

# Clause 4.6 Variation Height of Buildings

Clause 4.3 – HOB – Parramatta (Form The Hills) Local Environmental Plan 2012

Proposed Shoptop Housing  
9-11 Thallon Street, Carlingford NSW

Project 21-085  
October 2021  
Revision B

Prepared by Dickson Rothschild



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Dickson Rothschild  
D.R. Design (NSW) Pty Limited  
ABN 35 134 237 540

Suite 1 & 2, Level 5, Grafton Bond Building  
201 Kent Street  
Sydney NSW 2000 Australia  
Phone +612 8540 8720  
[www.dicksonrothschild.com.au](http://www.dicksonrothschild.com.au)



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# 1. Introduction

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## 1.1. Overview

This is a formal written request that has been prepared in accordance with clause 4.6 of the Parramatta (*Former The Hills*) **Local Environmental Plan 2012 (the LEP)** to justify a variation to the Height of Buildings development standard imposed by clause 4.3(2) of the LEP sought in the subject application.

The proposal seeks consent for a shoptop housing development at 9-11 Thallon Street, Carlingford. The proposed development is 12 storeys and includes a landscaped rooftop garden with lift and stair access.

### 1.1.1. The standard to be varied – Clause 4.3 Building Height

Clause 4.3 of the LEP and the associated map prescribes a maximum building height of 28m for the site.

### 1.1.2. Nature and extent of the variation

The proposed development seeks a variation to the height control across the whole tower. The extent of variation changes across the site due to sloping topography. The proposed height at key locations is as follows:

- 39.4 m (RL 130.35) to the parapet at the building's western edge near the centre of the façade, which is a variation of 40.7%. The height exceedance is 11.4m.
- 39.3m (RL130.35) to the southwest corner of the building parapet, which is a variation of 40.4%. The height exceedance is 11.3m.
- 38m (RL 132.85) to the fire stair, lift overrun and roof entry lobby block. This results in a maximum non-compliance of 10m, which is equivalent to a variation of 35.7%. The height exceedance is 10m.
- 34.1m (RL 130.35) to the top of the parapet at the northeast corner of the site, which is a variation of 21.8%. The height exceedance is 6.1m.

The height non-compliances are illustrated at DA-0-912 and DA-0-913 (See Figure 1 overleaf for excerpt of DA-0-913).

The maximum variation sought is 11.4m.

Clause 5.6(2) of the LEP permits an architectural roof feature to exceed the building height limit with development consent, subject to satisfaction of the matters in clause 5.6(3). The proposed development incorporates architectural roof feature elements associated with the roof garden. This includes pergolas, balustrades and planters. These elements are disregarded when taking into consideration the maximum height of the building. They do not give rise to adverse impacts such as overshadowing and visual impacts.

