

CLAUSE 4.6 VARIATION REQUEST CLAUSE 4.3 HEIGHT OF BUILDINGS

1-3 BRUNKER ROAD, BROADMEADOW (LOTS AND 2101 AND 2102 DP755247)



CLIENT: GEORGE THOMAS HOTELS PTY LTD

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PREPARED BY:



ABN 23 104 067 405
7 Canberra Street Charlestown NSW 2290 | PO Box 850 Charlestown NSW 2290
87 Herbert Street Gulgong NSW 2852 | PO Box 232 Gulgong NSW 2852
02 4942 5441 | 02 6374 2911
admin@dewittconsulting.com.au
www.dewittconsulting.com.au




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Prepared by:	Reviewed by:	Released by:
Name: Emma Mason Position: Principal Town Planner	Name: Josh Taylor-Real Position: Senior Town Planner	Name: Emma Mason Position: Principal Town Planner Signed:  Date: 25/08/2023 Version: Version 1, DA Issue

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1. OVERVIEW OF PROPOSAL

This submission seeks a variation to Clause 4.3 of the Newcastle Local Environmental Plan (LEP) 2012 which prescribes a maximum building height of 11 metres (m) to the subject site. This Clause 4.6 variation request has been prepared in support of a development application (DA) in respect to the demolition of the existing licensed premise (Premier Hotel) and commercial building and the erection of a nine (9) storey mixed use development on land known as 1-3 Brunker Road, Broadmeadow, NSW 2292 (Lots 2101 and 2102 DP755247) (the site). The proposal is detailed in the amended Architectural Plans prepared by JSA Studio Architects, dated 13/06/2023.

Measured in accordance with the definition of building height in the Newcastle LEP 2012, the proposal has a maximum height of 31.3m, resulting in a breach of 20.3m (or 185% exceedance).

2. WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The environmental planning instrument (EPI) that applies to the site is Newcastle Local Environmental Plan (LEP) 2012.

3. WHAT IS THE ZONING OF THE LAND AND WHAT ARE THE OBJECTIVES OF THE ZONE?

The site is zoned MU1 Mixed Use Zone (refer to *Figure 1*).

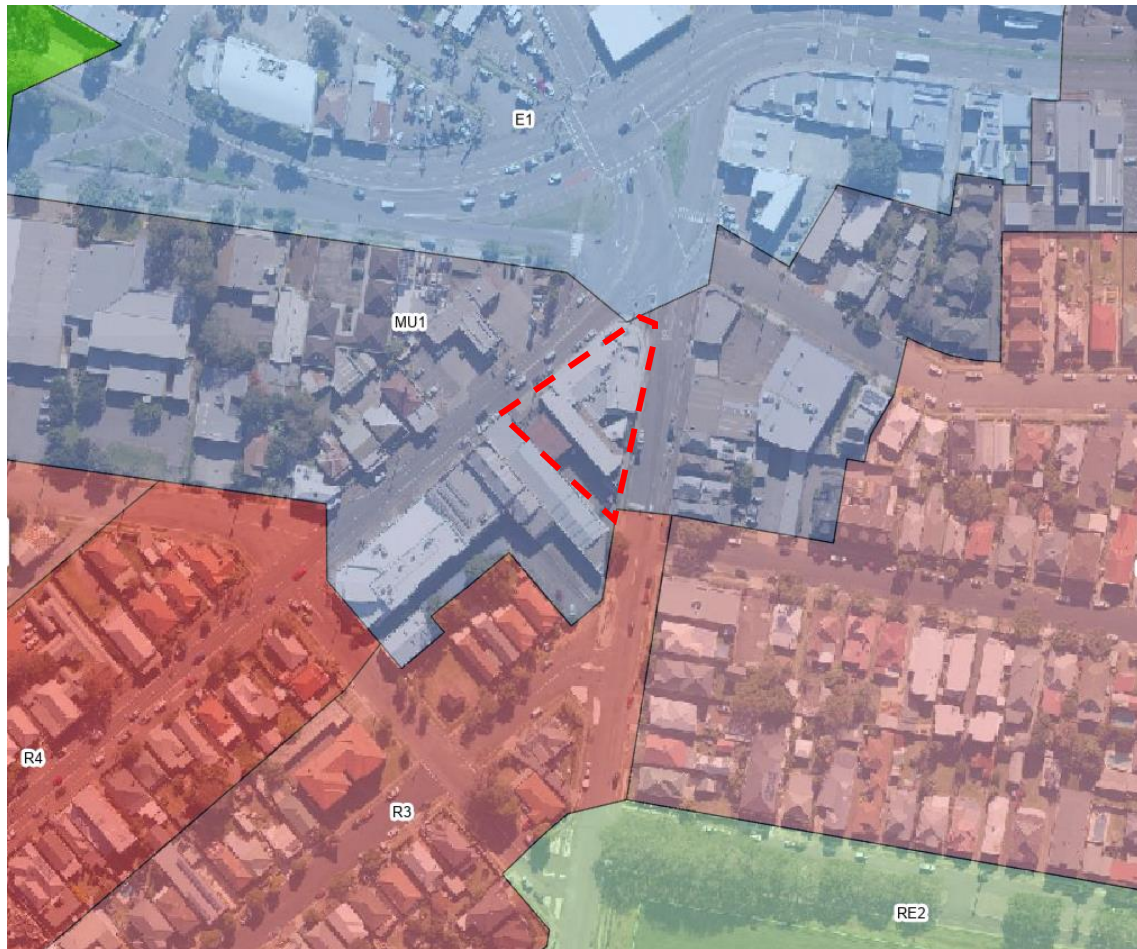


Figure 1: Land Zoning Map – subject site outlined in red (Source: NSW Planning Portal)

The objectives of the MU1 zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.

- 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.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

As discussed in Section 8.1 of this report the proposed development is consistent with the objectives of the zone despite the variation.

4. WHAT IS THE DEVELOPMENT STANDARD TO WHICH THIS CLAUSE 4.6 VARIATION APPLIES AND WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The development standard to which this variation relates to is Clause 4.3 Height of buildings, which reads as follows:

“4.3 Height of buildings

(1) *The objectives of this clause are as follows—*

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

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”*

A maximum building height of 11m applies to the subject site, as per Figure 2 below.



Figure 2: Height of buildings Map – subject site outlined in red (Source: NSW Planning Portal)

5. WHAT IS THE EXTENT OF THE VARIATION?

Referring to the Architectural Plans prepared by JSA Studio Architects (dated 19/06/2023) the maximum building height above existing ground level is displayed as 30.1m, being a 20.3m (185%) exceedance to the development standard.

Of that maximum height, 2.2m is attributed to an architectural roof feature atop the building's distinctive corner element. In terms of site area, the maximum exceedance occurs over less than 7% of the site (refer to Figure 3).



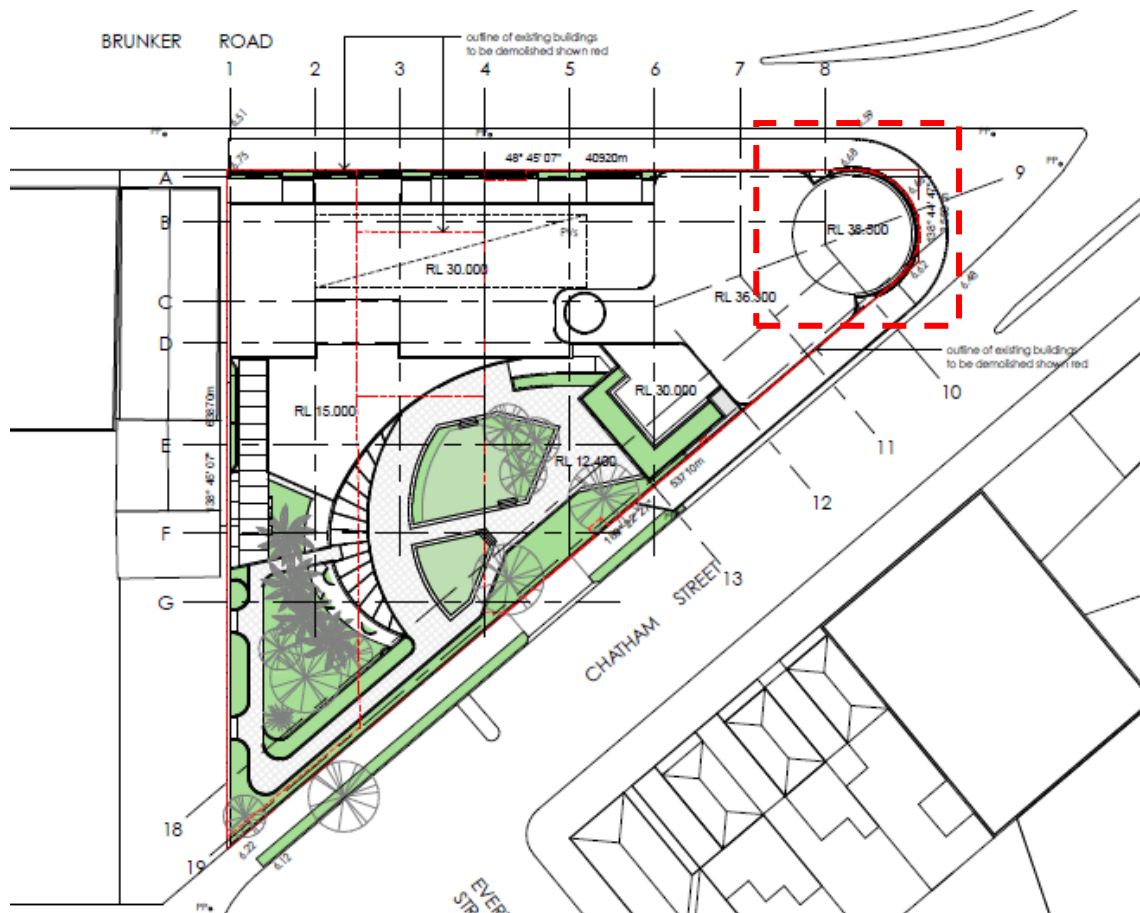


Figure 3: Component of the building with proposed height of 30.1m height (Source: JSA Studio Architects)

Moving away from the corner element, the height decreases to 29.1m (an exceedance of 18.1m or 165%). That exceedance applies to approximately 20% of the site (*Figure 4*).

