Clause 4.6 Variation Request

Height of Buildings (CL4.3 PLEP 2011)

9-11 Fig Tree Avenue, Telopea

October 2021

BMAURBAN

1. INTRODUCTION

This Clause 4.6 Exceptions to Development Standards request has been prepared by Bernard Moroz of BMA Urban on behalf of Fuse Architects. It is submitted in support of a Development Application (DA) for the redevelopment of the site at 9-11 Fig Tree Avenue, Telopea. Specifically, the proposed development seeks consent for the redevelopment of the site for the purposes of "***residential flat building***" atop a "***childcare centre*****".**

This request seeks approval to vary the height of buildings development standard in clause 4.3 of the PLEP 2011. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of PLEP 2011.

Clause 4.3 prescribes a numerical building height limit of 22m over the subject site. The proposed building height departs from this standard as demonstrated in **Part 2** of this variation request.

Clause 4.6 of the *Parramatta Local Environmental Plan 2011* (PLEP 2011) enables consent for development to be granted even though it contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

As the following request demonstrates, flexibility may be afforded by Clause 4.6 because compliance with the height of buildings development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

The following sections of the report provide an assessment of the request to vary the development standards relating to "***height of buildings****"* in accordance with Clause 4.6 of the *Parramatta Local Environmental Plan 2011* ('PLEP 2011').

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 judgments issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgment is the most relevant of recent case law.

Chief Justice Preston of the Land and Environment Court confirmed (in the above judgment):

The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable or unnecessary' and 'sufficient environmental planning grounds' tests:

> *"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..."* [15]

On the 'Five Part Test' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

> *"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most*

commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way..." [22]

That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

"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" [26]

That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

"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 will have a better environmental planning outcome than a development that complies with the development standard." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

In accordance with the PLEP 2011 requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (**Part 2**);
- identifies the variation sought (**Part 2**);
- Summarises relevant case law (**Part 3**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Part 4**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Part 4**);
- demonstrates that the proposed variation is 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 (**Part 4**);
- provides an assessment of the matters the secretary is required to consider before providing concurrence (**Part 4**); and
- Provides a conclusion summarising the preceding parts **(Part 5).**

This Clause 4.6 Exception to a Development Standard should be read in conjunction with the architectural plan concept detail prepared by Fuse Architects.

2. VARIAION OF HEIGHT OF BUILDING'S STANDARD

As identified in **Table 1**, PLEP 2011 prescribes a maximum building height for the subject site of 22m.

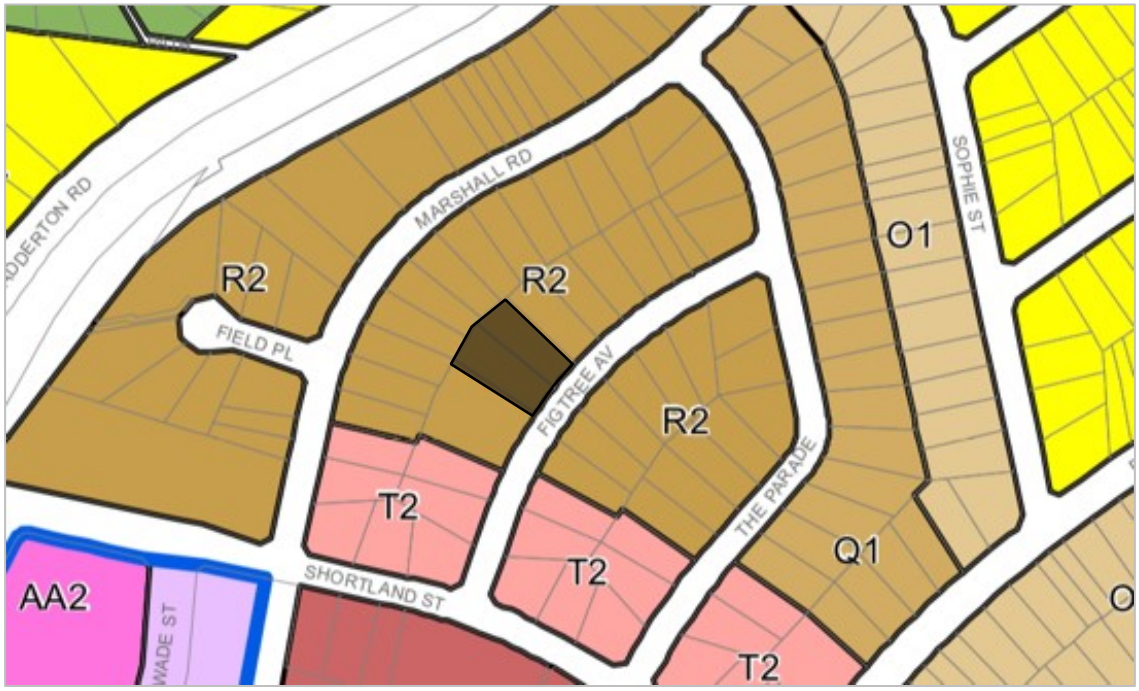

Figure 1: Height Map
(Source: PLEP 2011)

The proposed height breach ranges from 200mm to 3.26m. The extent of contravention from the prescribed height standard is best represented on the below reproduced height overlay (**Figure 2**). For ease of interpretation, the extent of breach is annotated in red.

