0.15-0.25m and altered the external design and setbacks which results in a variation from the heights considered in the SNPP Assessment Report. The proposed development results in the following variations to the HOB standard for all five buildings are as follows:

- Building A would be 17.91m high and breaches the height standard by a maximum of 410mm or 2.3%,
- Building B would be 17.66m high breaches the height standard by a maximum of 160mm or 0.9%,
- Building C would be 18.45m high and breaches the height standard by a maximum of 955mm or 5.4%,
- Building D would be 18.59m high and breaches the height standard by a maximum of 1090mm or 6.2%,
- Building E would be 18.49m high and breaches the height standard by a maximum of 995mm or 5.6%.

A visual representation of the extent of variation is provided in the building height plane diagram below. It is noted that extent of the variation for the proposed development when compared to the extent of variation for the surrounding existing development at Nos. 16-20 Park Avenue and 35-39 Balmoral Street, Waitara.

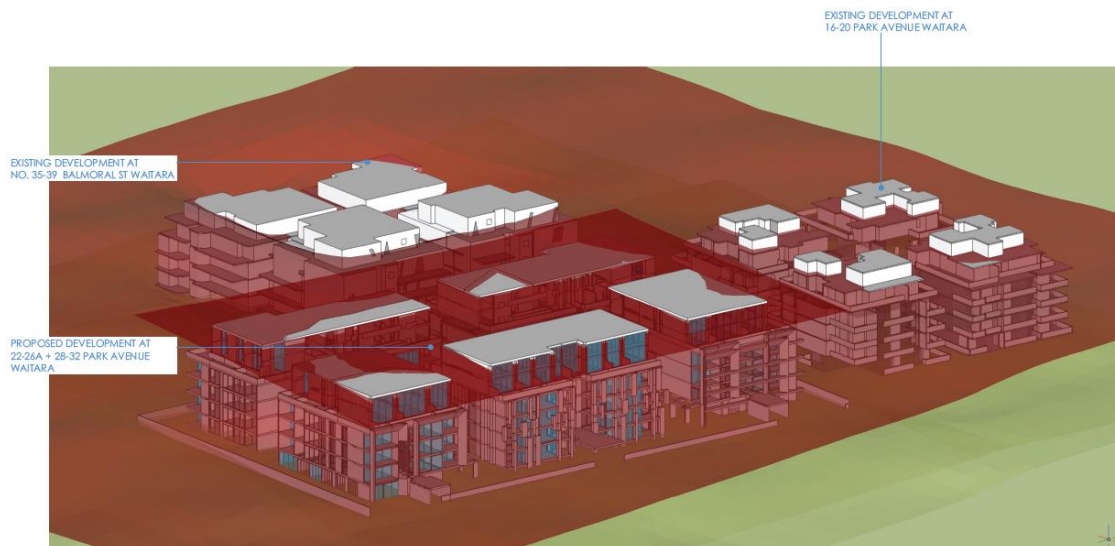


Figure 10 Height Blanket Diagram

3. Clause 4.6 to HLEP 2013

The objectives and provisions of clause 4.6 are as follows:

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 Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

When this Plan was made it did not include of these zones.

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4.*

The development standards in clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements

of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building heights as detailed in Part 2 above.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“ An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”

The judgement goes on to state that:

“ 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).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

“...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.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*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].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The height breach, in part, can be attributed to the requirement to site the development above the Flood Planning Level. The following table details the extent of the variation when excluding flooding:

	FPL (RL)	Plus 17.5m (RL)	Proposed RL	Height over FPL
Building A	172	189.5	189.95	450mm
Building B	172	189.5	189.95	250mm

Building C	171.1	188.6	189.05	450mm
Building D	171.7	189.2	189.45	450mm
Building E	172.2	189.7	190.15	450mm

Therefore, when excluding flooding the proposed development will be 250-450mm above the maximum height level. This variation occurs predominantly at the western end of each building given the cross fall of the site. In most instances, the extent of the height variation at the eastern end of the building is negligible or compliant (refer to Figure 3 below)



Figure 11 Short section detailing the fall of the site from east to west

Therefore, it is a combination of the flooding and topography that result in a variation to the height of buildings development standard. Both of these factors are site specific factors that are not contemplated by Clause 4.3 of HLEP 2013.