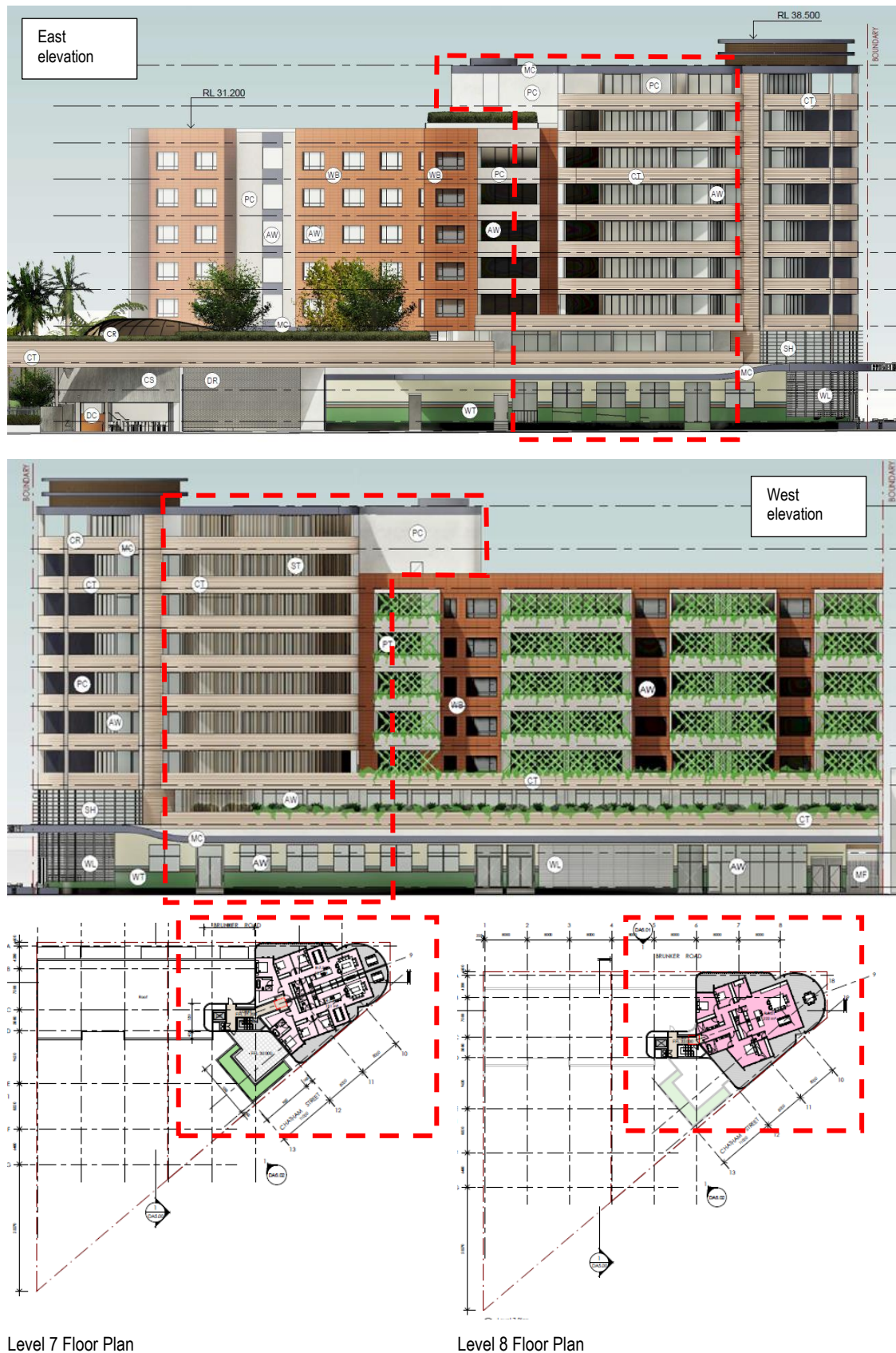


Figure 4: Component of the building with proposed height of 29.1m height (Source: JSA Studio Architects)

A further reduction in height to 24m (an exceedance of 13m or 118%) occurs where the built form has been located towards Brunker Road. This portion of the building and associated height exceedance occupies approximately 30% of the site area (Figure 5).

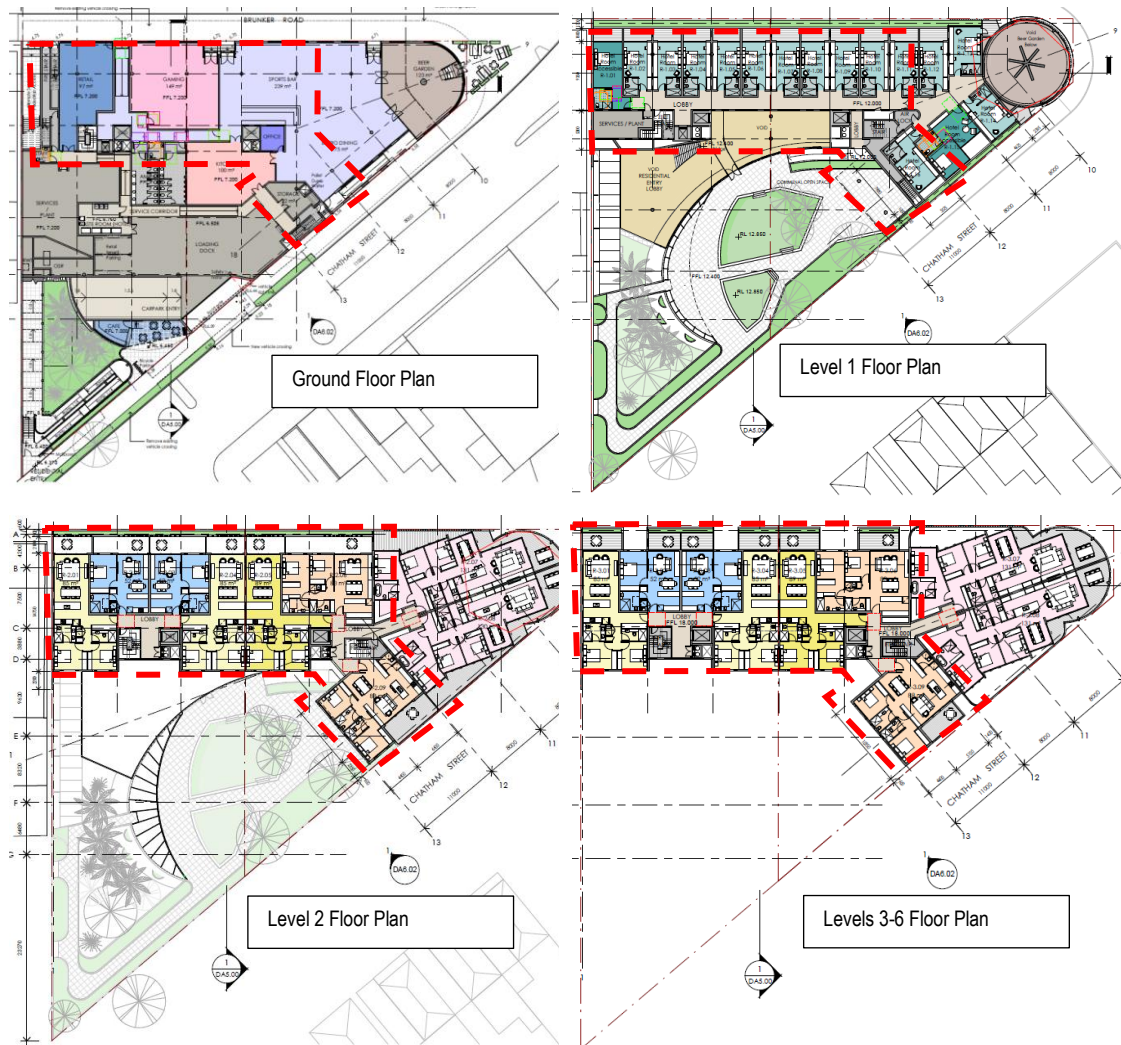
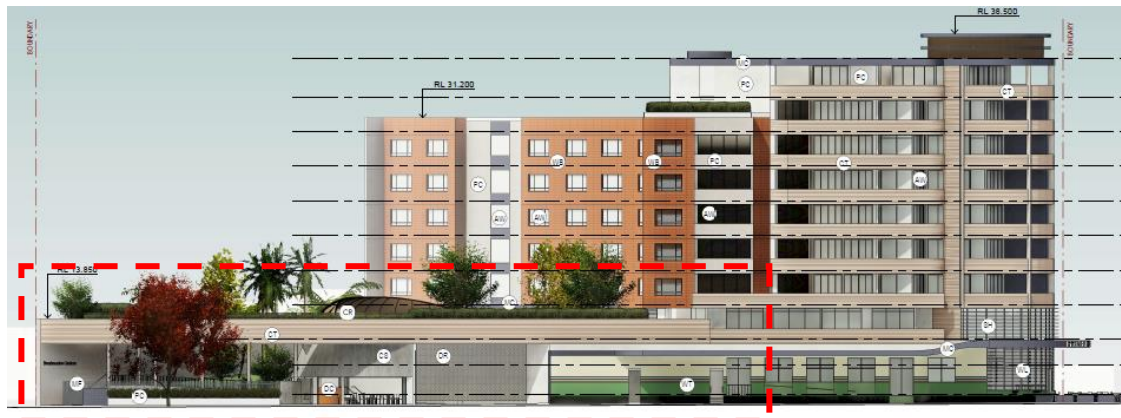


Figure 5: Component of the building with proposed height of 24m height (Source: JSA Studio Architects)

The height of building along the remainder of the eastern and central portion is 6.65m. This component of the proposed development is therefore compliant with the 11m height standard, and represents approximately 43% of the site area (Figure 6).