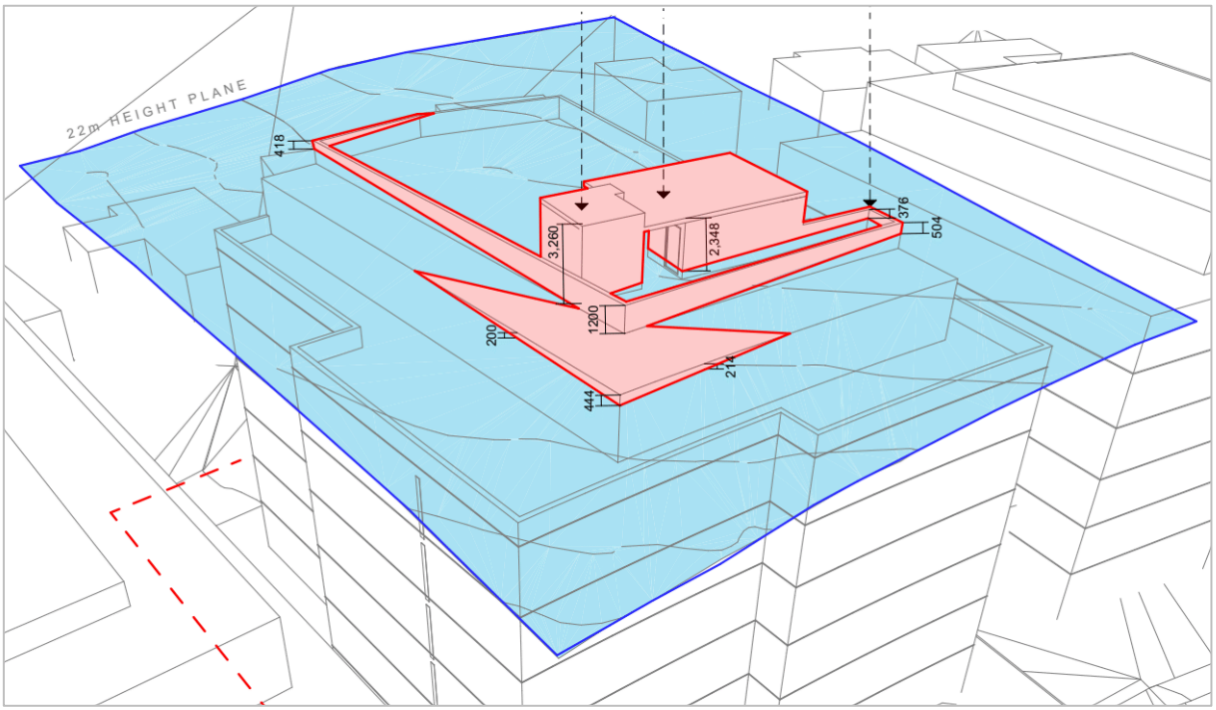

Figure 2: Height Breach Envelope
Source: Fuse Architects

3. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (**NSW LEC**) planning principles and judgements have refined the manner in which variations to development standards are required to be approached.

As briefly summarised in Part 1 of this Objection, the correct approach to preparing and dealing with a request under Clause 4.6 is neatly summarised by Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, duplicated for ease of consent authority reference as follows:

> *[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
>
> *[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
>
> *[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
>
> *[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*
>
> *[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
>
> *[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
>
> *[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] 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].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

[26] The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the

development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].

4. ASSESSMENT OF THE CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to building height in accordance with clause 4.3 of PLEP 2011. 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 PLEP 2011.

4.1 CONSIDERATION

4.1.1 Clause 4.6 (3)(a) – Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case?

The common way in which an Applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary is detailed in the 'five-part test' outlined in the Wehbe v Pittwater [2007] NSWLEC 827. These tests and case law are outlined in **Section 3** of this request.

Preston CJ identifies 5 options in *Wehbe v Pittwater* [2007] NSW LEC 827 which can used to analyse whether the application of the standard to a particular building is unreasonable or unnecessary in the circumstances of the case.

> Preston CJ at [16] states as follows:
>
> *"As to the first matter required by **cl 4.6(3)(a),** I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

In Wehbe, Preston CJ identified five ways in which it could be shown that application of a development standard was unreasonable or unnecessary. However, His Honour said that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

The five methods outlined in Wehbe are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 (**Fourth Method**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and

compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**. **Methods 2 through to and including 5** are not relied upon in the preparation of this variation request.

The objectives of the development standard are achieved notwithstanding the noncompliance (First Method).

The objectives of height of building standard are as follows:

(a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,

The underlying purpose of this objective is to ensure that any future development is designed in a manner whereby any resulting building height will appropriately respond to both the existing and future context in a controlled manner. The subject proposal demonstrates that the building will visually adapt with that of neighbouring building's both current and future and that the resulting height breach has been appropriately integrated into the built form envelope reducing its visual prominence from both neighbouring properties and the public domain. Importantly, the subject site is located within a pronounced high density setting and therefore, is not located amidst any transitional and or varying land uses.

As a result of the non-compliance being limited to the southern section of the upper most residential floor level, topmost roof awning component servicing the communal open space, balustrading which delineates the space and stair and lift providing access to the area, the development is not definably inconsistent with that anticipated to result by way of a compliant scheme. Furthermore, the recessive nature of the height breach, site slope and aspect of the site enable the proposed building to visually integrate with that of setting both current and future serving as an affirmation of the objective and not that of a building that abandons height controls.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

Visual Impact

The visual bulk of the non-compliant height elements are not significant because:

- The development presents as a six storey base with recessed uppermost level whereby the breaching height elements are integrated into the overall design of the building ad is of a form and materiality that does not create any unwarranted visual impact;
- **Figures 3 through to 10 below** make reference to the view line interpretation points, while demonstrating the extent of additional built form volume as perceived from the ground level adjacent to No's 5-7 Fig Tree Avenue to the south-west of the site, from across Fig Tree Avenue to the southeast of the site and from No. 13 Fig Tree Avenue to the north-west. For ease of clarity, the additional perceptible volume is annotated in red; and
- This analysis demonstrates that the breach will '***not'*** be identifiable at ground level adjacent to 5-7 Fig Tree Avenue. The breaching element will be marginally perceptible from along Fig Tree Avenue across from the site; however, this degree of perception given the extent of breach and its visually recessive nature, will not be interpreted as an unreasonable contribution to built form scale and or volume. With respect to the extent of identifiable breach from. No 13 Fig Tree Avenue, the breaching elements of the building will only be interpretable from within the south-eastern corner of the front yard of this neighbouring site with the assumption that similar would apply to the north-western rear corner. Centrally positioned within the front yard of the neighbouring site, the breach will not be identifiable from within this location. It is assumed that a similar scenario would be observed from within the rear of the site from within a centrally sited location.

