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# **CLAUSE 4.6 VARIATION – BUILDING SEPARATION**

711 Hunter Street, Newcastle  
West

Prepared for  
**HUNTER STREET JV CO PTY LIMITED**  
August 2023

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

|                    |                                    |
|--------------------|------------------------------------|
| Director           | Andrew Harvey                      |
| Associate Director | Naomi Ryan                         |
| Consultant         | Isabella Tonks and Kirraly Northey |
| Project Code       | P0034237                           |
| Report Number      | Final – V4                         |

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CLAUSE 4.6 VARIATION REQUEST - BUILDING SEPARATION - 711 HUNTER  
STREET NEWCASTLE WEST - AUGUST 2023

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# 1. INTRODUCTION

This Clause 4.6 Variation Request (**'the Request'**) has been prepared on behalf of Hunter Street JV Co Pty Limited (**the applicant**) and accompanies a Development Application (**DA**) for a mixed-use development at 711 Hunter Street, Newcastle West. The proposed development was subject to a Design Competition where three competitors participated to prepare design proposals for the site and is now subject to the Development Application process.

The Request seeks an exception from the building separation prescribed for the site under clause 7.4 of the Newcastle Local Environmental Plan 2012 (**NLEP**). NLEP prescribes a 24-metre separation distance above 45 metres or higher above ground level. The separation distance applies internally and externally to the site.

Given the proposed development exceeds 45 metres, a 24-metre building separation is required at 45 metres or higher above ground level. It is noted that this building separation controls does not align with the objectives and guidelines of the Apartment Design Guidelines (**ADG**).

A variation to the control is proposed between the northern (Stage 1) tower and the adjacent property to the west (723 Hunter Street), and between internally between Stage 1 and Stage 2.

The variation is request is made pursuant to clause 4.6 of NLEP.

For a request to meet the requires of clause 4.6(3) of the NLEP, it must adequately demonstrate:

- (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.*

The request contains justified reasoning for the proposed variation to the building separation standard and demonstrates that:

- The proposed development complies with the ADG, which is a State-wide policy that provides guidance on building separation and what is an equitable setback share in different scenarios.
- Plus Architecture was recommended by the Jury as the winning scheme in the competitive design process. The non-compliance was known at the competition stage. Post the competitive design process Plus increased the setback distances and replanned floor plates to ensure living spaces are not facing 723 Hunter Street. The scheme been reviewed and supported by the Design Integrity Panel (**DIP**) from a setback perspective on 07 October 2022.
- The design is a result of iterative detailed engagement and input from various CN teams including planning, waste, engineering, and heritage; and the Chair of CN's UDRP. The Chair of CN's UDRP has accepted the rationale for the reduced setbacks given compliance with the ADG, and the overall design response.
- The relationship between adjacent properties and the site, and internal to the site, is appropriate given compliance with the ADG. In particularly, a 9m setback is proposed between the northern tower and adjacent commercial building (723 Hunter Street). This represents an equitable share under the ADG given the setback is between a blank wall and a commercial development.
- CN, while not abandoning clause 7.4, have provided a number of recent examples of flexibility with this development including at 1 National Park Street, Verve and The Store.
- Clause 7.4 does not have any clear objectives in the NLEP; therefore, the design response has relied on the objectives established by the ADG.
- The proposed development results a better outcome than a compliant tower form. Should compliance be required, this would push the tower form to the east of the site toward the street frontage, which would result in non-compliance tower setbacks and lead to unreasonable impacts to the public domain. The design is sympathetic to the surrounding context and does not overwhelm the public domain.
- The building separation distance resulting from non-compliance does not result in any unreasonable impacts on adjoining properties and within the development, particularly with respect to overshadowing, loss of privacy and loss of views.

- The proposed variation does not result in any additional height above the NLEP height limit or the FSR above the design excellence bonus, therefore, the resultant additional bulk and scale is not unreasonable.
- Under clause 4.4 of the LEP an 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development. The bulk and scale of the proposal has been carefully resolved to respond the surrounding context and represents an appropriate design response. Should a commercial development be proposed on the site, this would result in a significantly reduced separation than proposed.

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated November 2022 and subsequent Request for Additional Information responses. This Clause 4.6 Variation Request has been updated to respond to the Hunter and Central Coast Regional Planning Panel (HCCRP) comments outlined in the Record of Deferral dated 8 August 2023.

The following sections of the report include:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** identification of the development standard, which is proposed to be varied, including the extent of the contravention.
- **Section 5:** outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** summary and conclusion.

## 2. SITE CONTEXT

### 2.1. SITE DESCRIPTION

The site is known as 711 Hunter Street, Newcastle West and is legally described as Lot 1 in Deposited Plan (DP) 867617. The site comprises a 4,743m<sup>2</sup> parcel of land with public frontages along the northern, eastern, and southern site boundaries, and direct interface with existing properties to the western site boundary.

The site currently accommodates a two-storey commercial building which fronts the corner of Hunter Street and National Park Street, this commercial building occupied by Muso's Corner, Anytime Fitness and an operational multi deck car park and has been historically occupied by Spotlight and Anaconda. The commercial building is connected via an existing pedestrian bridge to a three-storey carpark, with rooftop parking, and ground floor retail space which fronts King Street. The ground floor is currently occupied by two retail tenants. The existing carpark is still utilised. All existing structures onsite will be demolished upon commencement of construction. The site area is illustrated in **Figure 1** and site photos are provided in **Figure 2**.

Figure 1 – Site Location



Source: Urbis

Physically, the site has a relatively flat topography with minimal slope. The site does not have any vegetation or landscaping. There is one street tree which is located on the corner of National Park Street and Hunter Street which will be maintained.