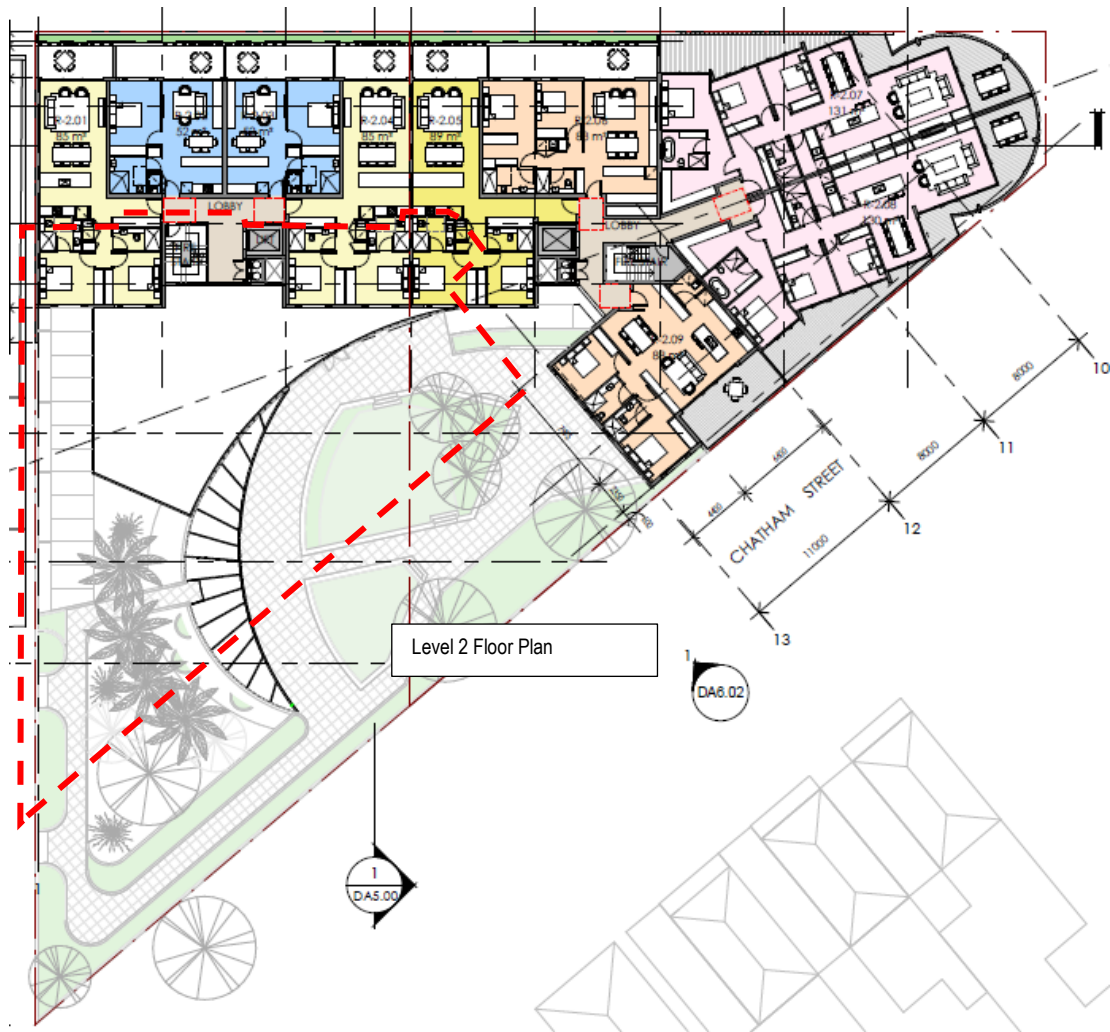


Figure 6: Component of the building with compliant height (Source: JSA Studio Architects)

The bulk of the building is weighted to the northern edge and street intersection, to optimize natural light within the development and provide active edges facing the commercial core of the town centre. This reduces the shadow impact and height at the southern edge to the residential zone. The rotunda tower builds up from both residential wings to a peak at the street corner creating the desired visible presence from the Nineways. In the spirit of historical development at site, the design intent is to give Broadmeadow an iconic legacy that restores its prominence at this important urban interchange (Figure 7). Section 8.3.3 of this report provides further discussion on the design intent.

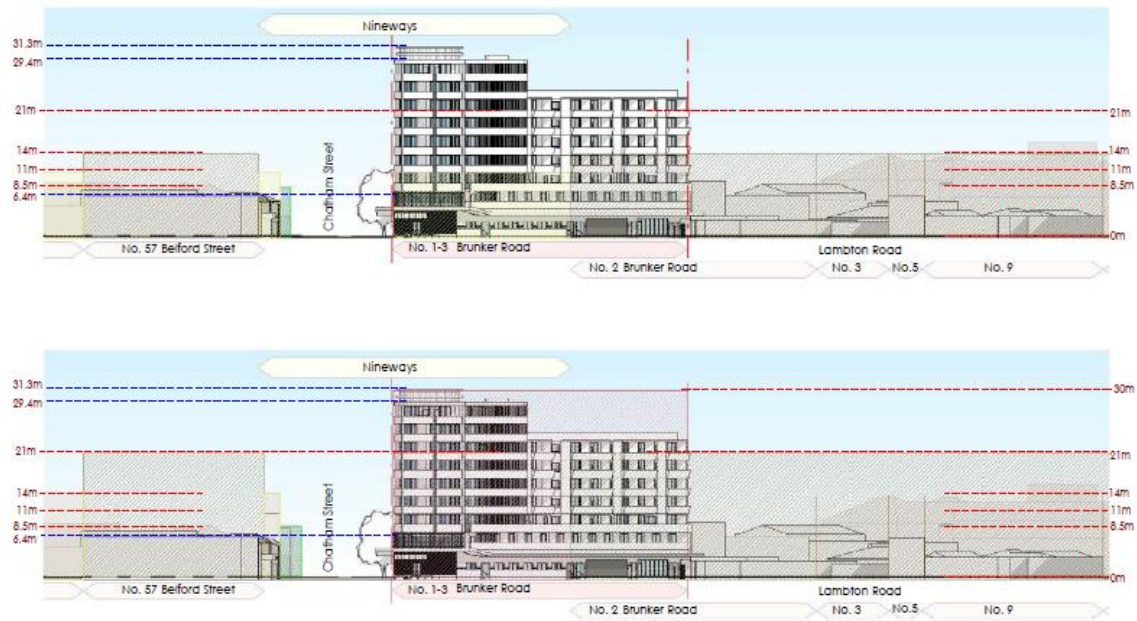


Figure 7: Context within existing (top image) and proposed (bottom image) height limits around the Nineways (Source: JSA Studio Architects)

6. CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

As detailed in this request, the proposed development is considered to meet the requirements prescribed under Clause 4.6 of the Newcastle LEP 2012, as the development standard is considered unreasonable, the development displays sufficient environmental planning grounds to warrant contravention of the development standard, and the development will be in the public interest because it is consistent with the objectives of the standard and the subject zone.

Clause 4.6 states the following:

“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 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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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 Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.
- (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
 - (caa) clause 5.5,
 - (ca) clause 8.1 or 8.2..”

7. JUSTIFICATION FOR PROPOSED VARIATION

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument and LEP should be assessed contained in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:

“Clause 4.6 of (the LEP) imposes **four preconditions** on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be **consistent with the**

objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be **consistent with the objectives of the standard in question** (cl 4.6(4)(a)(iii)). The third precondition requires the Court to consider a **written request that demonstrates that compliance with the development standard is unreasonable or unnecessary** in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are **sufficient environmental planning grounds** to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).” [paragraph 27] [emphasis added by author]

This written request satisfies the four preconditions in the following way:

- **Precondition 1: Consistency with zone objectives:** As described in Section 8.1.
- **Precondition 2: Consistency with the objectives of the standard:** As described in Section 8.2. Consistency with the objectives of the standard is demonstrated when establishing that compliance is unreasonable or unnecessary (specifically the first invocation of the “5 Part Test”).
- **Precondition 3: Compliance with the development standard is unreasonable or unnecessary:** As described in Section 8.3 utilising the accepted “5 Part Test”.
- **Precondition 4: Sufficient environmental planning grounds:** As described in Section 8.4.