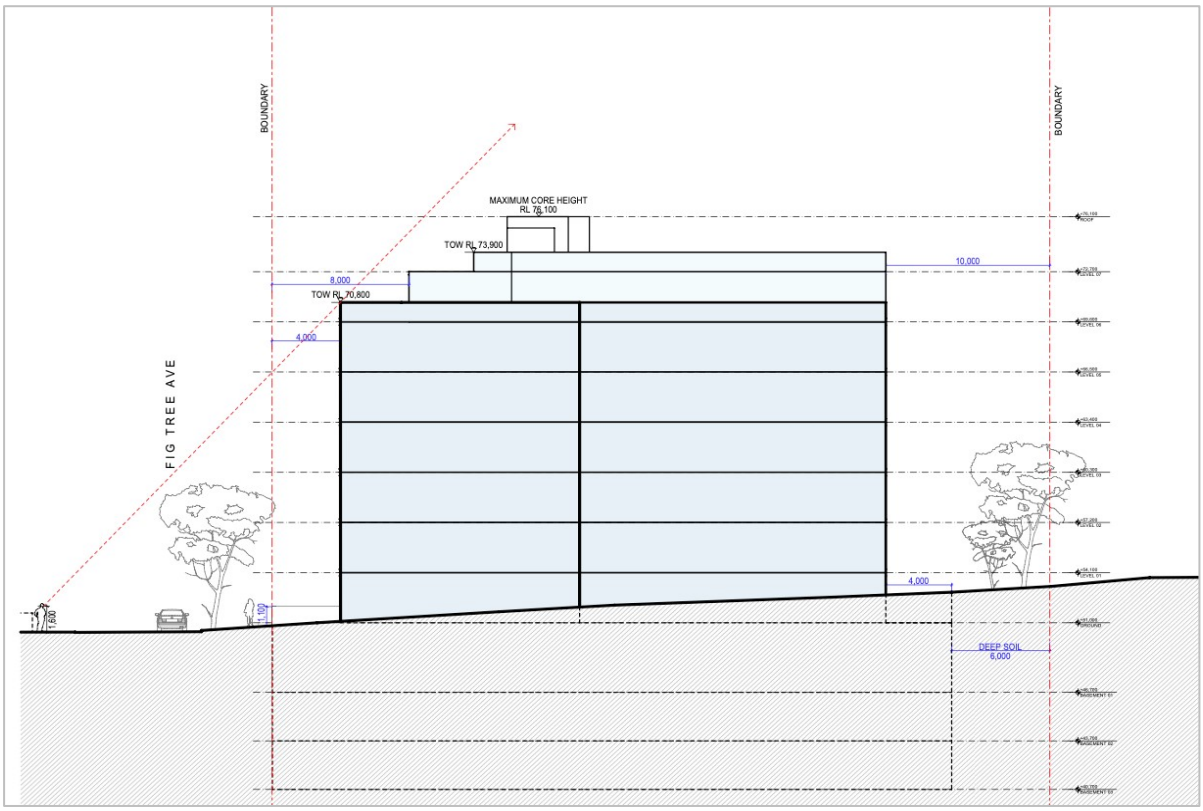

Figure 3: View Line Interpretation Point (Across Fig Tree Avenue)
Source: Fuse Architects

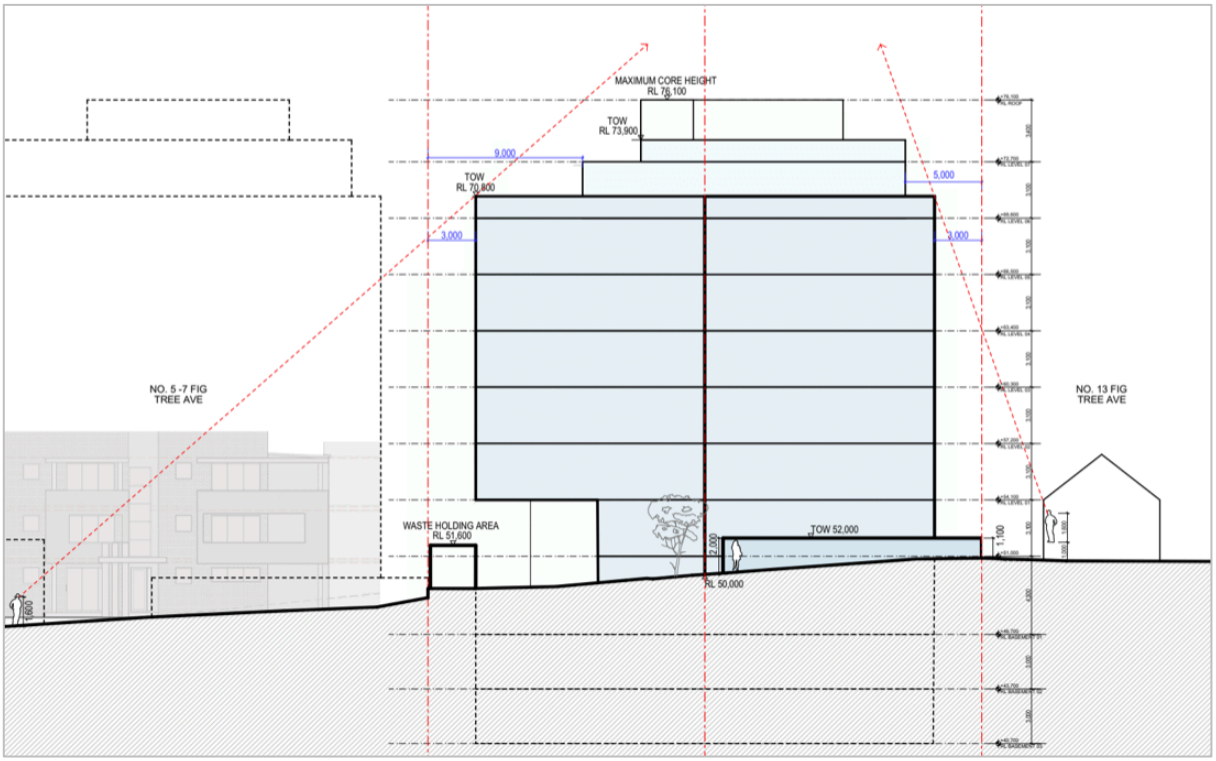

Figure 4: View Line Interpretation Points (No's 5-7 Fig Tree Avenue and No. 13 Fig Tree Avenue)
Source: Fuse Architects