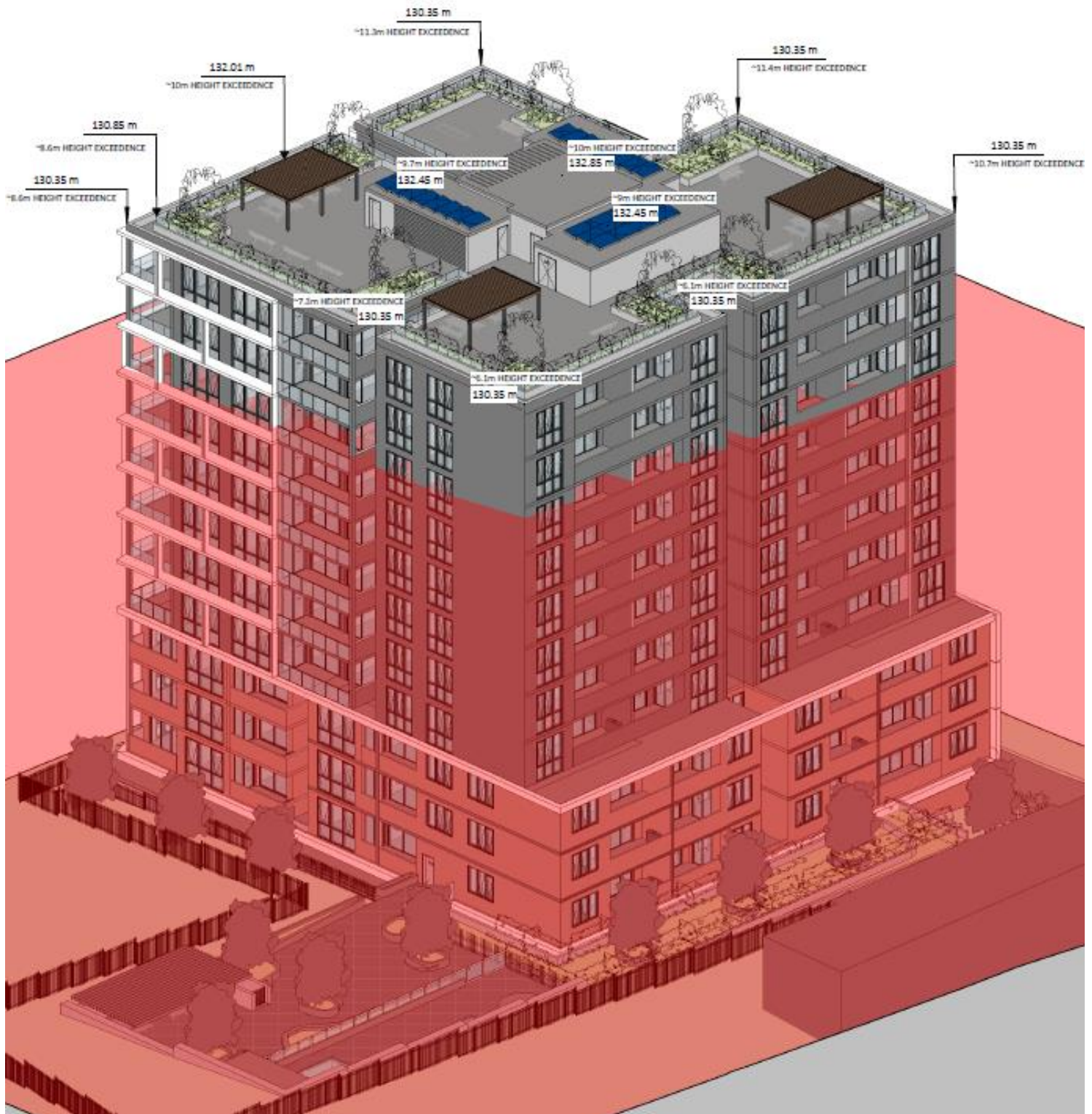


Figure 1: Excerpt, DA-0-912, Height Plane Building Diagram

## 1.2. Clause 4.6 framework and relevant case law

The proposal seeks a variation to the building height control in clause 4.3 of the *Parramatta (Former The Hills) Local Environmental Plan 2012*. The objectives of clause 4.3 are:

- (a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*
- (b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.*

The site is zoned R1 General Residential with proposed shoptop housing permitted with consent. The R1 zone objectives are:

- To provide for the housing needs of the community.*
- To provide for a variety of housing types and densities.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

Clause 4.6 of the LEP states:

### 4.6 Exceptions to development standards

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

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

*(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

*(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

*(4) Development consent must not be granted for development that contravenes a development standard unless—*

- (a) *the consent authority is satisfied that—*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning Secretary must consider—*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone 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.*
- (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), (cb) *(Repealed)*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the Development Application's proposed breach of the height of building development standard. This request has been prepared having regard to the latest authority on Clause 4.6, contained in the following guideline judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130

In summary, the principles arising from the above matters are:

- In as far as they are relevant, there are five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* that remain relevant. However, in order to satisfy the unreasonable and unnecessary test in Clause 4.6(3)(a), you need something more than Method 1 in *Wehbe*, because that test is now encompassed in Clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.
- Preston CJ in *Initial Action* held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- At paragraphs 23 and 24 in *Initial Action*, Preston CJ held that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.

In *RebelMH* the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.



## 2. Grounds for Clause 4.6 Variation

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Justification in accordance with the five grounds established in *Wehbe v Pittwater Council (2007)* is set out below.

### 3.1 Compliance with the standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

The principle set out in *Wehbe v Pittwater Council (2007)* (Wehbe) provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This request relies on method 1 in Wehbe which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

Compliance with the height control is unreasonable and unnecessary in the circumstances of this proposal as the objectives of the development standard (building height) are achieved, notwithstanding the non-compliance with the height control. The Development Application achieves the objectives of the development standard contained at clause 4.3 of the LEP, as outlined below. Further, the height non-compliance itself is related to achieving a better planning outcome than what would otherwise be achieved by a building that strictly complied with the height limit. This is also discussed below.