As demonstrated throughout this report, the use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request.

7.1 IS THE PROPOSAL CONSISTENT WITH THE ZONE OBJECTIVES?

The objectives of the MU1 zone are:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *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.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

In relation to the **first zone objective**, the proposal is a mixed use development that expands upon the long standing use of the site as a licenced premise (hotel) and associated hotel rooms. New retail, food and drink and residential uses are proposed. *Figure 8* below illustrates the distribution of uses. The hotel expansion will generate approximately 14 new full time equivalent (FTE) positions in addition to the 10 existing FTE roles. The proposed retail component will provide further diversity and activation within the area, as well as additional employment opportunity. In this regard the proposed development is consistent with the first zone objective.

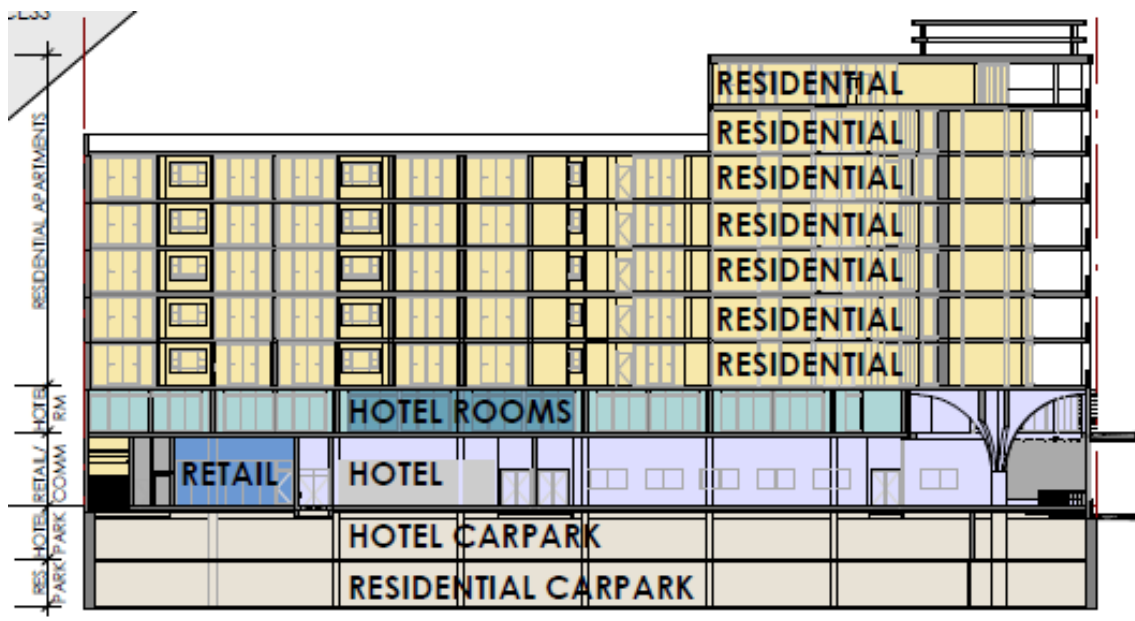


Figure 8: Spatial distribution of commercial, hotel and residential uses (Source: JSA Studio Architects)

The proposed development is consistent with the **second zone objective** in terms of its ability to generate active street frontage (refer to Figure 9). The ground floor comprises retail, café and hotel uses. The uses have been distributed to optimise connection to the Brunner Road frontage and the commercial core of Broadmeadow. The materiality reflects the usage, with large open louvres, glazing and double doors at ground floor along the commercial and retail edge. Along the Brunner Road frontage a cantilevered awning with street planting provides a functional and inviting pedestrian environment. Along the Chatham Street frontage, where the built form and opportunities for activation take a lower scale respectful of the more residential nature of land uses to the south and east, a covered colonnade breaks the facade to a landscaped oasis and new softer urban greenscape to the street. A café provides a more intimate scale of activation and a place for nearby residents and workers to gather. Again, awnings are provided to enhance pedestrian comfort. For these reasons the development is consistent with the second zone objective.

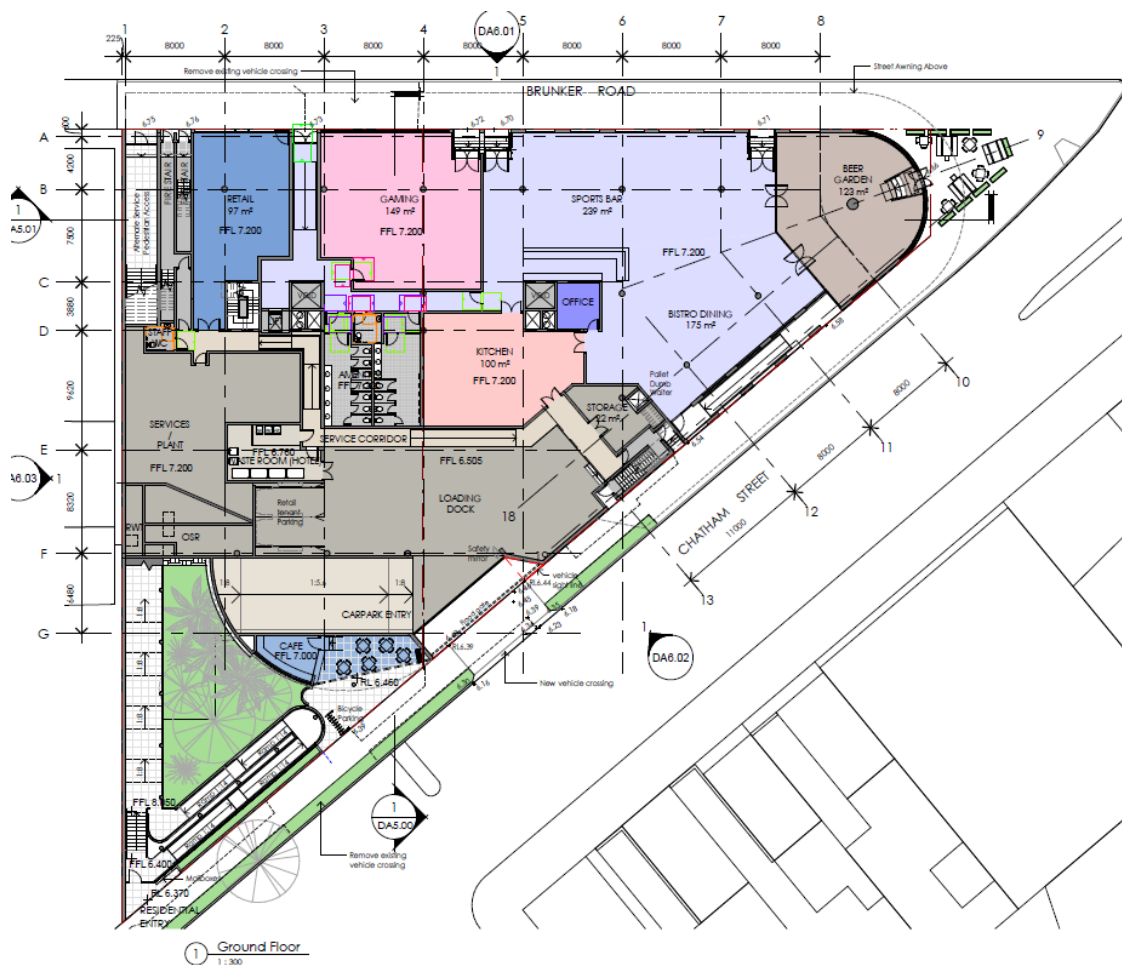


Figure 9: Street activation and amenity (Source: JSA Studio Architects)

The **third zone objective** seeks to minimise conflict between land uses within this zone and land uses within adjoining zones. The proposal responds to this objective by weighting the building bulk to the northern edge and street intersection, and maximising the street presence and active edges facing Brunker Road and the commercial core of Broadmeadow. This reduces the shadow impact and height to the residences on the eastern side of Chatham Street and the R3 Medium Density Residential zone to the south. As well as a reduction in building scale, the intensity of use is reduced on the southern edge of the development. A landscaped open courtyard and café are located on the eastern extent, sleeving parking, loading and servicing which are all located internal to the site to minimise visual and acoustic impact to surrounding land uses.

The **fourth zone objective** encourages business, retail, community and other non-residential land uses on the ground floor of buildings. As referred to above, the ground floor accommodates non-residential uses including hotel, retail and café. The proposal builds on the existing pub and hotel with more diverse and expansive facilities in response to the evolving needs of the community. Accessible and visible, a perimeter awning provides amenity to the public realm and minimises the visual impact at the street level.

The proposed development is consistent with the **fifth zone objective**, to support nearby or adjacent commercial centres without adversely impacting on the viability of those centres. The ongoing use of the site as a licenced premise and hotel, combined with a compatible mix of additional retail, food and drink and residential uses will complement the range and scale of uses in the Newcastle City Centre, the regional hub for business and commercial activities. The development achieves a scale commensurate with Broadmeadow's status within the strategic planning framework as a 'strategic centre'; where higher order services, cultural and recreational facilities and high density commercial and residential uses are encouraged (refer to Section 8.2). The proposal also creates a distinction between the scale and nature of development typically expected to find in surrounding local centres and neighbourhood centres, without impacting the viability of those centres.