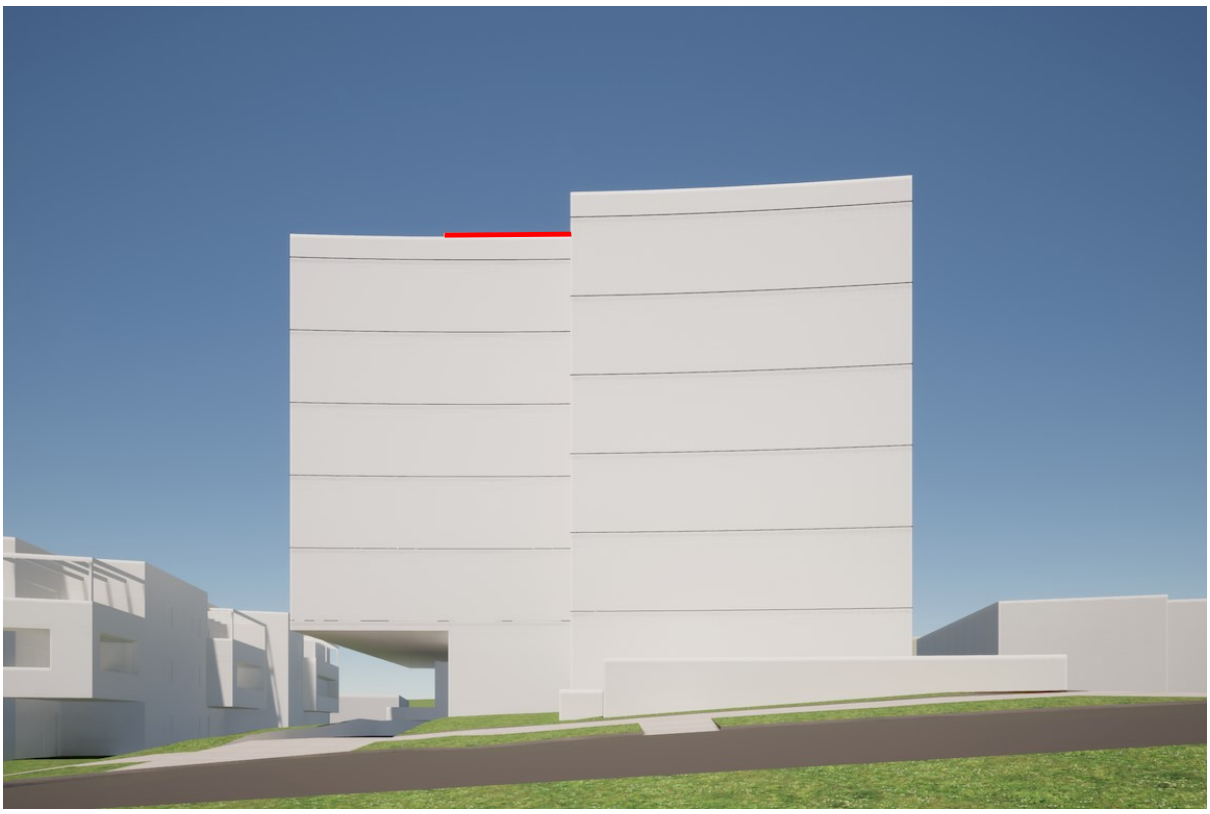

Figure 5: Extent of additional increase in building bulk from across the site along Fig Tree Avenue (View 1)
Source: Fuse Architects