Figure 2 – Existing Site



Picture 1 – Corner of National Park and Hunter Street



Picture 2 – Middle of National Park Street (Pedestrian Bridge)



Picture 3 – View of Site looking north along National Park Street



Picture 4 – View of site looking east along King Street

Source: Urbis

## 2.2. LOCALITY CONTEXT

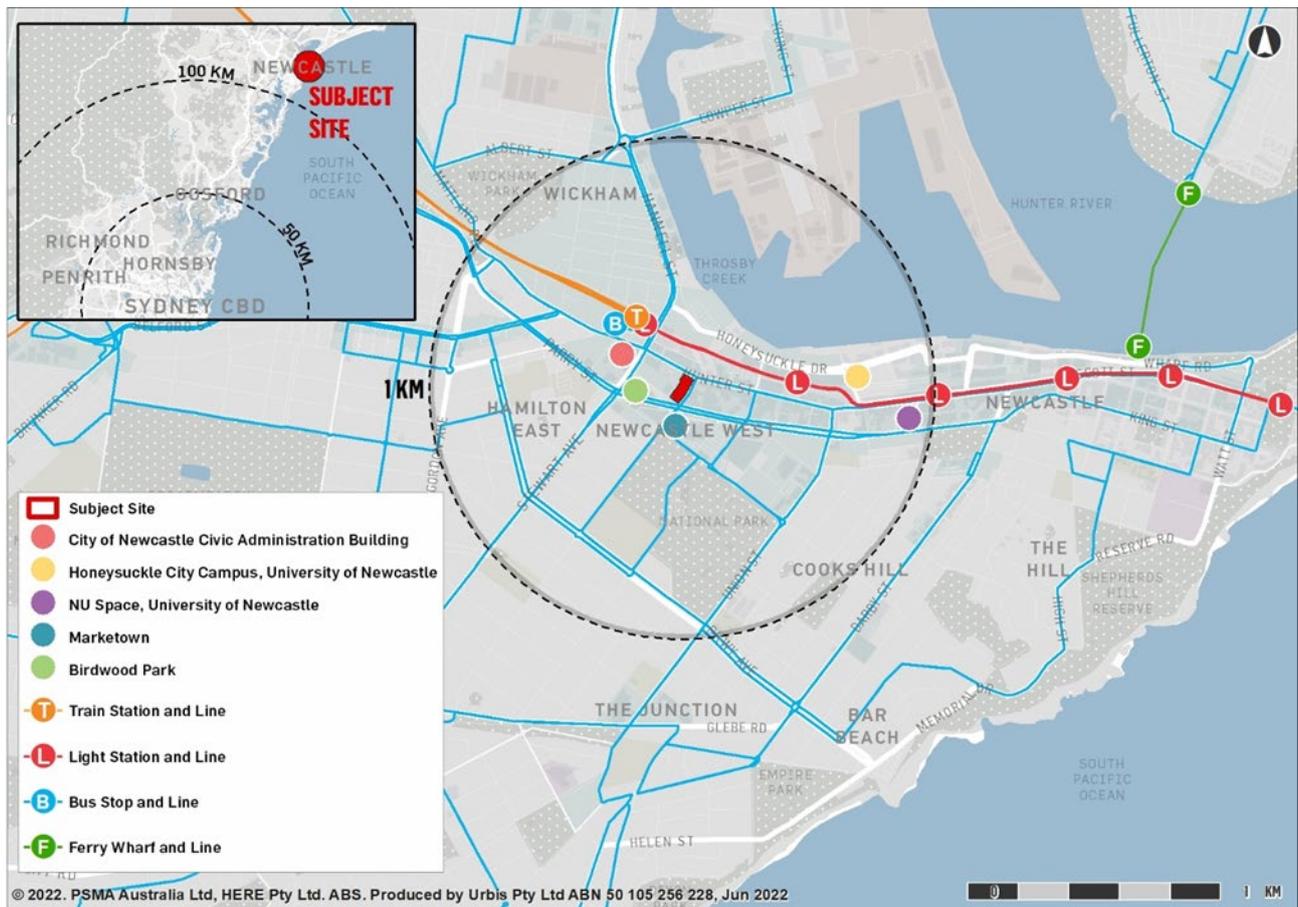
The site is located within an area of Newcastle that is principally of commercial use. Development along both sides of King Street and Hunter Street have a mix of scale accommodating residential, retail and commercial development, with various buildings and uses.

- To the **east** of the site directly is National Park Street. DA2019/00711 was approved by the Land and Environmental Court on the 21 September 2020, for a mixed-use development at 1, 17 and 19 National Park Street and 484 King Street. The approved development comprised the demolition of existing structures, construction of two towers of 22 and 19 stories comprising 193 dwellings, office premises, ground floor retail premises, car parking and associated landscaping. Construction has started on this site, the proposal has removed all street trees along the Eastern side of National Park Street, demolition and ground works are also well underway. Further east of the site is 'Verve' a mixed-use development with 2 residential towers.
- The 'Army Drill Hall' is located to the **south-west** of the site which is a locally listed heritage item. Birdwood Park is also located to the south-west and is an important piece of public domain due to the limited amount of green space in Newcastle City Centre. Development consent (DA2018/00051) was granted for a 14-storey mixed use commercial development to the west (723 Hunter Street) and retention of the 'Army Drill Hall.' The approval also included 5 levels of above-ground parking integrated into the

fabric of the building, with access from Little King Street. DA2020/01357 subsequently approved an additional 2 storeys, bringing the overall total height to RL + 62.920. Construction has largely been completed with scaffolding almost all removed.