Therefore, the development is entirely consistent with the objectives of the MU1 Mixed Use zone.

7.2 IS THE PROPOSAL CONSISTENT WITH THE OBJECTIVES OF THE STANDARD?

The development standard to which the development relates is Clause 4.3 Height of buildings. The objectives of this clause are as follows—

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

In response to **objective (a)** of the Height of Buildings development standard, reference is made to the established centres hierarchy as defined by the strategic planning framework and implemented by Newcastle LEP through land use zoning.

The strategic planning framework within which the site operates consists of the Hunter Regional Plan 2041, the Greater Newcastle Metropolitan Plan 2036 and the Newcastle Local Strategic Planning Statement (Figure 10).

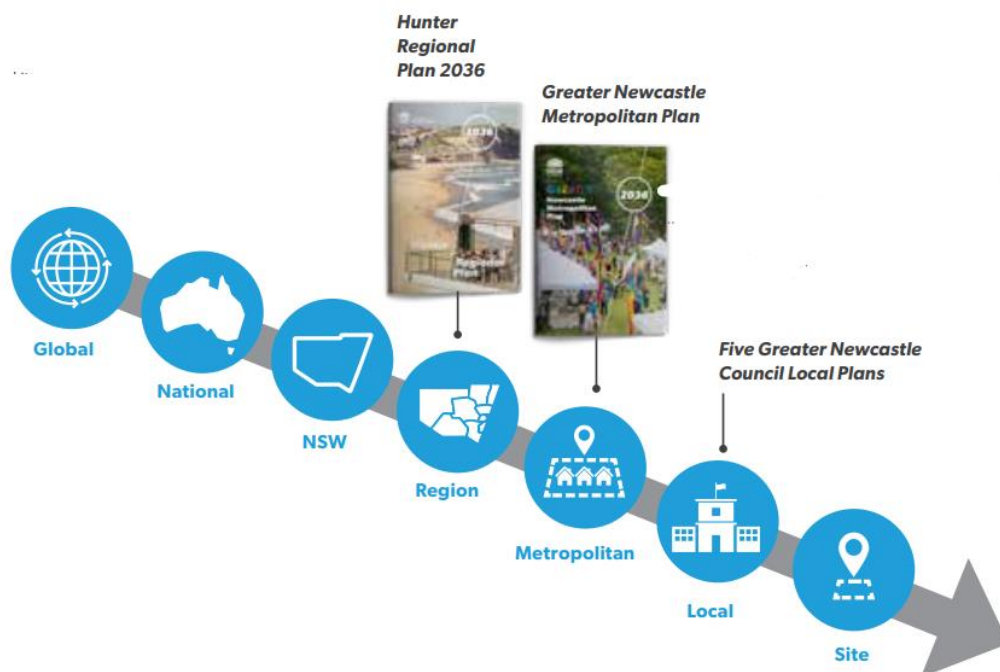


Figure 10: Strategic planning framework (Source: Department of Planning and Environment)

In its discussion on the centres hierarchy, the Hunter Regional Plan 2041 identifies the Newcastle City Centre as the Metropolitan capital of economic significance to NSW. Strategic centres that are the heart of the surrounding district provide a range of civic, retail, commercial and recreational services. It notes that the potential for increased housing and employment in these areas will be determined by councils. Broadmeadow is identified as a strategic centre.

The Greater Newcastle Metropolitan Plan 2036 identifies Broadmeadow's role in Greater Newcastle as a Nationally significant sport and entertainment precinct and a catalyst area for growth. Catalyst areas are places of metropolitan significance and include **Broadmeadow**, Callaghan, East Maitland, John Hunter Hospital, Kotara, Newcastle City Centre, Glendale and Cardiff, Beresfield–Black Hill, Tomago, Newcastle Airport at Williamtown and Newcastle Port. These locations are intended to underpin new job opportunities for Greater Newcastle, including in the health, defence and education industries and help to meet the expected demand for diverse housing options close to jobs, services and transport.

The Newcastle Local Strategic Planning Statement defines the commercial hierarchy as comprising strategic centres, local centres (major), neighbourhood centres and local centres (minor). Broadmeadow is identified

as a strategic centre, intended to service the Hunter region with higher order administration, education, health services, cultural and recreational facilities with high density commercial and residential uses (Figure 11).

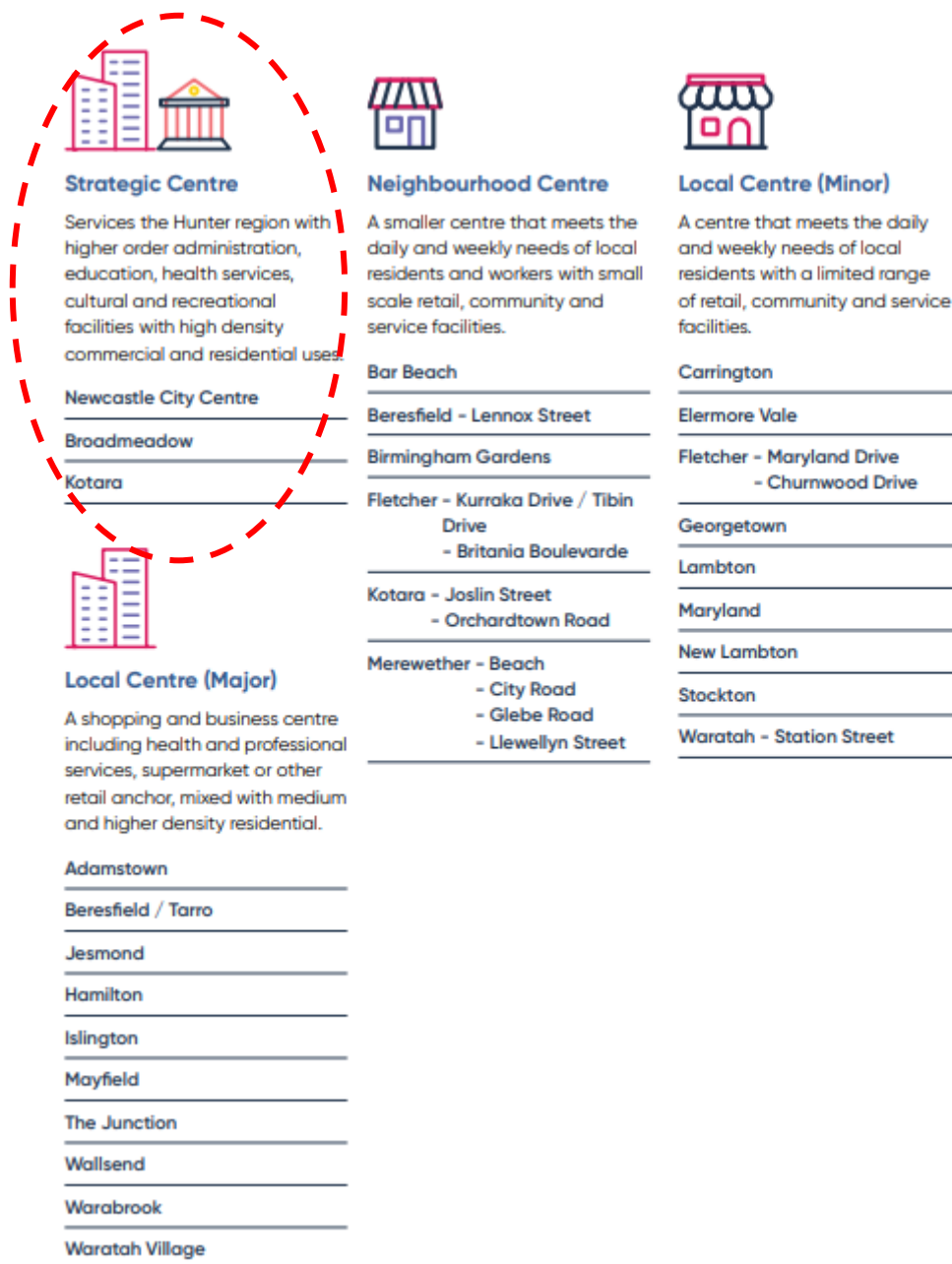


Figure 11: Centres hierarchy (Source: Newcastle Local Strategic Planning Statement, City of Newcastle)

Newcastle LEP assigns the MU1 Mixed Use Development zone to the site, which allows for the range of commercial, recreational, residential and other uses consistent with those envisaged for higher order centres by the strategic planning framework.

The proposed development includes a licensed premise, hotel accommodation, retail, food and drink premise and residential, all of which are consistent with the types of uses encouraged within a strategic centre and catalyst area. It is therefore concluded that the proposed development is of a nature and scale that is consistent with the established centres hierarchy and **objective (a)** of the development standard.

In accordance with **Objective (b)** the design masses the building bulk towards the north and west of the site, reducing in scale to the south and east to maximise solar access to the site, surrounding developments and the public domain (in this case the local road network). The success of this approach is demonstrated

in the solar access numerical data for the site. *Figure 12* illustrates that 90% of the proposed residential units comply with solar access requirements of the Apartment Design Guide, over the two hour minimum.