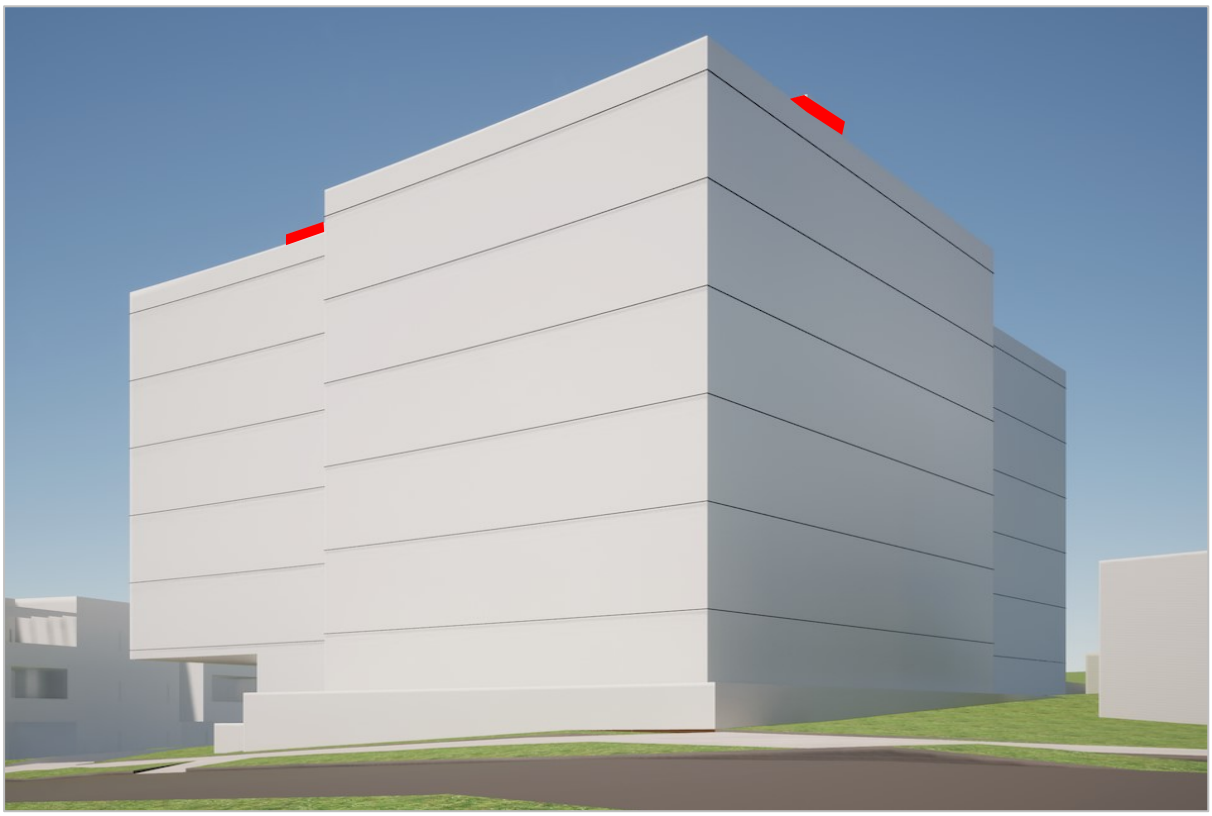

Figure 6: Extent of additional increase in building bulk from across the site along Fig Tree Avenue (View 2)
Source: Fuse Architects

Figure 7: Extent of additional increase in building bulk from across the site along Fig Tree Avenue (View 3)
Source: Fuse Architects

Figure 8: Extent of additional increase in building bulk from ground level of 5-7 Fig Tree Avenue
Source: Fuse Architects

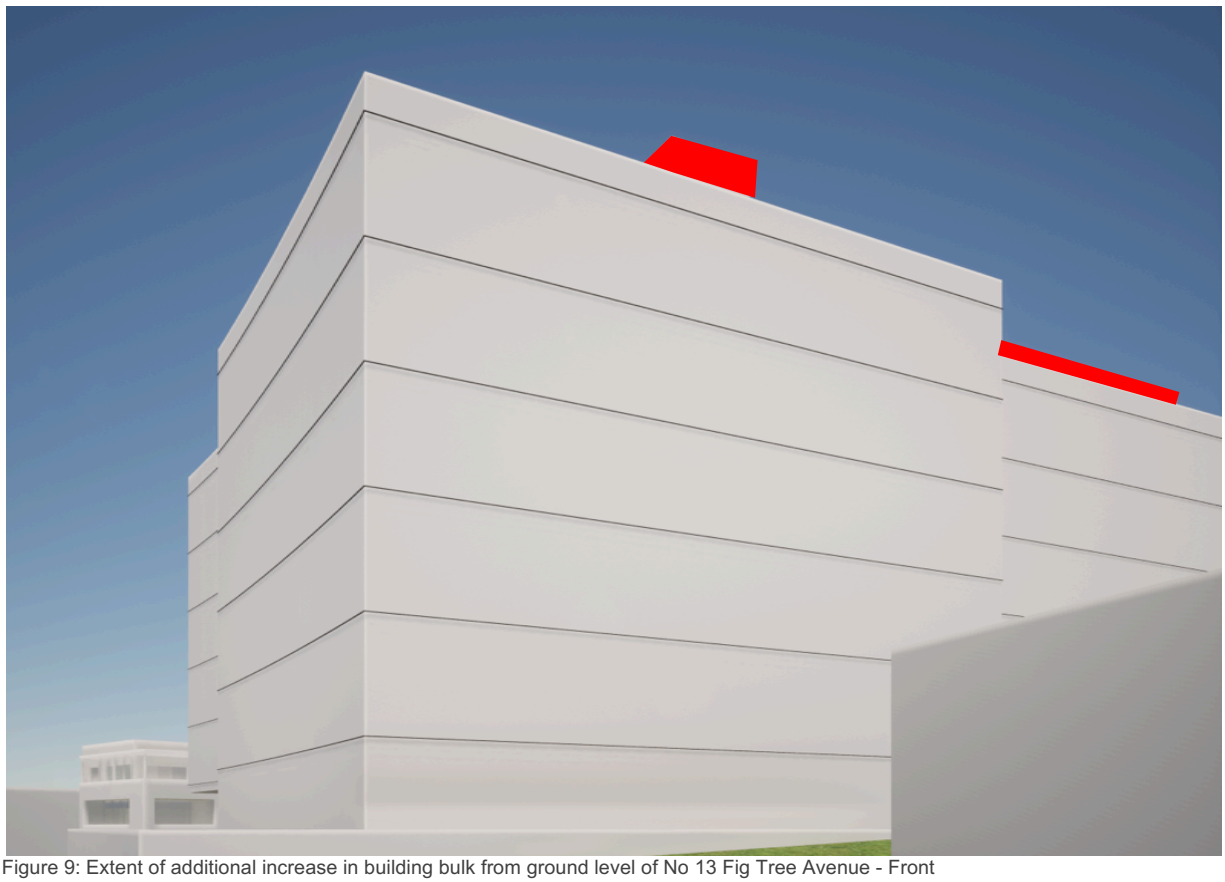

Figure 9: Extent of additional increase in building bulk from ground level of No 13 Fig Tree Avenue - Front yard/south-eastern corner)