- Further **west** is City of Newcastle Administration Building fronting Stewart Avenue, Holiday Inn and a recently completed senior living facility fronting Birdwood Park.
- To the **north-west** is Newcastle Interchange providing access to light rail, trains and bus services. The Store site, at 854 Hunter Street, incorporates a recently constructed multi-level car park and commercial building.
- To the **north** of the site 'Aero' mixed-use development with 4 levels of parking and two commercial tenancies fronting Hunter Street which is approximately 14-storeys in height. Hunter Street has a mix of scale accommodating residential, retail and commercial development, with various buildings and uses. Bank Corner, a local heritage listing identified in Schedule 5 of the Newcastle LEP 2012, is located on the corner of Bellevue Street and Hunter Street. Further north is the Honeysuckle Precinct and Newcastle Harbour.
- To the **south** of the site is King Street, and Parry Street. The Parry Street Precinct includes The Edwards, a creative retailer with F&B, Vinyl store, live music and a retro coin-op laundry was the first retailer that acted as a catalyst for other retailers to open. There are now about 7 retailers in the former industrial car yard precinct. Parry Street has played a strong role in the ground plane and retail briefing response for this proposal. Further **south** is the Fearnley Dawes Athletic Centre and Newcastle High School.
- Marketown Shopping Centre is located to the **south-east** of the site, Marketown is a sub-regional centre consisting of two sides (east and west). The east is anchored by Woolworths, Big W and Dan Murphy's and has 28 specialty stores, and has residential apartments located above. The west centre is anchored by Coles and Officeworks and also has 28 specialty stores.

Figure 3 – Site and surrounding locality



Source: Urbis

# 3. PROPOSED DEVELOPMENT AND DESIGN HISTORY

## 3.1. OVERVIEW

This Clause 4.6 Variation Request has been prepared to accompany a DA for the staged redevelopment of a mixed-use precinct that has undergone a competitive design competition.

The overall outcome of the proposal aims to develop a mixed-use precinct with high quality tower forms providing a positive relationship to the immediate surrounds and acknowledging the surrounding heritage context. The proposal intends to act as a landmark for Newcastle West with a curated mix of eclectic and creative retail, F&B and commercial opportunities activating the ground and podium levels.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated November 2022. The proposal is also detailed within the architectural, engineering and landscape drawings that form part of the DA.

The key features are summarised below:

- Demolition of the existing commercial premises and ancillary structures on-site;
- Construction of a mixed-use precinct forming active ground and podium levels reaching 5 storeys of retail and commercial tenancies including food and beverage tenancies, as labelled on the architectural plans, with two tower forms for residential apartments reaching 26 storeys comprising of 258 apartments;
- Podium level car park for 300 cars incorporated within the podium levels;
- Communal open space for residents located on level 5 and 17;
- Vehicle access to the site via Little King Street;
- Associated landscaping with the public domain improvements;
- A mix of retail, food and beverage and business tenancies will front Hunter and King Street to enhance activation of the ground plane and pedestrian traffic. These will be accompanied by appropriate landscaping features to enhance public domain;
- An urban plaza fronting National Park Street providing opportunities for activation and public art; and
- Construction of ancillary infrastructure and utilities as required.

It is noted that the overall development will form two separate concurrent DAs. Stage 1 will form the northern tower and podium elements and Stage 2 will form the southern tower and podium elements. These separate DA components are explored further below.

## 3.2. STAGE 1 – NORTHERN TOWER

The northern tower will include commercial and retail tenancies at ground level which will be accessible via National Park Street, Little King Street and Hunter Street. The podium levels will be situated above ground and contain car parking for both visitors and residents, accessed via Little King Street. Level 5 to Level 25 will contain a mixture of residential apartments ranging from 1 bedroom to 3 bedrooms. A numerical breakdown of Stage 1 is shown below:

- 136 apartments including: 35 one bedroom, 74 two bedroom, 26 three bedroom, 1 four bedroom.
- Total GFA: 14,015.23 sqm
- Floor space ratio: 5:58:1
- Total car parking spaces: 165 spaces over 4 podium levels

### 3.3. STAGE 2 – SOUTHERN TOWER

The southern tower will include commercial and retail tenancies at ground level which will be accessible via National Park Street, Little King Street and Hunter Street. The podium levels will be situated above ground and contain car parking for both visitors and residents, accessed via Little King Street. Level 1 to Level 25 will contain a mixture of residential apartments ranging from 1 bedroom to 3 bedrooms.

- 121 apartments including: 35 one bedroom, 71 two bedroom, 16 three bedroom.
- Total GFA: 12,484.56sqm
- Floor space ratio: 5.64:1
- Total car parking spaces: 135 spaces over 4 podium levels

Both stages will include surrounding landscaping, public domain works and green spaces. The strata and stratum approach are detailed further in this SEE.

The overall built form and design is illustrated in **Figure 4** and **Figure 5** below.

Figure 4 – Perspective looking north-east towards Stage 2 (Southern Tower)



Source: Plus

Figure 5 – Perspective looking south-west towards Stage 1 (Northern Tower)



Source: Plus

## 4. VARIATION OF BUILDING SEPARATION STANDARD

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

### 4.1. DEVELOPMENT STANDARD

The development standard for building separation that is applied to buildings on land that applies to the NLEP.