#### 2.1.1. Building Height - Objective (a)

*(a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*

The height of the development is compatible with that of the adjoining development and the overall streetscape. The development is consistent with the height objective despite the non-compliance for the following reasons:

- The development is located within the core of the R1 zone and as such will be surrounded by future (proposed and approved) high density residential and mixed use development. In this regard the development, despite the non-compliance is compatible with the streetscape by providing a transition from the 18-21 storey buildings (with 8 storey podiums) on the west, southwest and south to the 7-9 storey buildings to the north, northeast and east.
- The majority of sites to the north have been redeveloped from low and medium density residential or are approved for development, creating a context to the north that is greater than what currently exists.
- The proposed built form has a height of 12 storeys, fitting within the pattern of building height considered from both north to south and east to west across the Carlingford Precinct south area (south of Post Office Road). The proposal provides a transition in both the north-south and east-west directions in terms of the scale of built form. The Urban Design Report by Dickson Rothschild provides a detailed analysis of the contextual fit of the proposal.
- Refer to the figures below.

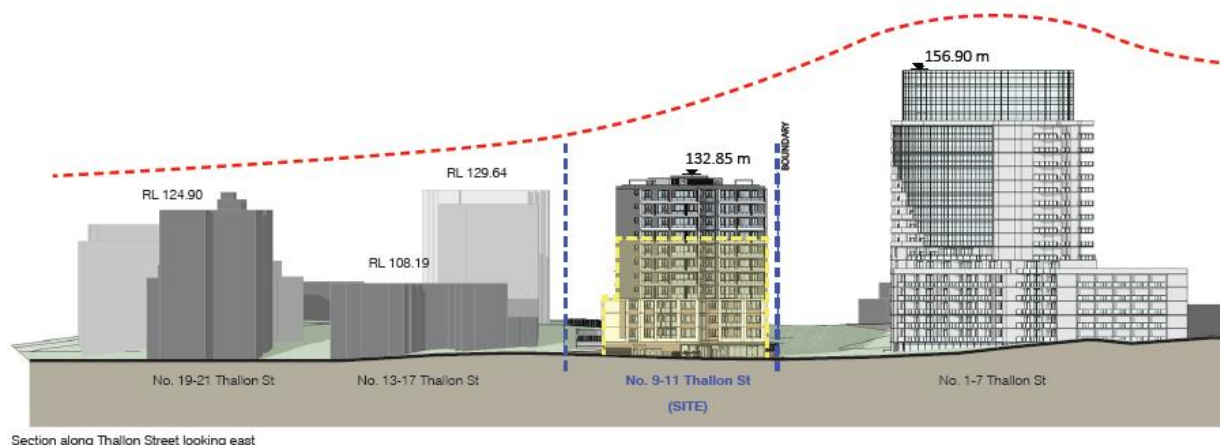


Figure 2: Excerpt, Urban Design Report, Dickson Rothschild, pg. 14

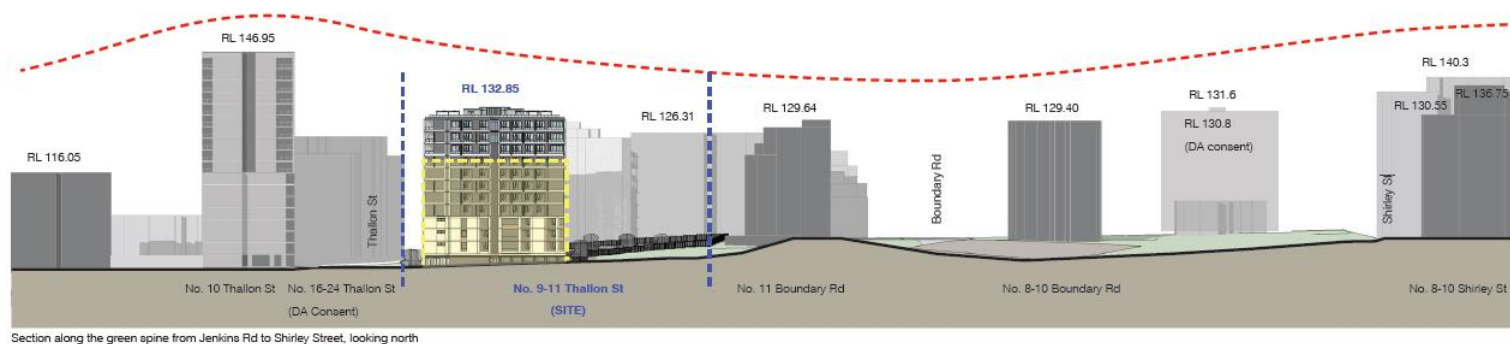


Figure 3: Excerpt, Urban Design Report, Dickson Rothschild, pg. 14

- The site context does not represent a uniform character of built form and character. Building types range from medium rise to high rise and from 4-21 storeys within 40m of the site. Generally, the precinct is emerging as a high density precinct, but there is a variety of heights, density, built form, and character in the area.
- The development provides a four storey podium to the adjoining 4 storey building to the north which is not yet redeveloped, and which does not have an approved DA for uplift. The proposed tower is setback from the podium to the northern boundary to provide visual relief to the north and achieve an effective transition to the north, thus achieving compatibility with the streetscape and context.
- The proposed tower is concentrated on the western half of the site with a rear setback of over 35m from the rear boundary of the site. Built form is concentrated in this western location which is closer in its context to the 18 storey buildings to the west and south west and the 21 storey building to the south. The proposal also has an increased front setback to its southwestern half to protect significant trees which exist on site. The proposed siting of the building which responds to site context and on-site constraints limits the tower footprint, pushing the building up in height. The tower footprint (above the proposed podium and including balconies) is 1,068m<sup>2</sup> or 34% of the site area, limiting the proportion of the site where height non-compliance arises.
- The precinct plan that forms the DCP and informed the height standard for the site, took the view that the site would not be redeveloped due to its strata titling. Therefore, its strategic

location within the precinct including its proximity to the rail station and open space spine were not considered when determining development potential. This led to the height control pattern in the precinct being irregular with the 57m height limit area:

- Being further from the light rail station than the subject site.
- Extending northward past the subject site on the western side of Thallon Street.