Source: Fuse Architects

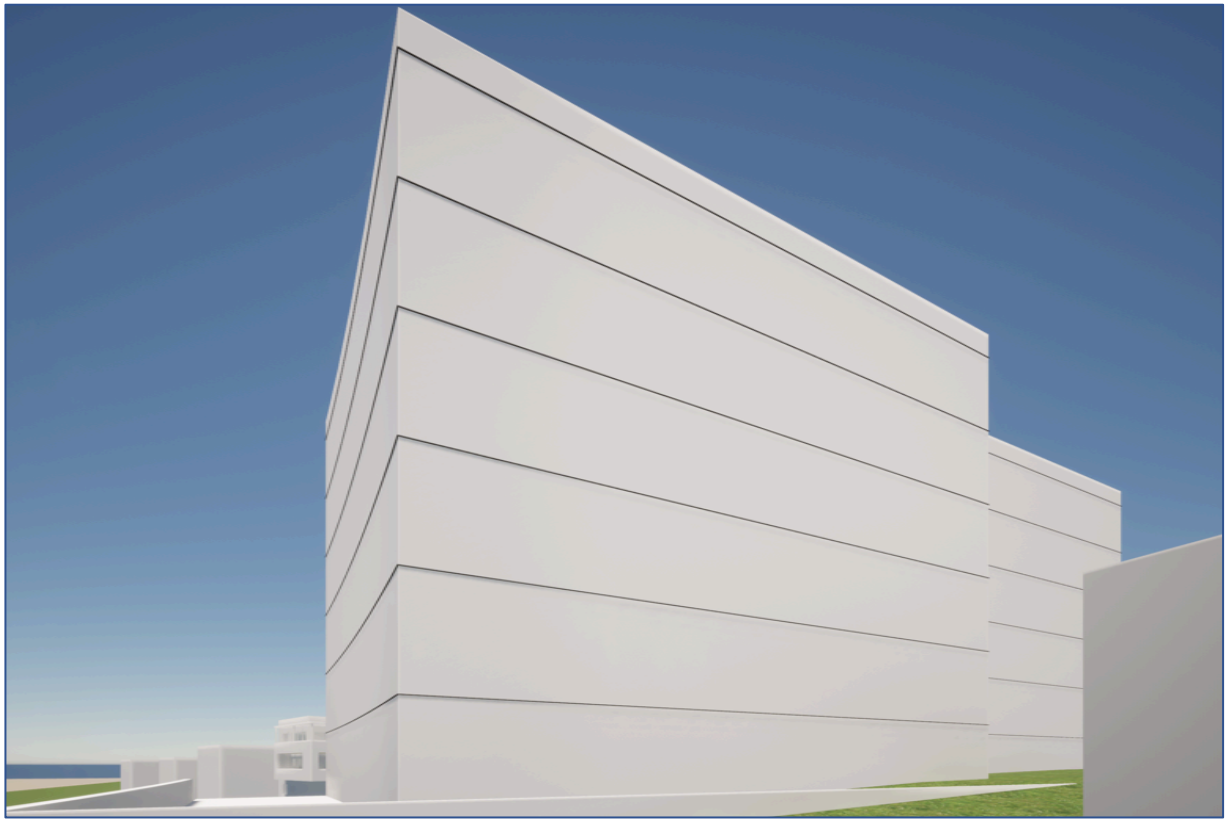

Figure 10: Extent of additional increase in building bulk from ground level of No 13 Fig Tree Avenue - Front yard-centre of site)

Source: Fuse Architects

Disruption of Views

The siting, scale and relationship the breaching element will have with neighbouring properties both current and likely to emerge upon redevelopment of older housing stock, will have no definable bearing on the extent or quality of views capable of being both retained and or attained.

Loss of Privacy

The extent, nature and siting of the breaching element's is such that no adverse privacy outcomes will result. The breaching element which has been generously recessed into the built form, in no way affords the ability for any additional adverse level of overlooking to occur into neighbouring properties and vice versa.

Solar access to existing development

Comparative shadow diagrams which form part of the architectural plan detail set prepared by Fuse Architects **Figures 11 through to and including 14** have been provided illustrating the extent of additional overshadowing impact on June 21 (annotated in red) resulting from the height variation. This analysis demonstrates that the height non-compliance will only be discernible at 1pm-3pm on June 21. At 1pm the additional shadow cast by the non-compliant building element falls over the existing driveway ancillary to the dwelling located at No. 8 Fig Tree Avenue. At 2pm, this additional diminutive shadow is cast over both the roof area and rear yard area of No. 8 Fig Tree Avenue. Of note, the rear yard area of No. 8 Fig Tree Avenue is currently heavily vegetated and therefore, notwithstanding the already very minor nature of the breach, will ensure the extent of additional shadowing impact will not be to any notable degree discernible. At 3pm, the additional shadow cast by the breach will fall over the heavily vegetated interface between No's 5 and 7 The Parade. Of importance, the resulting increase in shadowing cast by the breach will have no bearing on the neighbouring building's/dwelling/s fenestrated components continuing to received unimpeded solar access.