The relevant clause 7.4 of the NLEP applies as follows:

*(1) A building on land to which this Part applies must be erected so that the distance from the building to any other building is not less than 24 metres at 45 metres or higher above ground level.*

*(2) For the purposes of this clause, a separate tower or other raised part of the same building is taken to be a separate building.*

Given the proposed development exceeds 45 metres, a 24-metre building separation is required at 45 metres or higher above ground level. It is noted that this building separation controls does not align with the objectives and guidelines of the ADG. For comparison, the ADG requirements are outlined below:

| Building Height        | Habitable rooms and balconies | Non-habitable rooms and balconies |
|------------------------|-------------------------------|-----------------------------------|
| Up to 12m (4 storey)   | 6m                            | 3m                                |
| Up to 25m (5-8 storey) | 9m                            | 4.5m                              |
| Over 25m (9+storey)    | 12m                           | 6m                                |

Clause 7.4 does not have any clear objectives in the NLEP; therefore, the design response has relied on the objectives established by the ADG.

### 4.2. PROPOSED VARIATION TO CLAUSE 4.3 OF THE NLEP

This clause 4.6 variation request seeks to gain approval for a variation to the minimum building separation standards as prescribed by clause 7.4 of the NLEP.

The building separation proposed between the northern tower and the adjoining residence at 723 Hunter Street, Newcastle West is 15.1 metres, and 17 metres between the southern tower and 723 Hunter Street, Newcastle West. Both these separation distances do not comply with the 24 metres prescribed by Clause 7.4 (a).

This non-compliance is a result of 723 Hunter Street being a commercial development and not providing equitable setbacks as per the ADG, and the numerous design considerations including apartment layout design, solar access, and view impacts.

The building separation between the two towers proposed in Stage 1 and Stage 2 is 22.633-metre separation with a 1 metre non-compliance. This non-compliance is minor and managed through apartment layouts and careful consideration of amenity impacts.

A summary of the numerical details of the variation area outlined below.

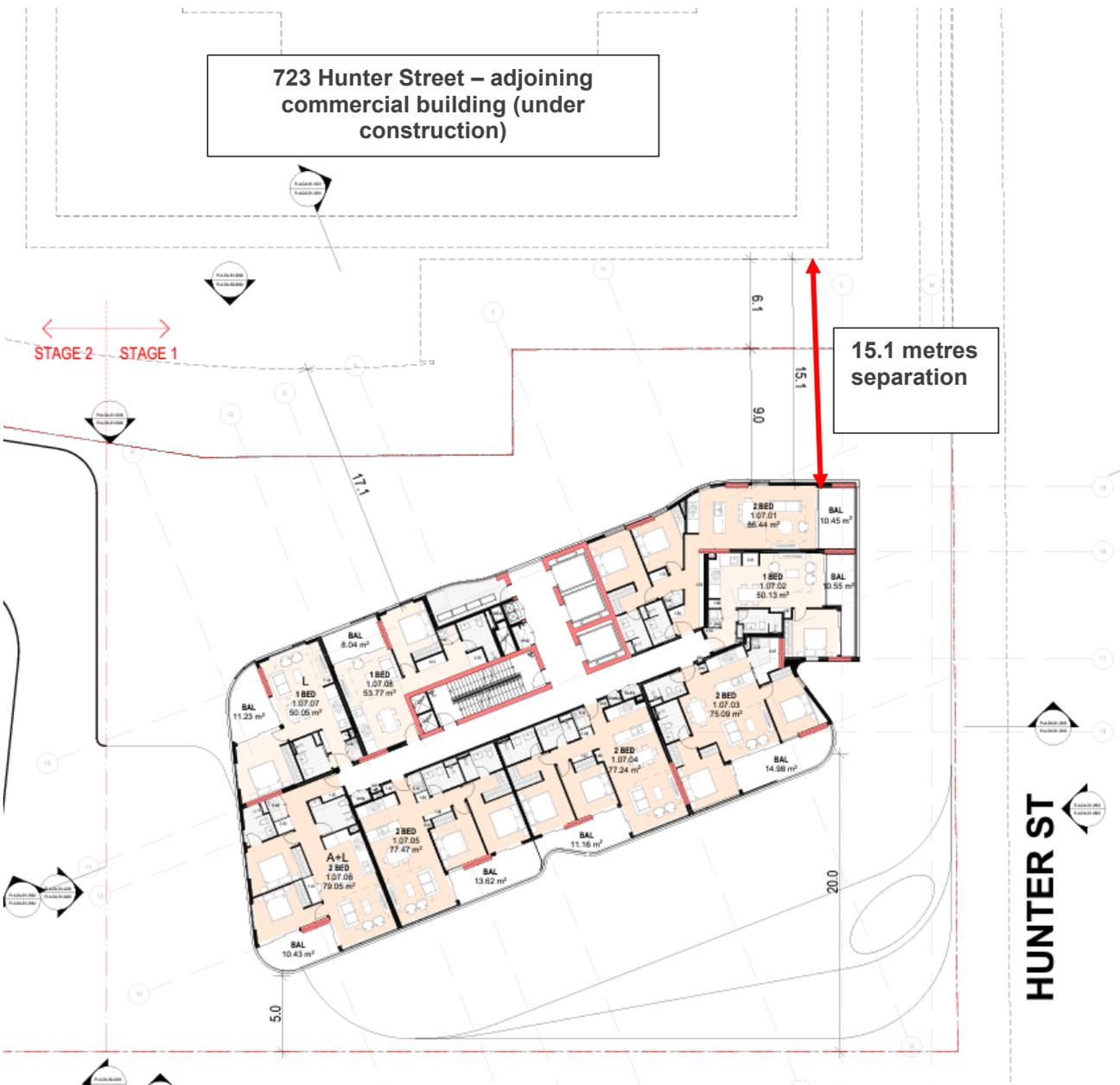
Table 1 – Numeric Overview of Proposed Variation

| Required Building Separation | Proposed  |
|------------------------------|---|
| 24 metres                    | 15.1 metres between northern tower and 723 Hunter Street (Stage 1 DA) |

| Required Building Separation | Proposed  |
|------------------------------|---|
| 24 metres                    | 22.633 metres between northern and southern tower elements (Stage 2 DA) |
| 24 metres                    | 17 metres between southern tower and 723 Hunter Street (Stage 2 DA)     |