The nomination of Key Sites in the centre also related to the undergrounding of High Voltage Power Lines which also contributes to a pattern of heights and densities that see key sites peppered along the east-west open space link (the open space link being where the HV Power Lines were previously located).

This places the site in a unique streetscape context where there is a notable mismatch between building height and density on the western side of Thallon Street with the height and density afforded to the eastern side of the street at the subject site. There is urban design merit in having a taller building on the subject site than what is set out by the LEP control, since it can still achieve compatibility with the existing context, while delivering good planning outcomes including, increased infill densities in existing urban areas that are specifically identified as urban renewal areas (as set out by the Regional Plan) and where new investment in public transport has or is occurring. The site is optimally located in this regard and achieving a transition between the key sites to the south and west and the lower forms towards the north achieves compatibility with the site's streetscape and context.

- The site is located directly across Thallon Street from a site (10 Thallon Street, a Key Site) which is afforded a building height standard of 57m and which comprises an 18 storey building with an 8 storey podium. The site is in the immediate streetscape context of this 18 storey building at 10 Thallon Street. The proposed height is compatible with the 18 storey building at 10 Thallon Street.
- The precinct plan included a low scale (approximately 4 storey) building at 1-7 Thallon Street immediately adjacent to the subject site (DA 943/2010/JP). This building was subsequently eliminated and the floor space shifted onto the tower at 1-7 Thallon Street, resulting in a building on that site of 21 storeys under DA/495/2017. The removal of the four storey building just south of the subject site eliminated a significant constraint on the subject site. This four storey building would have been heavily impacted by shadow and visual impacts from a redevelopment of the subject site. It would also place a new, low scale building adjacent to the subject site which would influence the built form context of the site. Instead, in the location of the previously approved 4-storey building, public open space has been expanded and the built form context of the site to the south is that of the large 21 storey building at 1-7 Thallon Street separated by the public reserve. The proposed development is compatible in character and built form with the 21 storey building to the south of the site.
- The proposed tower is concentrated on the western part of the site, providing reasonable separation to the existing 7 and 9 storey towers to the east and north east of the subject site. Building separation which is consistent with the separation between existing buildings is achieved. The 12 storey building height transitions from the 18-21 storey buildings to the south, south west and west towards the 7-9 storey buildings to the east and northeast, achieving compatibility with the streetscape and site context.
- The proposed development steps back at the south west corner, opening up the corner to the public open space to the south, protecting existing trees and reducing bulk and scale within

the streetscape, achieving compatibility with the site context and streetscape. This corner is activated with a shop and restaurant fronting the street and the public open space, contributing to the vibrancy and character of the precinct in close proximity to the light rail station and the key east-west pedestrian link in the precinct.