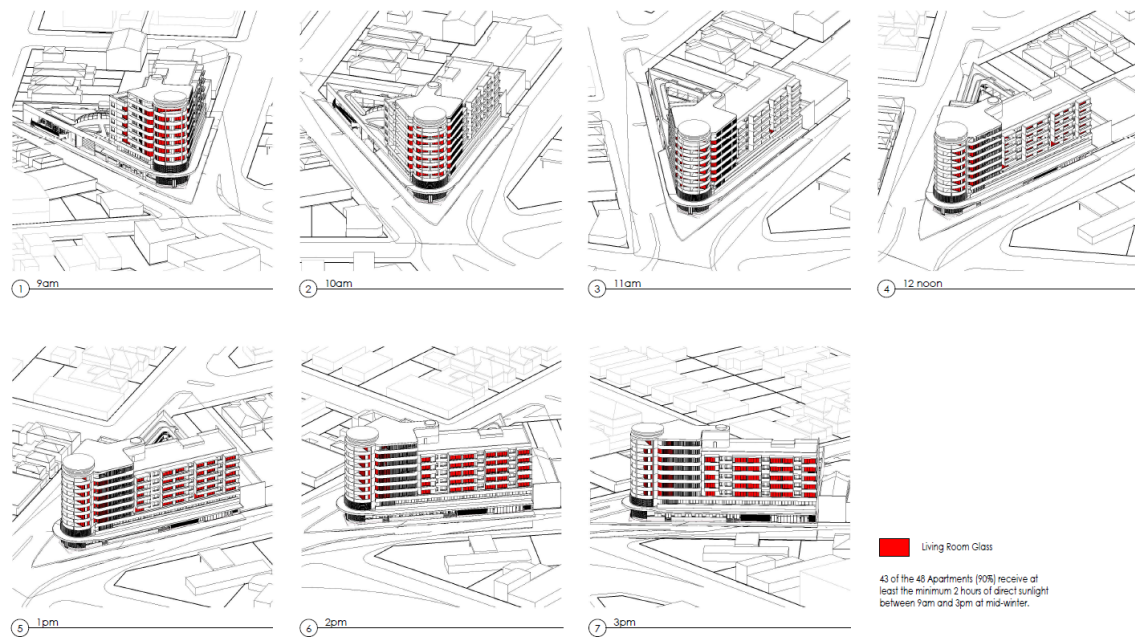


Figure 12: Solar access study (Source: JSA Studio Architects)

The minimal impact on surrounding development and public domain is demonstrated in the shadow diagrams which show that no surrounding property is overshadowed for more than 3 hours during the winter solstice (*Figure 13*).

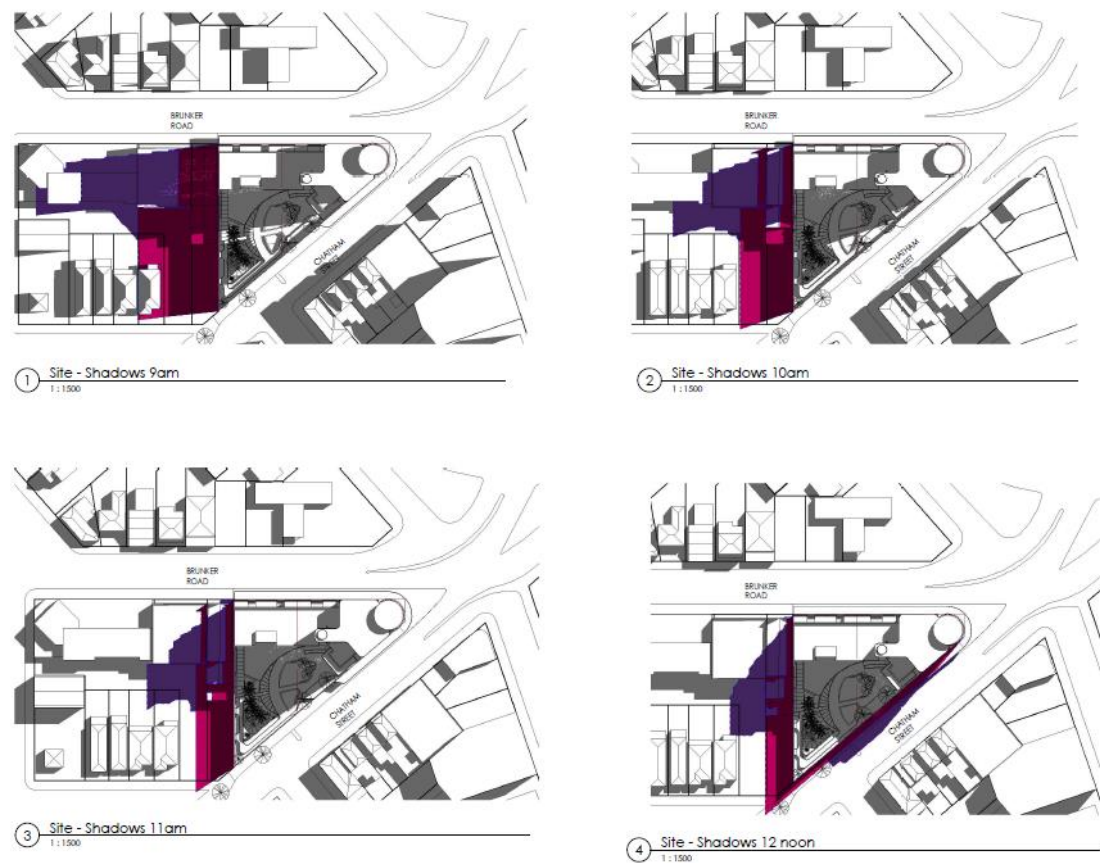




Figure 13: Shadow diagrams (Source: JSA Studio Architects)

The development is therefore able to demonstrate consistency with **objective (b)** of the development standard.

7.3 IS COMPLIANCE WITH THE STANDARD UNREASONABLE OR UNNECESSARY?

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court (LEC) in *Wehbe v Pittwater Council* (2007) NSWLEC 827.

In the decision of *Wehbe v Pittwater Council* (2007) NSWLEC 827, Chief Justice Preston expressed the view that there are five (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. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

Table 1: “5 Part Test” established under *Wehbe v Pittwater Council* (2007) NSWLEC 827

Test	Description
1	The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development provides an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.
2	The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

Test	Description
3	The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that 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 particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".

Satisfactorily demonstrating that compliance with a development standard is unreasonable or unnecessary in any one of these ways is sufficient for meeting the requirement in Clause 4.6(3)(a) of LEP 2012.

This variation determines compliance is unnecessary and unreasonable considering the first and third tests in particular. The following discussion is provided in response to each of the above tests.

7.3.1 Are the objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe Test No.1)

The objectives supporting the height of buildings control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental planning impacts, would demonstrate that strict compliance with Clause 4.3 would be unreasonable in this instance.

As previously stated, the objectives of the standard are:

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

As discussed in Section 8.2 the proposed development is consistent with **objective (a)** and the established centres hierarchy, which identifies the site as part of a *strategic centre* where higher order services with high density residential and commercial uses are located. Whilst there is strong alignment between the established centres hierarchy and the Newcastle LEP insofar the site's zoning is concerned, the numerical provision applied to the site by Clause 4.3 is vastly out of alignment with the established centres hierarchy. This clause 4.6 request contends that, not only is the proposed development consistent with **objective (a)** notwithstanding the non-compliance with the numerical standard, a development with a compliant height of 11m *would not* result in a scale of development that makes a positive contribution towards the desired built form envisaged for this strategic centre. We contend that a compliant built form would in fact be inconsistent with objective (a) (refer to Section 8.3.3). In accordance with the first test in Wehbe, the proposed development provides an alternative means of achieving the objective, and strict compliance with the standard would be unnecessary and unreasonable. This is explored in further detail below.

Objective (a) is achieved notwithstanding the variation

- The proposed development seeks to accommodate residential and commercial density typical of the two other strategic centres within the Newcastle local government area, those being Newcastle City Centre and Kotara. The height of building provisions in Newcastle City Centre range from 10m-30m harbourside to 24m-90m around the Newcastle Transport Interchange. In Kotara, the maximum prescribed height is 14m, however in 2017, the Hunter and Central Coast Joint Regional Planning Panel approved alterations and additions to Westfield Kotara resulting in a height of 24m. From this we can conclude that the prescribed and actual building heights around Newcastle City Centre and Kotara reflect the higher order of development expected of a strategic centre. Where lower heights are prescribed, these are associated sensitive locations such as those adjoining Newcastle Harbour.

Within the Broadmeadow strategic centre, height limits range from 11m -21m. Substantial areas of Broadmeadow have no prescribed height limit. While the Local Strategic Planning Statement

encourages the intensification of land use and an increase in housing and employment in the strategic centres, the 11m height standard constricts built form to three storeys, akin to development within local centres (minor).