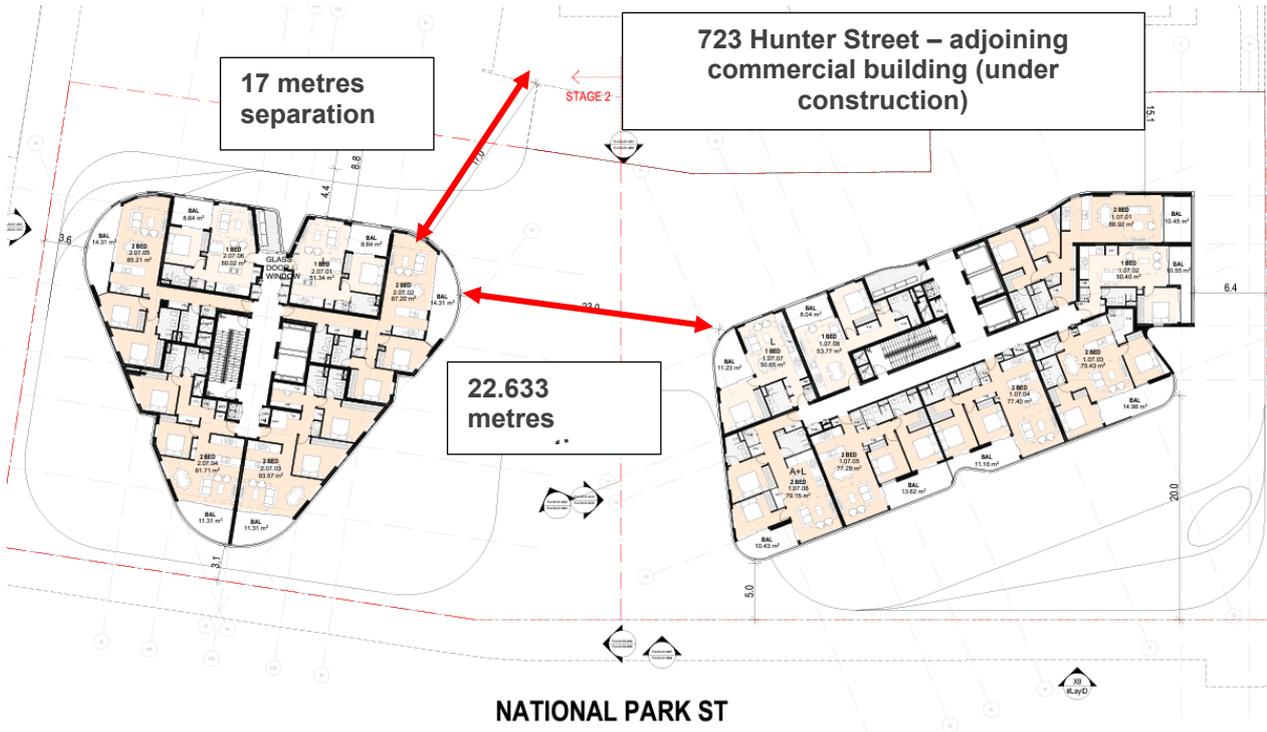
The non-compliance between the northern tower and 723 Hunter is illustrated in **Figure 6**, the red arrow highlight shows the non-compliance areas. Further, the non-compliance between the internal tower elements and southern tower and 723 Hunter is illustrated in **Figure 7**, the red arrow highlight shows the non-compliance areas.

Figure 6 – 15.1 metres between northern tower and 723 Hunter Street



Source: Plus (as annotated by Urbis)

Figure 7 – Northern tower and 723 Hunter and 17 metres between southern tower and 723 Hunter Street



Source: Plus (as annotated by Urbis)

## 5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of Newcastle Local Environmental Plan 2012 (NLEP) includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of NLEP are:

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

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

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (d) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (c) the public benefit of maintaining the development standard, and*
- (d) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the Building Separation prescribed for the site in clause 7.4 of NLEP is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the building separation development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the building separation in accordance with clause 7.4 of NLEP.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

### 6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The building separation prescribed by clause 7.4 of NLEP is a development standard capable of being varied under clause 4.6(2) of NLEP.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of NLEP.

### 6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential unreasonable impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

Clause 7.4 of the NLEP does not have any specified objectives therefore an assessment against the Newcastle City Centre objectives prescribed in clause 7.2 of the NLEP are detailed in **Table 2** below. It is noted that some of the objectives are not relevant for this variation but have been addressed for completeness. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 – Assessment of Consistency with Clause 7.1 Objectives