- Each façade is well articulated, limiting the impact of bulk and scale.
- The ceiling heights proposed at the ground level allow for an active non-residential frontage to Thallon Street and the public open space, allowing for high quality, high amenity spaces which will provide opportunities to enliven the public domain and improve the quality of the streetscape. The generous ceiling height together with sloping topography increases the overall height of the building.
- The proposal seeks a floor-to-floor height of 3.15 m, greater than what was used as the standard when the height limit was formulated in 2007-2010 where a floor to floor of 3m and sometime 2.9m was considered adequate. The increased floor-to-floors allow for accommodation of services, waterproofing, sound insulation, etc, and high quality construction standards consistent with the NCC and to address issues raised by the Building Commissioner, while avoiding reliance on bulkheads within apartments.
- The provision of communal open space at roof level is an appropriate response to the site's town centre location. Extending the lift to the roof garden achieves universal access and maximises amenity of the open space. It also contributes to the building height non-compliance.
- The proposal is consistent with the desired future character statement for the Carlingford Southern Precinct as set out in the Hills DCP – Part D, Section 12, Clause 3.3. The proposal achieves the desired street-oriented village built form and character.
- The site's landscape character of the site is not diminished by the height non-compliance. Sufficient deep soil landscape is provided on site, consistent with ADG and DCP standards. Large, significant trees are retained on the site, which have a significant positive impact on the streetscape. On structure planting is proposed to soften built form and enhance the landscape character of the site. A large communal open space is maintained at ground level with deep soil setbacks, contributing positively to the spatial relationship of the site to adjoining buildings to the north and east. The proposed balance of built form and landscape is compatible with the character and site context.
- The site achieves full compatibility with its streetscape and context. The building height proposed provides a transition, achieving a smoother transition than would an 8 storey building which would be an abrupt change in scale within Thallon Street and an inconsistent streetscape.

#### 2.1.2. Building Height - Objective (b)

*(b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.*

#### Overshadowing

The development is consistent with (b) regarding overshadowing due to the following:

- The additional building height gives rise to a minimal impacts regarding overshadowing of adjoining properties. The adjoining buildings to the south, south west and west along Thallon Street maintain good solar access, consistent with SEPP 65.
- The proposed development will impact the linear green open space between Jenkins Street and Thallon Street between 9am and 10am. It will have no impact on the main seating areas between main activity period from 10am to 2pm. A compliant envelope will generate similar shadow impact to the extent of the area affected by the subject development.
- The proposal will cast shadows on the public open space to its immediate south given its position to the north. However, it is noted that a compliant envelope will generate shadows at a similar level to this open space between 9am and 12pm. In the afternoon, the subject development will create small amount of additional shadow to this open space between 1-2 pm.
- The Sun View diagrams (DA-0-906 to DA-0-909) suggest that the proposed development will have some impact on the lower level units of No. 1-7 Thallon Street from 9-3pm in mid-winter. A further study based on the internal floor layouts (on following page) suggests that there are 4 units to the north-west corner of the building on podium levels will be affected. However, these affected units are still able to receive sufficient solar access (3+ hours) during the day.

Refer to the figures overleaf relating to the above.

BUILDING A

GROUND LEVEL



BUILDING A

LEVEL 1



BUILDING A

LEVEL 3



Typical lower level layout plans for No. 1-7 Thallon Street (source: <https://www.realestate.com.au/property/1-7-thallon-st-carlingford-nsw-2118>)

Figure 4: Excerpt, Urban Design Report, Dickson Rothschild, pg. 16.