- The greatest extent of the variation occurs on the western elevations of Buildings C, D & E. The non-compliant elements are setback 12.2-13.75m from the front (western) boundary and are 3-4.2m behind the base element as detailed in Figure 3 above. Given the height and scale of the base elements, the top elements will appear as visually recessive elements that are not visually jarring to the casual observer on Park Avenue when viewed in context of surrounding properties.
- The topography of Park Avenue includes a fall from south to north with the following typical RL heights:

Address	RL Height
4-6a Park Avenue	RL 191.6
8-10 Park Avenue	RL 190.99
12-14 Park Avenue	RL 190.64
16-18 Park Avenue	RL 190.47
Building E	RL 190.15
Building D	RL 189.45
Building C	RL 189.05
34-38 Park Avenue	subject to future redevelopment

As detailed above there is a gradual fall in the topography which is followed by existing development on the eastern side of Park Avenue. Despite the height variation, the proposed development will step with the change in topography and transition to the currently underdeveloped site at Nos 34-28 Park Avenue. Insistence on compliance with the height control would put the development out of step with the gradual fall of building heights with the topography. Figure 4 has been prepared which provides a visual presentation of the built form and topogpray and how the proposed development, despite the variation will sit in its context and appear from pedestrian level on Park Avenue.



Figure 12 Visual representation of the proposal within in context

4. The height of the proposed development, including the variation, will be entirely compatible with the height and character of surrounding development. As demonstrated in Figure 2, Nos. 16-20 Park Avenue and 35-39 Balmoral Street do not comply with Clause 4.3 of HLEP 2013. Whilst these variations in themselves are not a sufficient reason to vary the development standard, it is Council's actions in approving height variations in the Balmoral Street, Waitara Precinct that sets a different context to one that is governed by the permissible planning controls. Whilst it cannot be said that the height standard has been thrown away, it is clear that the Balmoral Street, Waitara precinct does not demonstrate a high level of compliance with the height of buildings development standard and therefore height variations can be considered in the context of existing and approved buildings.

This is broadly consistent with Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 found the following at Para 62-63:

Construction of the term “desired future character” that would confine its meaning to being defined and fixed by the development standards only would make forming the opinion of satisfaction under cl 4.4(4)(a)(ii) that the proposed development is consistent with these objectives difficult, if not impossible. On this construction, the height and FSR development standards define and fixed the desired future character. A development that contravenes the height and FSR development standards needs to demonstrate that it will be consistent with the desired future character. It cannot do this because, contravening the development standards, it is inconsistent with the desired future character that is defined and fixed by those development standards.

This circularity is avoided if the term “desired future character” is construed as permitting regard to be had to matters other than only the development standard. On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Whilst the facts and degree may vary, it is clear that the character of the locality, whilst defined in the HDCP, is not specifically defined in the HLEP 2013 and is therefore subjective and can be set by the existing, recently approved and proposed buildings within the neighbourhood. When considering the development in the context of the surrounding development, including existing non-compliant buildings, the proposal development, even with the height variation, will sit in harmony with surrounding development and is considered to be entirely compatible with the scale and character of surrounding development, noting that compatible does not mean sameness (*Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191).

5. The proposed development will provide for a five storey development with a mezzanine style level that is entirely compatible with mezzanine style additions approved at Nos. 4-6a, 8-10, 12-14 and 16-18 Park Avenue, all of which are to the south of the site. The proposed top element with a fifth level and mezzanine style addition will only comprise of a bedroom and a bathroom for each apartment and represent a small proportion of the total area for each apartment.
6. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - a. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining properties when compared to a compliant building envelope. This is detailed in the hourly shadow diagrams provided with this submission that detail the additional overshadowing as a result of the height variation. It is concluded the height breach will not result in any adverse loss of solar access to surrounding properties and continues to provide sufficient solar access. That is, the extent of additional overshadowing from the additional height would be insignificant and would not be noticeable to the owners of surrounding properties.



- b. The height breach does not result in any adverse additional privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy to the adjoining properties when compared to the approved built form. The extent of the variation is limited to the upper portion of the proposed development where windows that are compliant with the height limit will have a greater impact on privacy. As such, the loss of privacy caused by the non-compliant elements would be insignificant or nil; and
 - c. The height breach will not result in any significant view loss. No significant views have been identified in the locality and therefore the extent of view loss caused by the non-compliant element would be insignificant or nil.
- 7. The height breach facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development with the provision of mezzanine style additions. Insistence on compliance with the height control would result in the removal of the mezzanine style addition which would result in a disproportionate loss of amenity for the occupants with insignificant or nil benefits to the amenity of adjoining properties. Furthermore, insistence on compliance with the height development standard would reduce the height of Buildings C, D & E which would not facilitate the gradual stepping of buildings with the topography.
- 8. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone (as further detailed in Section 7 below);
- 9. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
 - b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- 10. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
 - a. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));



- b. Approval of the proposed variation will allow for a variation of building height and scale across the locality which is commonly accepted urban design approach instead of buildings with consistent height; and
- c. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the flood levels, the topography and character of the precinct. Insistence on compliance with the height control will result in the removal of the mezzanine style level which is a disproportionate response given the insignificant impacts of the proposal. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is not visually jarring from the public domain.