| Objectives   | Assessment  |
|--|---|
| (a) to promote the economic revitalisation of Newcastle City Centre,   | The variation to the building separation clause is considered minor and will not prevent the economic revitalisation of Newcastle City Centre.  |
| (b) to strengthen the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth,                         | <p>The proposal is highly consistent with all strategic planning aims and objectives for the Newcastle City Centre and the Hunter region by providing a diversity of housing, and employment opportunities in a well-connected area.</p> <p>The variation to the building separation clause is considered minor and will not prevent the strengthening of Newcastle’s regional position or hinder employment and economic growth.</p>   |
| (c) to protect and enhance the positive characteristics, vitality, identity, diversity and sustainability of Newcastle City Centre, and the quality of life of its local population, | <p>The development will enhance the positive characteristics of Newcastle City Centre and contribute significantly revitalising the city centre.</p> <p>The variation to the building separation clause is considered minor and will not create unreasonable that will detrimentally affect the local population, particularly given no additional overshadowing will occur to public spaces as a result of the variation.</p>  |
| (d) to promote the employment, residential, recreational and tourism opportunities in Newcastle City Centre,   | <p>The proposal will promote employment, residential and recreational opportunities in Newcastle City Centre through the provision of retail and business premises which will lead to ground plane activation, and the delivery of a variety of apartment types.</p> <p>The variation to the building separation clause is considered minor and will not prevent the promotion of a diverse range of land use opportunities in Newcastle City Centre, nor will it hinder other people’s opportunities to promote employment, residential, recreational and tourism opportunities.</p> |
| (e) to facilitate the development of building design excellence appropriate to a regional city,  | This development has undergone an Architectural Design Competition where three competitors put forward their designs in accordance with a robust Design Excellence Brief and Strategy. The Plus Architecture scheme was recommended by the Jury as the winning scheme in the competitive design process.  |

| Objectives   | Assessment   |
|--|--|
|  | <p>The variation to the building separation clause is considered minor and hinder the proposals' ability to achieve design excellence.</p>   |
| <p>(f) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Newcastle City Centre achieves sustainable social, economic and environmental outcomes</p> | <p>The proposed development has considered the responsible management, development and conservation of natural and man-made resources.</p> <p>The development includes appropriate mitigation measures to minimise environmental impacts, for example, a basement has not been proposed to minimise the ground disturbance with Aboriginal archaeology in mind and to minimise impacts on the high-water table.</p> <p>In terms of social and economic impacts, the proposal will deliver a variety of benefits including construction and ongoing opportunities, deliver a range of apartment types, deliver generous public domain offers and at a high level urban transformation of Newcastle's West End and set a high standard for future developments and urban renewal in the area.</p> <p>The variation to the building separation clause is considered minor and does not result in any adverse sustainable social, economic and environmental outcomes.</p> |
| <p>(g) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Newcastle City Centre for the benefit of present and future generations,</p>                                      | <p>The site is not identified as an environmentally sensitive area. Therefore, the variation does not result in any adverse environmental outcomes.</p> <p>However, the proposed development has been designed with the Connecting with Country Framework in mind. The variation does not result in a decreased ability to respond to the Connecting with Country Framework, nor will it disadvantage present and future generations given the amenity impacts are negligible.</p>   |
| <p>(h) to help create a mixed use place, with activity during the day and throughout the evening, so Newcastle City Centre is safe, attractive, inclusive and efficient for its local population and visitors alike.</p> | <p>The proposed development will contribute to delivering a safe, diverse, inclusive, vibrant and creative city.</p> <p>The variation to the building separation clause is considered minor and will not hinder the ability to create a mixed-use precinct that is safe, attractive, inclusive and efficient.</p>  |

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon.

- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The proposed building separation does not result in any unreasonable burden to the community. As outlined below:

- The proposed development complies with the ADG, which is a State-wide policy that provides guidance on building separation and what is an equitable setback share in different scenarios.
- The relationship between adjacent properties and the site, and internal to the site, is appropriate given compliance with the ADG. In particular, a 9m setback is proposed between the northern tower and adjacent commercial building (723 Hunter Street). This represents an equitable share under the ADG given the setback is between a blank wall and a commercial development.
- CN, while not abandoning clause 7.4, have provided a number of recent examples of flexibility with this development including at 1 National Park Street, Verve and The Store.
- Clause 7.4 does not have any clear objectives in the NLEP; therefore, the design response has relied on the objectives established by the ADG.
- The building separation distance resulting from non-compliance does not result in any unreasonable impacts on adjoining properties and within the development, particularly with respect to overshadowing, loss of privacy and loss of views.
- The proposed variation does not result in any additional height above the NLEP height limit or the FSR above the design excellence bonus, therefore, the resultant additional bulk and scale is not unreasonable.
- Under clause 4.4 of the LEP an 8:1 FSR is permitted for wholly commercial development, which represents a scale significantly more than the proposed development. The bulk and scale of the proposal has been carefully resolved to respond to the surrounding context and represents an appropriate design response. Should a commercial development be proposed on the site, this would result in a significantly reduced separation than proposed.
- The proposed variation does not result in any adverse amenity impacts from an overshadowing perspective to nearby public spaces including Birdwood Park.

As explored above, this Request is a result of 723 Hunter Street being a commercial development and not providing equitable setbacks as per the Apartment Design Guidelines (ADG), and the numerous design considerations including apartment layout design, solar access, and view impacts.