	Unit ID	9am	10am	11am	12pm	1pm	2pm	3pm	3 + hours solar
GF	1	YES	YES	YES	YES	NO	NO	NO	YES
	2	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	3								
	4								
	5								
LEVEL 1	6	YES	YES	NO	NO	YES	YES	YES	YES
	7	YES	YES	YES	YES	NO	NO	YES	YES
	8	YES	YES	YES	YES	NO	NO	NO	YES
	9	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	10								
	11								
	12								
	13								
	14								
	15	YES	YES	NO	NO	YES	YES	YES	YES
LEVEL 2	16	YES	YES	NO	NO	YES	YES	YES	YES
	17	YES	YES	YES	YES	NO	NO	YES	YES
	18	YES	YES	YES	YES	NO	NO	NO	YES
	19	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	20								
	21								
	22								
	23								
	24								
LEVEL 3	25	YES	YES	NO	YES	YES	NO	YES	YES
	26	YES	YES	NO	NO	YES	YES	YES	YES
	27	YES	YES	YES	YES	NO	NO	YES	YES
	28	YES	YES	YES	YES	NO	NO	NO	YES
	29	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	30								
	31								
	32								
	33								
	34								
LEVEL 4	35	YES	YES	NO	YES	YES	NO	YES	YES
	36	YES	YES	YES	YES	YES	YES	YES	YES
	37	YES	YES	YES	YES	NO	NO	YES	YES
	38	YES	YES	YES	YES	NO	NO	NO	YES
	39	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	40								
	41								
	42								
	43								
	44								
LEVEL 5	45	YES	YES	YES	YES	YES	NO	YES	YES
	46	YES	YES	YES	YES	YES	YES	YES	YES
	47	YES	YES	YES	YES	NO	NO	YES	YES
	48	YES	YES	YES	YES	NO	NO	NO	YES
	49	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	50								
	51								
	52								
	53								
	54								
LEVEL 6	55	YES	YES	YES	YES	YES	NO	YES	YES
	56	YES	YES	YES	YES	YES	YES	YES	YES
	57	YES	YES	YES	YES	YES	YES	YES	YES
	58	YES	YES	YES	YES	YES	NO	NO	YES
	59	UNITS NOT AFFECTED BY 9-11 THALLON ST.							
	60								
	61								
	62								
	63	YES	YES	YES	YES	YES	YES	YES	YES
	64	YES	YES	YES	YES	YES	YES	YES	YES
LEVEL 7-16	UNITS NOT AFFECTED BY 9-11 THALLON ST.								

Table summary of units affected by the proposed development on hourly interval.

Figure 5: Excerpt, Urban Design Report, Dickson Rothschild, pg. 16



- The proposed development will overshadow the lower levels of No. 2 Thallon Street between 9-10am. The approved strata plan shows that the existing units on ground level are commercial/retail uses. Only the units on Level 2-4 will be affected by the subject development. However, these units will receive a minimum of 2 hours of sun light in mid-winter between 9:45am to 11:45am. Therefore, the level of impact generated by the subject development is acceptable.

Refer to the Figures below.