It is noted that the SNPP Assessment Report makes many assertions that the original Clause 4.6 variation request was not well founded and raised a number of issues such as the 3.1m floor to floor height, the desired future character requiring 5 storeys under HDCP, the planning proposal to reduce the height to 16.5m and various non-compliances with the HDCP and ADG separation, landscaped area and other notable controls. With the greatest of respect to Council staff, none of these issues are relevant matters when considering a variation to the height of buildings development standard under Clause 4.6 of HLEP 2013.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

- 86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
- 87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 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 clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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 (Clause 4.6(4)(a)(ii))



Height of Buildings Objectives

The sole objective of clause 4.3 of HLEP 2013 is as follows:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

The construction of Clause 4.3(a) of HLEP 2013 requires a consideration of the site constraints, development potential and infrastructure capacity of the locality to establish a height that is "appropriate". The difficulty in addressing this objective is heightened by the fact that the terms "site constraints", "development potential" and "infrastructure capacity" are not defined in HLEP 2013. However, the fact that heights of buildings are only required to be "appropriate" when considering the site constraints, development potential and infrastructure capacity sets a lower bar when considering the Clause 4.6 variation against the objectives of the height of building control. Contrary to Council considerations in the SNPP Assessment Report, the above objective does not necessitate an assessment of HDCP and ADG requirements.

As discussed in Part 5 (above), the proposed development has site specific constraints with regard to flooding and topography that necessitate a built form that does not "nestle" into the site like surrounding buildings. In any event, the resultant building height is demonstrated to step with the gradual fall of the topography along Park Avenue and comprise of a height that is entirely "appropriate" when considered in the context of the height of surrounding developments (refer to Reason 3 and Figure 4 above).



In terms of the development potential, it is noted that HLEP 2013 does not contain a maximum FSR for the site but relies on the DCP envelope controls to establish development potential. However, if the development potential is limited to application that strictly comply with the development standard for height then Clause 4.6 of HLEP 2013 would have no work to do. A similar situation exists regarding compliance with the HDCP envelope and setbacks where Clause 4.15(3A) of EPA Act would have no work to do. These requirements provide flexibility from strict application of the controls and in this instance, the proposed variation to the height standard will permit additional accommodation in the form of mezzanine levels that is entirely compatible with the mezzanines and height of surrounding properties. The additional development potential will achieve a planning purpose by providing high quality residential accommodation in a suitable location in close proximity to services and transport. These benefits are in the absence of any significant additional adverse streetscape or amenity impacts on neighbouring properties and the variation is considered “appropriate” or not antipathetic to this objective.

In terms of infrastructure capacity, insisting on compliance with the height of buildings development standard will not alter the number of apartments provided in the proposed development but simply reduce the amount of habitable floor space (bedroom and bathroom). Therefore, the impacts on the local road network, essential services such as electricity and water, access to shops, public transport and local facilities and other similar services will not be significantly different if the height variation is permitted. It is therefore considered that the variation to the height limit is considered “appropriate” or not antipathetic to this objective.

The burden of insisting on strict compliance would result in the effective removal of the mezzanines which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with other high density developments in the vicinity and the planning controls, subject to flexibility available under Clause 4.6, permit a development of this general scale.

The proposal is therefore consistent with objective (a), despite the technical height variation.

Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R3 are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development will provide for the housing needs of the community. The height variation will assist in providing additional accommodation when compared to the compliant parts of the building to assist in providing for the housing needs of the community within a high density environment.

- *To provide a variety of housing types within a high density residential environment.*

The height variation will assist in providing additional and varied accommodation when compared to the compliant parts of the building. That is, the proposed mezzanine apartments that will add and diversify the housing stock within a high density environment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

This objective is not relevant to the proposal.

The proposed development, including those parts of the building that breach the height of buildings development standard, is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

The issue of the concurrence of the Secretary of the Department of Planning and Environment is dealt with by Planning Circular PS 20-002 ‘Variations to development standards’, dated 5 May 2020. This circular is a notice under 64(1) of

the Environmental Planning and Assessment Regulation 2000. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

Concurrence cannot be assumed for a request for a variation to a numerical standard by more than 10 per cent if the function is to be exercised by a delegate of the consent authority. This restriction does not apply to decisions made by local planning panels, who exercise consent authority functions on behalf of councils but are not legally delegates of the council. As such, it is anticipated that the development application will be determined by the local planning panel.

The Secretary can be assumed to have given concurrence to the variation.

9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by up to 935mm or 5.3%, the proposed development is consistent with the objective 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.

11. Conclusion

This written request has been prepared in relation to the proposed variation to the 17.5m height of buildings development standard contained in Clause 4.3 of HLEP 2013.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.



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