- Unlike sites with lower height limits in the other strategic centres, the subject site is unconstrained by physical limitations and is not in a location considered to be sensitive to higher density development in terms of view sharing, solar access, impact on public domain etc (refer to discussion on objective (b)). It is our contention that the site is eminently suitable for larger built form due to the separation from surrounding sites by the local road network, and favourable orientation, both which limit potential privacy and solar access impacts to surrounding development.
- The scale of the development will make a positive contribution towards the desired built form by:
 - Accommodating a suitable mix of uses and a higher density of commercial and residential uses commensurate with a strategic centre.
 - The site is near a range of commercial, retail, community, sporting and leisure facilities as well as the main Broadmeadow railway station with connections to Newcastle centre and beyond. The higher density of commercial and residential uses results in a transit oriented development with the potential to stimulate further investment in public transport infrastructure such as the revitalisation of Broadmeadow train station and light rail extension.
 - Locating the tallest element at the site's apex adjacent the confluence of Brunker Road, Chatham Street and Denison Street. The rotunda tower builds up from both residential wings to a peak at the street corner creating a prominent visible presence from within Nineways.
 - Activating the Brunker Road frontage where the site is oriented towards the commercial core.
 - Providing a lower scale of activation, bulk and scale along the Chatham Street frontage where the site interfaces an area of lower scale residential, commercial, and mixed-use development.
 - Providing cantilevered awnings to the perimeter to provide amenity to pedestrians and create an inviting public-private interface. A grand covered colonnade along the southern edge breaks the façade to a gated landscaped oasis to the public and new softer urban greenscape to the street.
 - Demonstrating to other developers and investors that this is a place worth investing in and trigger compounding revitalisation. Broadmeadow has been identified as a Catalyst growth area in the Greater Newcastle Metropolitan Plan 2036 and Local Strategic Planning Statement and is earmarked as an area for significant urban transformation. The community and market expect to see change in Broadmeadow, particularly given the declining urban fabric and development potential of the area. The proposal has the potential to facilitate catalytic development in the area, firstly by initiating street front activation of Brunker Road and secondly by indicating strong investment in a quality mixed use product.

To summarise, strict compliance with Clause 4.3 would be unreasonable in this instance as the proposed density of use and extent of built will achieve the intent of **objective (a)** notwithstanding the variation.

As addressed in Section 8.2 the proposed development is consistent with **Objective (b)** which is to allow reasonable daylight access to all developments and the public domain. The development provides a high amenity residential outcome for future residents, preserves the environmental amenity for adjoining properties and makes a positive contribution to the public domain by:

- Concentrating built form to the northern edge to maximise solar access within the development and to minimise shadowing impacts to surrounding sites (refer solar access and shadow diagrams in Section 8.2). The site's isolation between two major roads further minimises the impact of the additional height on surrounding properties.
- Upgrading public amenity with an active perimeter of retail and dining, street tree planting and internal landscaping.

- Protecting and enhancing the residential character and amenity of the adjoining residential with a lower built form and a visible landscape courtyard along the southern edge.
- High level of amenity for future residents of the development:
 - 69% of residential units have natural cross ventilation, which reduces artificial cooling demand
 - 90% of units receive over and above the 2 hours sunlight mandated by the ADG whilst also having uninterrupted views. Daylight penetration also occurs for bedrooms, retail, hotel rooms and commercial space, thus reducing powered lighting demand.
 - A combined open space area of 626m², 6% over the minimum ADG standards with a deep soil area just under 7% of the open space zone.

In this regard, the intent of objective (b) is achieved notwithstanding the variation.

7.3.2 The underlying objective or the purpose of the standard is not relevant to the development (Wehbe Test No.2)

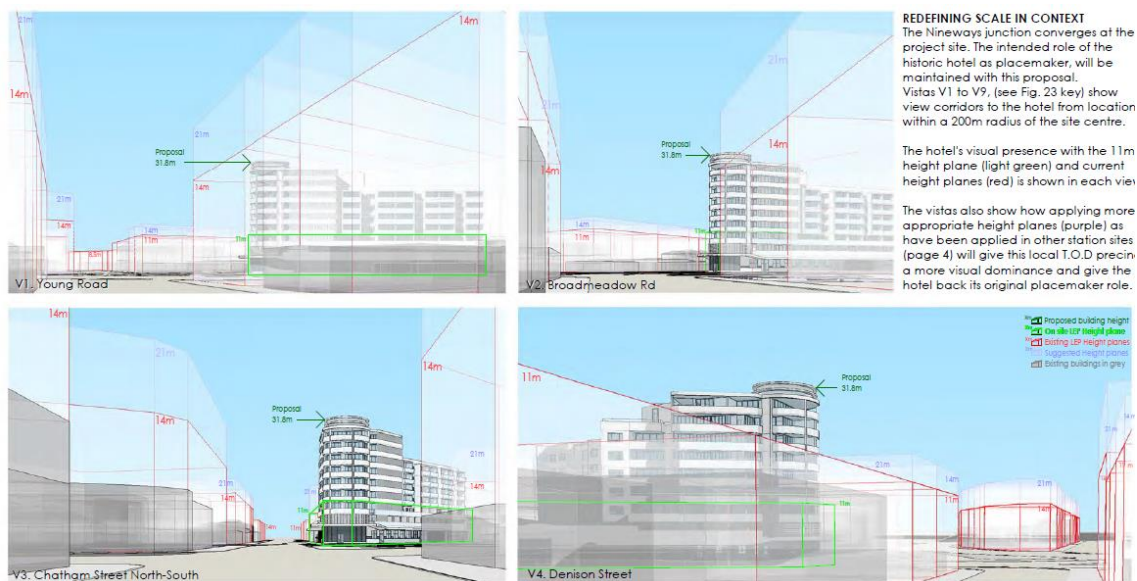
The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in 8.1.1 above. Therefore, this clause is not applicable.

7.3.3 The underlying object or purpose would be defeated or thwarted (Wehbe Test No.3)

Compliance with the development standard would be overly restrictive and could result in outcomes that are both unsuitable to the locality and of lesser or poor quality. On balance, the proposed development provides a better means to achieve the object of the standard, when compared with a compliant built form.

As previously established, the first object of the height standard is to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy. A compliant built form would be constricted to three storeys. It is our contention that a three-storey built form would not make a positive contribution and would not be consistent with the centres hierarchy, and therefore would defeat or thwart the object of the standard.

The site's atypical shape and location at the confluence of several major and local roads makes a larger scale of building necessary to have a positive impact on the streetscape. Detailed design studies documented in the State Environmental Planning Policy (SEPP) 65 Design Report (and replicated in *Figure 14*) demonstrate how scale is a positive factor in placemaking at this particular location.



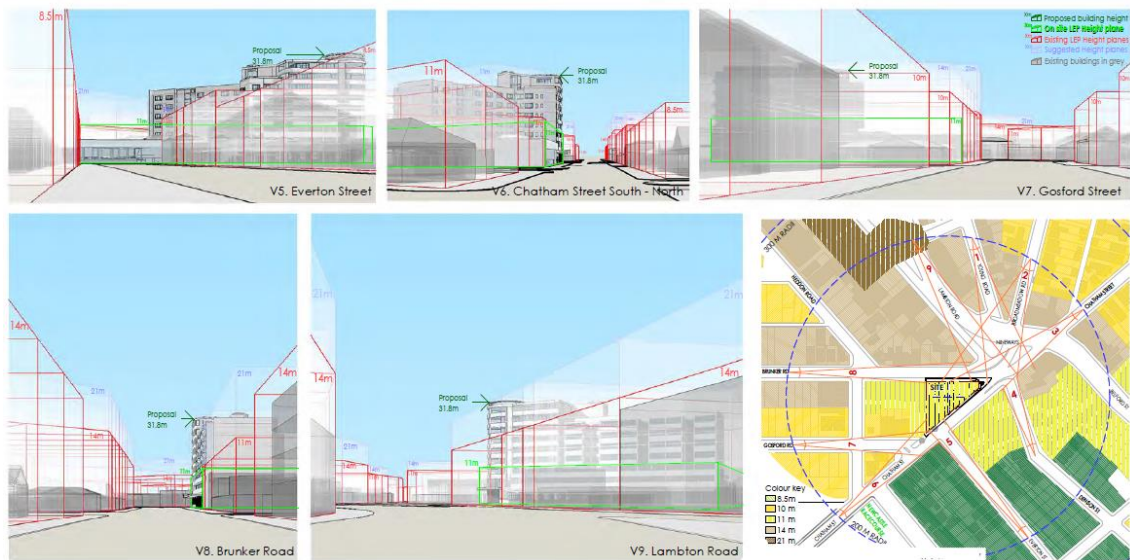


Figure 14: Scale in context stud. key refers to the existing LEP heights and numbers refer to the views – see SEPP 65 Statement for greater detail (Source: JSA Studio Architects)

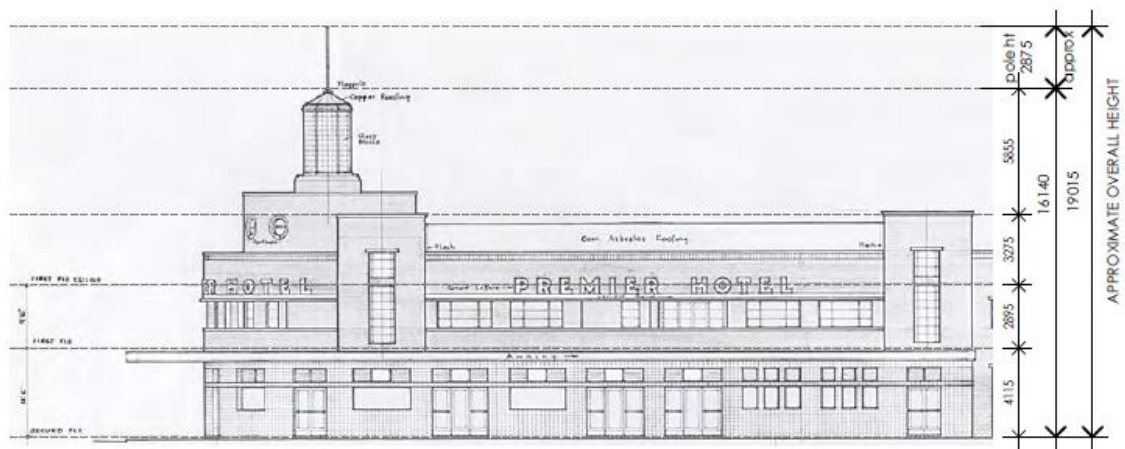
The site's historical built form is much larger scale than the current height limit. An historically larger built form represents the importance of the site as a community hub and gateway to surrounding suburbs (Figure 15). In the 1930s the Premier Hotel was a town centre landmark, twice the height of the surrounding context. It was and still is a well frequented spot for racegoers enroute from Broadmeadow station. The public park at the roundabout centre is now lost. Today the Premier Hotel still sits in a favourable location as a local pub and hotel accommodation for visitors and locals alike. The legacy of its historical activities and usage, will be maintained and enhanced for future generations and create a more prominent community space akin to its value in the past. In the spirit of the original architect's vision and later designs, the aim is to give Broadmeadow an iconic legacy that restores its prominence at this important urban interchange.