Figure 11: 9am and 10am June 21 Shadows
Source: Fuse Architects

Figure 12: 11am and 12pm June 21 Shadows
Source: Fuse Architects

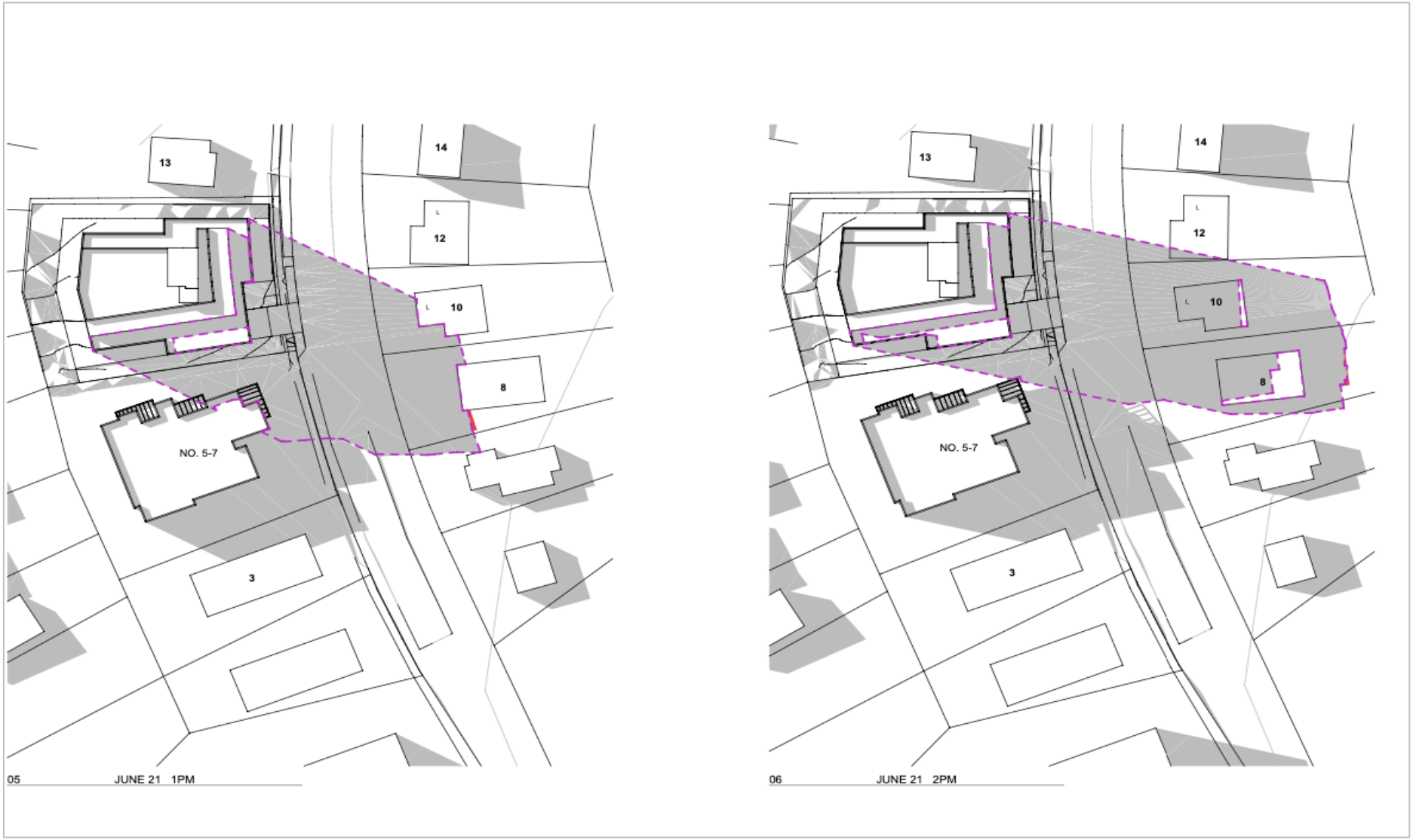

Figure 13: 1pm and 2pm June 21 Shadows
Source: Fuse Architects

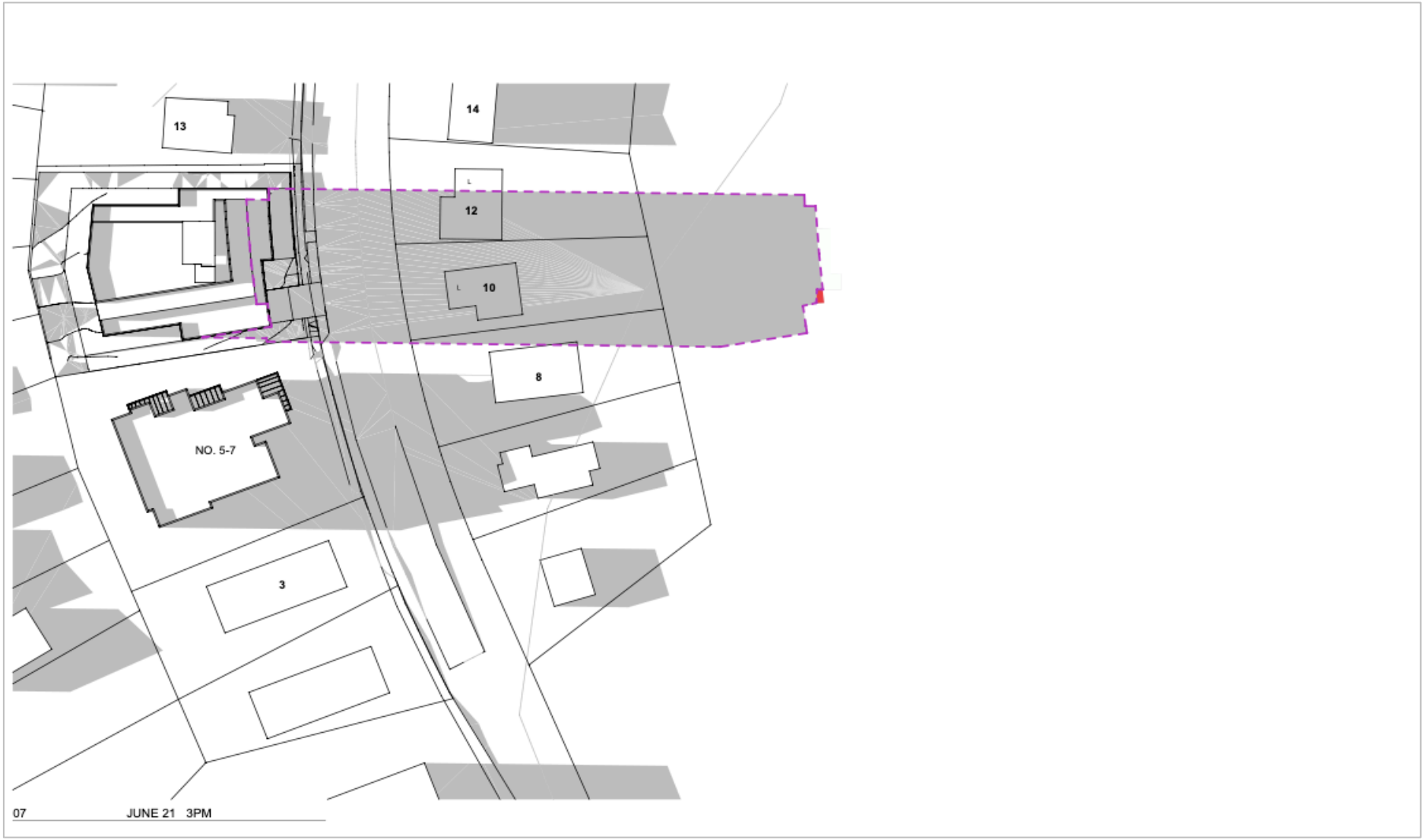

Figure 14: 3pm June 21 Shadows
Source: Fuse Architects

(c) to require the height of future buildings to have regard to heritage sites and their settings,

The proposed development, more specifically the breach, has no direct relationship with an Item of heritage significance or its setting.