### **6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)**

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

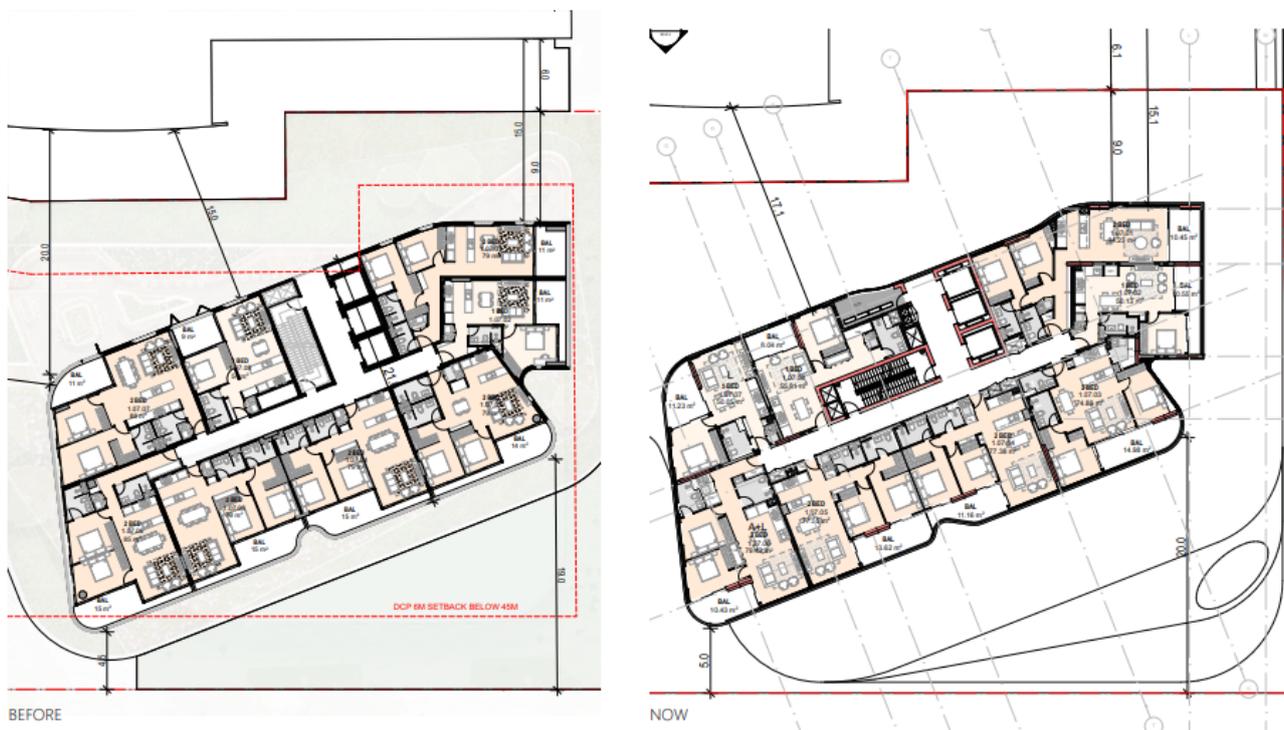
*“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- The proposed development results a better outcome than a compliant tower form. Should compliance be required, this would push the tower form to the east of the site toward the street frontage, which would result in non-compliance tower setbacks and lead to unreasonable impacts to the public domain.
- The alternative design solution has created a better public domain response and is sympathetic to the surrounding context. The alternative solution does not overwhelm the public domain.
- Plus Architecture was recommended by the Jury as the winning scheme in the competitive design process. The non-compliance was known at the competition stage. Post the competitive design process Plus increased the setback distances and replanned floor plates to ensure living spaces are not facing 723 Hunter Street. The scheme been reviewed and supported by the Design Integrity Panel (DIP) from a setback perspective on 07 October 2022 given the absence of environmental harm.
- The northern tower carefully considers the adjacent commercial building by positioning the core along the western edge and designing the apartment in such a way that there are no visual privacy issues between these buildings. Apart from the commercial building to the west there are no immediate context which will compromise the amenity of the buildings. The shape and orientation of the buildings will ensure strong shared amenity between the two towers and maximize views towards both the rivers as well as the ocean towards the southeast. A comparison between the competition scheme and proposed scheme are outlined in **Figure 8** below.

Figure 8 – Comparison between Competition Scheme and Proposed Scheme



Source: Plus Architecture

- The proposed façade design incorporates screens along the western façade to manage the harsh western sun on the facades. The screens also manage the wind impact on some of the corner balconies. The screens to the northern towers also assist with the privacy for residents in the lower section towards the commercial building. The screens are carefully positioned to maintain views from within and the proposed perforation will still allow for a form of visibility through from within the apartments.

- The proposal is highly consistent with all strategic planning aims and objectives for the Newcastle City Centre and the Hunter region by providing a diversity of housing, and employment opportunities in a well-connected area.
- The non-compliance will not hinder the development’s ability to satisfy the objectives of the Newcastle City Centre.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed building separation non-compliance in this instance.

## **6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)**

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

## **6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)**

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in Table 2 above. The proposal is also consistent with the land use objectives that apply to the site under NLEP. The site is located within the E2 Commercial Centre zone. The proposed development is consistent with the relevant land use zone objectives as outlined in Table 3 below.

Table 3 – Assessment of Compliance with Land Use Zone Objectives

| <b>Objective</b>  | <b>Assessment</b>  |
|---|--|
| To strengthen the role of the commercial centre as the centre of business, retail, community, and cultural activity | <p>The proposed towers will redevelop the site to deliver a mixed-use precinct that will provide retail, commercial, residential and community land uses all within the one site. The precinct will provide a positive public open space that will activate the ground plane and respond sympathetically to the surrounding land uses.</p> <p>The ground plane and podium also provide opportunities for retail and business premises which will lead to ground plane activation and contribute to the revitalisation of Hunter Street, National Park Street and King Street.</p> <p>The variation to the building separation clause is considered minor and will not hinder the delivery of a range of land uses to serve the needs of the local and wider community.</p> |