Source: Snowball Collection - Newcastle Region Library Archives
The original 12.2 metre tall 1891 Premier Hotel



Source: Noel Butlin Archives, Australian National University
The 1939 Premier Hotel 16.1m tall (19m incl. flagpole)



1939 Art Deco hotel drawing extract of the original building with dimensions showing the relative height.

Figure 15: Historical built form (Source: JSA Studio Architects)

Urban design expert Ed Blakey (Blakely Global) was commissioned to review the design. He notes that:

“...past owners (the Wakelys) commissioned Ruwald's design original as a community beacon with a historic lighthouse element marking this location as not only central but safe. The 1989 earthquake and the propping up of the building reduced not only its character, but left the community without the levers to attract the form of development required in this urban design and development era. The visual corridors of the nine-way intersection remain intact. The design of the building needs to be transformed and not merely mimic the past, but re-capture the spirit of the new heart and character for the area's complete revitalisation. These elements shape the new Place, forming the urban fabric of the future.

The proposed design is more than a single building but a connected community place generating a beautiful walkable frame for the entire vicinity. Thus, the new building form links the past while acting as the fulcrum to create a more vital neighbourhood.

The original Premier Hotel was imposing and of a dominant scale in comparison with the surrounding buildings. The new Premier Hotel approach is to deliver a contemporary building as a new civic beacon. Historically, the site functioned as the area's magnet with its height, bulk and texture. Thus, the current design performs a similar function creating a benchmark for surrounding buildings, that will eventually increase in size. This design is ideal for increased height planes relative to other strategic centres. It will act as the beacon, and the building's visibility will increase across streets when approaching the Nine Ways centre. In addition, the gradual rise of the building opens vistas for its residents and prevents unnecessary shadowing, thus opening green space to the south and aligning to lower-height residential areas too. This improved design reflects the continuation of the building's historical role, and the new design shapes the ground rules for the future of Broadmeadow.”

To summarise, a lower scale building would not achieve the higher planes relative to the surrounding built form, reflective of the need for the building's visibility to be maintained from each street corridor. A compliant built form would not result in a positive outcome for the desired built form.

It is noted that **objective (a)** refers to being "consistent" which is often considered as being "compatible" with when discussing the context of development. In *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191, Roseth SC considers "compatibility", finding that "compatible" is different from "sameness" and that development can harmoniously coexist within the urban context whilst projecting different built forms and outcomes (paragraph 22 reproduced below):

"There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve." [paragraph 22]

Council has not adopted specific character objectives for each category of the centres hierarchy, instead relying on development controls and guidelines such as the LEP, DCP and Apartment Design Guide to encourage a particular built form. However, Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (Paragraph 54) where the desired future character is not defined, the desired future character is subjective and can include the existing, recently approved and proposed buildings within the neighbourhood. Despite the proposed height variation, the proposed development is consistent in scale to developments in other strategic centres, and that which ought to be encouraged within Broadmeadow.

A building that complies with the 11m height limit would defeat or thwart the object of the standard being to encourage development that makes a positive contribution to the desired built form. The proposal in its current form is more appropriate in its context than a development that complies with the standard.

7.3.4 The development standard has been virtually abandoned or destroyed (Wehbe Test No.4)

Council has approved several DAs in the suburb of Broadmeadow and throughout the Newcastle local government area (LGA) with height variations. Whilst Council encourages compliance with standards, the previous variations indicate Council has historically applied a suitable level of flexibility to the standards where appropriate. We would argue that the same level of flexibility is being sought here.

The strength of the proposed development's ability to meet the objectives of the standard notwithstanding the variation, the unique site configuration, the site's history of placemaking and strong environmental planning grounds for the proposed height, warrant a level of flexibility suited to this particular development. Therefore, the development can be supported without abandoning the standard. In this instance, compliance with the standard is unnecessary and unreasonable in the context of the locality.

7.3.5 The zoning of the land is unreasonable or inappropriate (Wehbe Test No.5)

Not applicable as the zoning of the site is appropriate. We contend that the underlying issue for this particular case is that the prescribed height of building standard is not commensurate with the zone and objectives.

8. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

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, 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].” [paragraph 24]

In this regard, the justification contained within Section 8.1.1 of this Clause 4.6 variation has focused on the ability of the elements of the development that are outside the height plane to demonstrate compliance with the objectives of the standard, and why, despite the height exceedance, the proposal is nonetheless able to achieve these standards.

Further, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what a Clause 4.6 variation request does and does not need to satisfy. Importantly, there does not need to be a “better” planning outcome:

“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”. [paragraph 86]

“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.” [paragraph 86]

The assessment in the preceding sections and as shown throughout the supporting documentation demonstrates that the resultant environmental impacts of the proposal will be satisfactory, subsequently providing the justification for contravening the development standard. The proposal is consistent with the relevant objectives of the zone and the development standard, and it has been established that compliance with the standard is unreasonable or unnecessary.

There are sufficient environmental and planning grounds to justify contravening the development standard and are summarised from the preceding sections as follows:

- The proposed development meets the zone objectives (Section 8.1) and the height control objectives (Section 8.2).
- The proposed development is compatible with existing and future built form within the surrounding locality.
- The proposed development will provide a high level of internal and external environmental amenity for future residents of the building. The proposed development does not result in unfavourable or negative visual impact resulting from density, height or scale, and the works are expected to significantly improve the visual perception of the site. The development both maintains and enhances the neighbourhood character, landscape character, streetscape and amenity of the locality. The site will be returned to its historical function as a community hub and a placemaker.
- The additional height will have a negligible effect on solar access (Section 8.1.1). The shadows created by the development are considered to be satisfactory in regard to impacts to adjoining sites, the public domain and also within the development site.
- The additional height will not impact privacy of adjoining residents considering the height exceedance.
- The additional height will not impact on view sharing.
- Substantial components of the development are compliant with the maximum building height.

The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the supporting documentation and this request. Notwithstanding the variation, the proposed works represent a well-considered development that addresses the unique character of the site, streetscape appearance and

public domain interface, solar access, privacy, and relevant objectives of both the development standards and the MUI Mixed Use zone. Given the nature of the variation, the proposal will continue to maintain high levels of amenity within the development and to the surrounding context. The proposal continues to make a positive contribution to the desired built form of the locality and has been skilfully designed in consideration of its surrounding context and land uses.

As outlined above, it is considered that the proposal will provide for a better planning outcome than a strictly compliant development. In this case, we submit that there are sufficient environmental planning grounds to justify contravening the development standard.

9. OTHER MATTERS THAT MUST BE SATISFIED

9.1 IS THE VARIATION IN THE PUBLIC INTEREST?

As detailed above, Clause 4.6 (4)(a)(ii) of the LEP requires demonstration that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard (described and addressed in Section 8.1.1 above) and the objectives for the zone in which the development is proposed to be carried out (as described and addressed in Section 4). The demonstration of compliance with both the objectives of the standard and the land zone in turn confirm that the proposal is in the public interest.

9.2 CONCURRENCE OF THE PLANNING SECRETARY

Clause 4.6(4)(b) requires that a development consent must not be granted for development that contravenes the development standard unless the concurrence of the Planning Secretary (of the Department of Planning and Environment (DPE)) has been obtained.

Planning Circular PS 20-002 states that the consent authority may assume the Secretary's concurrence, subject to conditions attached to the circular. The conditions are not applicable to this development, being decisions made by independent hearing and assessment panels (of which this DA would not be assessed by) and therefore, the secretary's concurrence can be assumed by Council.

9.3 WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING

The variation sought does not raise any matter of significance for State or regional environmental planning.

9.4 PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standard. As established, there are no unreasonable or adverse impacts resulting from the development including the height exceedance. As such, there would be no public benefit in maintaining strict numerical compliance the standard.

10 CONCLUSION

The proposal does not comply with the 11m height of buildings control prescribed by Clause 4.3 of the Newcastle LEP 2012. Having evaluated the likely effects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of LEP 2012 are met, as compliance with the maximum height development standard are unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of both the development standard and the land zone. Further, this request has demonstrated that there are sufficient environmental planning grounds to support the exceedance.

Based on the above, it is reasonable to conclude that strict compliance with the maximum building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application of the development standard. Consequently, the use of Clause 4.6 of the LEP 2012 to vary this development control is appropriate.

The consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request and the proposal is worthy of favourable consideration.