(c) to ensure the preservation of historic views,

Given the development's setting, this objective is not relevant to the proposed development.

(d) to reinforce and respect the existing character and scale of low density residential areas,

The subject site is located in an R4 High Density Residential setting and bears no direct relationship with low density residential lands. In this regard, this objective is not relevant to the proposed development.

(e) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

The subject site is no located in a commercial setting. In this regard, this objective is not relevant to the proposed development.

4.1.2 Clause 4.6 (3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

Clause 4.6(3)(b) of the PLEP 2011, requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

> *"That there are sufficient environmental planning grounds to justify contravening the development standard".*

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118).

The proposed development is supportable on environmental planning grounds for the following reasons:

- The proposal (notwithstanding the LEP contravention) is consistent with the objectives of the development standard as provided in clause 4.3 of the PLEP 2011.

- The proposal is compliant with the maximum FSR that applies to the land. Therefore, the height variation does not seek to provide any additional density or gross floor area (GFA).

- The shadow diagrams that form part of this variation request demonstrate that the area of height variation will not result in an unreasonable increase to the extent of overshadowing impact on either neighbouring properties or public domain.

- The building form has been designed in response to Parramatta Council's DCP controls applicable to the precinct in terms of building for, siting and setbacks.

- The slope of the site being a maximum of 4.2m (approx) from the northern corner of the site down towards the southern corner along the Fig Tree Avenue street edge has been a determinative factor with regards to the extent of height variation observed across the building.

- The perception of building height, most notably where it breaches the standard, has been formed in a manner that continues to enable the visual identification of a built form that remains appropriate for the site and commensurate with both existing and envisaged development likely to occur on neighbouring undeveloped sites. At high level, the proposed building successfully mitigates environmental impacts such as overshadowing, privacy and visual impact.

- The height breach facilitates the provision of a rooftop area of communal open space, and access to this space, which will have a direct bearing on occupant amenity.

The Objects of the Act under S1.3 are also relevant to whether grounds exist to warrant a variation. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **the table below** we consider whether the proposed development is consistent with each object.

The objects of this Act and how this proposal responds to the object are as follows:

Object	**Comment**
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	This object is not relevant to this application.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,	The proposal will facilitate an ecologically sustainable development given that no negative impact on environmental and social considerations will arise. This in turn will serve to offer the ongoing sustainment of the economic health of the area.
(c) to promote the orderly and economic use and development of land,	The proposed development will promote the orderly and economic use of the land by way of providing a land use intensity consistent with that envisaged by Council.
(d) to promote the delivery and maintenance of affordable housing,	This proposed development seeks to introduce a number of affordable dwelling's to the development.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	Given the nature and character of the urban setting the proposed development is located within, no impact on threatened species or ecological communities is likely to result.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	This object is not relevant to this development

(g) to promote good design and amenity of the built environment,	The proposed development promotes good design in that it serves to provide a built form and massing arrangement that serves as a positive influence on the built form environment both existing and likely to emerge upon the redevelopment of building stock.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	Nothing will preclude the proposed development from having the ability to comply with all relevant BCA codes and standards. Furthermore, the breach in part supports the provision of a COS area, which in turn, reduces the impact of the new population on existing resources and as outdoor recreation and relaxation improves the physical and mental health of the occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	This object is not relevant to this development
(j) to provide increased opportunity for community participation in environmental planning and assessment.	The proposed development will be publicly notified in accordance with Council's DCP requirements.

Based on the above, the consent authority can be satisfied that there the proposed development remains consistent with the Objects of the Act despite the height non-compliance.

4.1.3. Clause 4.6 (4)(a)(i) - Has the Written Request adequately Addressed the Matters in Sub-Clause (3)?

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.

4.1.4. Clause 4.6 (4)(a)(ii) - Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

Clause 4.6(4)(a)(ii) provides that development consent must not be granted for development that contravenes a development standard unless 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.

In Part 4.1.1 of this request, it was demonstrated that the proposal is consistent with the objectives of the development standard. The proposal, inclusive of the non-compliance, is also consistent with the objectives of the R4 High Density Zone as detailed overpage:

Zone R4 – High Density Zone

Objective	Comment
• To provide for the housing needs of the community within a high density residential environment.	The proposal seeks to provide a development typology that will facilitate the provision of housing in a high density residential setting.
• To provide a variety of housing types within a high density residential environment.	This proposal seeks to provide a number of apartment layouts and configurations capable of catering to a broad population base.
• To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal seeks the provision of a childcare centre which will form part of the development. This centre may be utilised by future building occupants.
• To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.	The subject site is located in a reasonably serviced area in terms of transport nodes and services; however, is located in proximity to the Parramatta Centre which provides for excellent levels of employment opportunity.
• To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood.	The indicative apartment layouts indicate that there is ample opportunity for future residents to carry out a range of activities from their respective dwelling's.

The objectives of the zones as demonstrated above, as well as the objectives for the standard, have been adequately satisfied. Therefore, the proposal is considered to be in the public interest.

4.1.5. Clause 4.6(5)(a) – Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the height of building's development standard will not raise any matter of significance for State or regional environmental planning.

4.1.6. 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 height development standard and the land use zoning objectives. As such, there is no public benefit in maintaining the development standard given the substantial activation throughout the development.

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

There are no known additional matters that need to be considered within the assessment of the clause 4.6 Request and prior to granting concurrence, should it be required.

5. CONCLUSION

This written request has been prepared in relation to the proposed variation to a development standard contained in Clause 4.3 of PLEP 2011. The request explains that, despite the proposed variation, the development satisfies the objectives of the standard and the objectives of the *High Density R4 Zoning* (**Wehbe-way 1**).

The request also explains that it is unreasonable or unnecessary to require strict compliance with development standard in circumstances where there are no significant/unreasonable adverse impacts from the variation and important planning goals are better achieved by allowing the variation. In addition, the request demonstrates that there are sufficient site specific environmental planning grounds to justify the variation, and therefore the proposal is considered to be in the public interest.