| <b>Objective</b>   | <b>Assessment</b>  |
|--|--|
| <p>To encourage investment in commercial development that generates employment opportunities and economic growth.</p>                            | <p>The project will catalyse the urban renewal of a key site in Newcastle West.</p> <p>The proposal represents a significant investment in the Newcastle City Centre and will boost the local economy during both the construction and operational phases. In particular, the project will also offer a range of retail and commercial opportunities including cafes, shops and a roof top bar.</p> <p>The variation to the building separation clause is considered minor and will not prevent the strengthening of Newcastle’s regional position or hinder employment and economic growth.</p>   |
| <p>To encourage development that has a high level of accessibility and amenity, particularly for pedestrians.</p>                                | <p>The site is located in close proximity to the Newcastle Interchange, which has multiple modes of transportation including trains, buses, light rail and ferry connections.</p> <p>The proposal will deliver high-quality residential dwellings in a convenient, accessible and naturally beautiful location.</p> <p>The proposal encourages active transport for business and retail users through the provision of bicycle parking spaces and end of trip facilities.</p> <p>The variation to the building separation clause will not discourage public transport patronage or active modes of transport.</p>  |
| <p>To enable residential development only if it is consistent with the Council’s strategic planning for residential development in the area.</p> | <p>The proposed towers propose residential development that is consistent with City of Newcastle’s Local Strategic Planning Statement in the area: specifically Planning Priority 8, Plan for growth and change in Catalyst Areas, Strategic Centres, Urban Renewal Corridors and Housing Release Areas, 9: Sustainable, healthy and inclusive streets, neighbourhoods and local centres and 10 Development responds to the desired local character of our communities.</p> <p>The development will deliver a residential community integrated with a mixed-use precinct - retail, commercial and open space. The precinct will improve amenities in the area, retail demand whilst also connecting residents to community land on the ground plane.</p> |

| Objective  | Assessment  |
|--|---|
| <p>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</p>   | <p>The precinct proposed will provide opportunities for regional businesses within the Newcastle City Centre through the provision of non-residential floor space. Bell Ringer Property Group, a retail consultant, has been engaged to provide expert input into the curation and makeup of the ground floor plan. The business and retail spaces are underpinned by following design principles: Design for all users, contextual, diversity of experience, flexibility, compression and laying, authentic materials, celebrate project storey and history, and connected.</p> <p>The variation to the building separation clause is considered minor and will not prevent the strengthening of Newcastle’s regional position or hinder employment and economic growth.</p>   |
| <p>To provide for commercial floor space within mixed use development.</p> <p>To strengthen the role of the Newcastle City Centre as the regional business, retail and cultural centre of the Hunter region.</p> <p>To provide for the retention and creation of view corridors.</p> | <p>A significant amount of non-residential floor space (business and retail) will be provided for the development. The non-residential floor space has been proposed to front the new urban plaza and street frontages to encourage pedestrian activation.</p> <p>The variation to FSR is considered minor and will not hinder the delivery of a range of land uses to serve the needs of the local and wider community.</p> <p>The precinct proposed will provide opportunities for regional businesses within the Newcastle City Centre through the provision of non-residential floor space. Bell Ringer Property Group, a retail consultant, has been engaged to provide expert input into the curation and makeup of the ground floor plan. The business and retail spaces are underpinned by following design principles: Design for all users, contextual, diversity of experience, flexibility, compression and laying, authentic materials, celebrate project storey and history, and connected.</p> <p>The variation to the building separation clause is considered minor and will not prevent the strengthening of Newcastle’s regional position or hinder employment and economic growth</p> <p>The DCP does not identify any nearby view corridors. The proposal does not impact any identified view corridors in the NDCP.</p> |

| Objective | Assessment  |
|-----------|---|
|           | <p>Nevertheless, the proposed development has accounted for the spectacular views that span around the site, including the Newcastle beach and ocean (south-east), Hunter River (north) and Birdwood Park (south-west). The development has been designed to maximise view potential. Re-orientation of the tower forms has allowed for views to be maximised for the residential component whilst providing corridors for the surrounding developments due to the design of the tower shape.</p> <p>Level 17 includes a chef grade internal kitchen, an outdoor kitchen, northern views over the water and a multi-purpose design to allow for events, functions, and a place to work during the day. This communal area will ensure residents from all floors and access the views.</p> <p>The urban plaza also provides the opportunity to visually link National Park Street to the local heritage item, the Army Drill Hall.</p> |

## 6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2021*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

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

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the building separation and the land use zone objectives despite the technical non-compliance.

Accordingly, there is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard. 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.

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

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

## 7. CONCLUSION

For the reasons set out in this written request, strict compliance with the building separation contained within clause 7.4 of NLEP is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the building separation to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposed development complies with the ADG, which is a State-wide policy that provides guidance on building separation and what is an equitable setback share in different scenarios.
- Plus Architecture was recommended by the Jury as the winning scheme in the competitive design process. The non-compliance was known at the competition stage. Post the competitive design process Plus increased the setback distances and replanned floor plates to ensure living spaces are not facing 723 Hunter Street. The scheme been reviewed and supported by the Design Integrity Panel (**DIP**) from a setback perspective on 07 October 2022.
- The relationship between adjacent properties and the site, and internal to the site, is appropriate given compliance with the ADG.
- CN, while not abandoning clause 7.4, have provided a number of recent examples of flexibility with this development including at 1 National Park Street, Verve and The Store.
- Clause 7.4 does not have any clear objectives in the NLEP; therefore, the design response has relied on the objectives established by the ADG.
- The building separation distance resulting from non-compliance does not result in any unreasonable impacts on adjoining properties and within the development, particularly with respect to overshadowing, loss of privacy and loss of views.
- The proposed variation does not result in any additional height above the NLEP height limit or the FSR above the design excellence bonus, therefore, the resultant additional bulk and scale is not unreasonable.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the building separation should be applied.

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