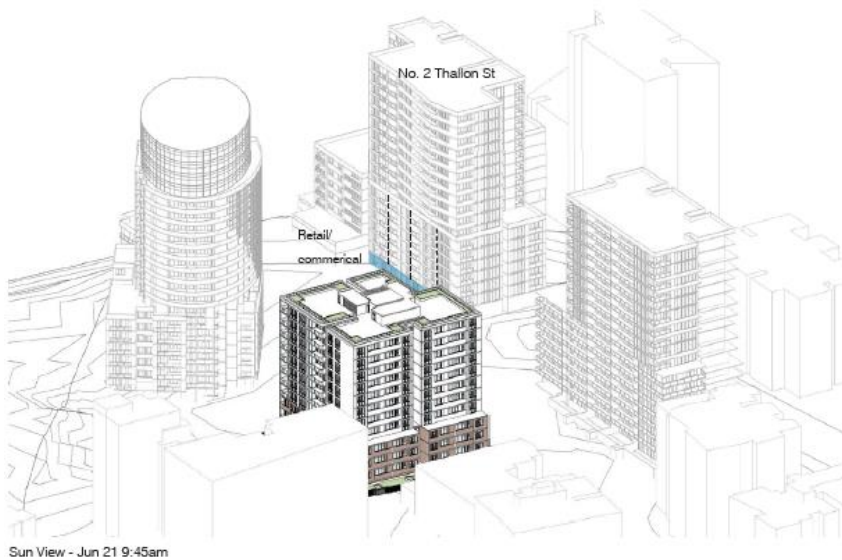
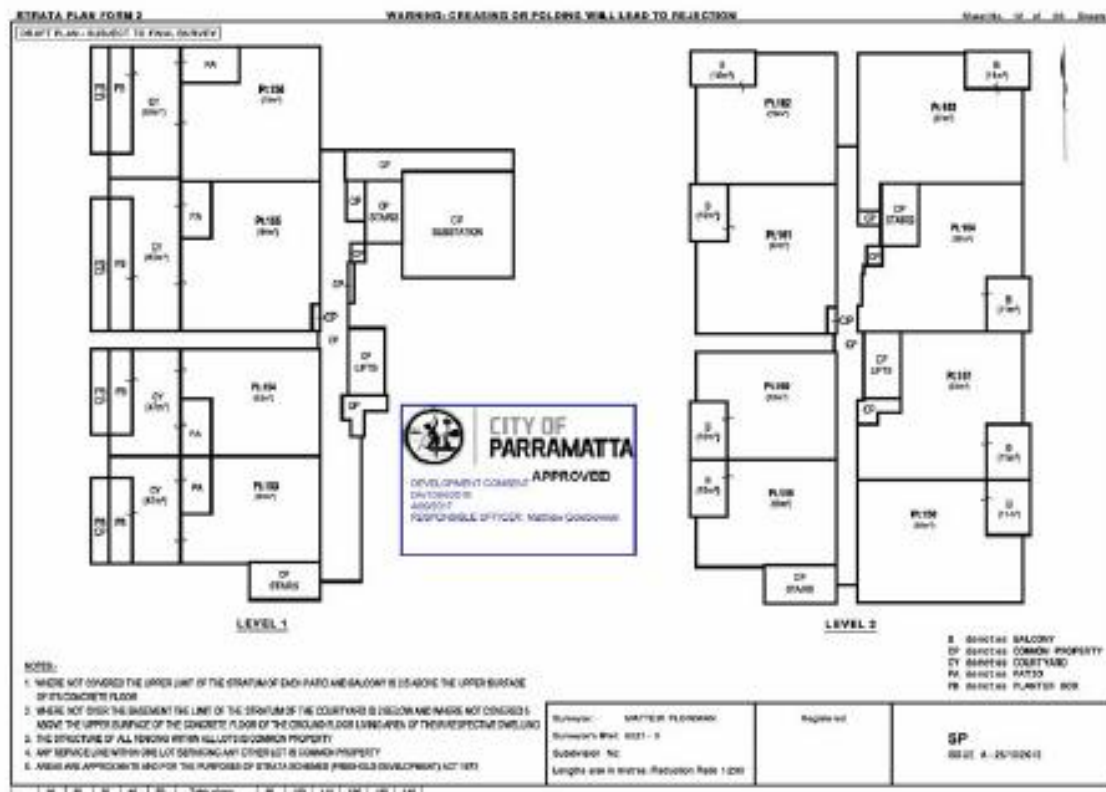


Figure 6: Excerpt, Urban Design Report, Dickson Rothschild, pg. 17



Consented strata plan for No. 2 Thallon St

Figure 7: Excerpt, Urban Design Report, Dickson Rothschild, pg. 17.



- In summary, the overshadowing impact caused by the proposed development is minimal with adverse impacts being minimised and adjoining buildings and public open space maintaining good amenity.

## Visual Impact

The development is consistent with (b) regarding visual impact due to the following:

- The proposed development fits within its immediate and wider streetscape context and does not give rise to adverse visual impacts.
- The built form is compatible with its context sitting in a transitional locations between the 18-21 storey buildings to the west, south west and south and the 7-9 storey buildings to the north.
- The proposed built form minimises visual impacts on the adjoining 4 storey building directly to the north but maintaining a human scale, four storey podium to the northern boundary with the tower form setback above as well as generous upper levels setbacks of 9-12 m. A well-articulated façade is proposed which limits visual impacts to the north, north east and east.
- The proposed development does not give rise to adverse visual impacts being compatible with the bulk and scale of the existing buildings to the south, south west and west which dominate the Thallon Street streetscape and the east-west public open space west of the light rail corridor. The proposed building has a bulk and scale that achieves a transition from the taller, denser buildings to the south, southwest and west and the lower scale building to the north, northeast and east.
- The elevations which form part of the Architectural Plans demonstrate the building is limited in its bulk and scale when compared to the backdrop formed by the key site development on adjoining sites and the building sits comfortably within its transitional setting between the taller buildings to the south and west and the lower buildings to the north and east. An excerpt is provided in the figure below.

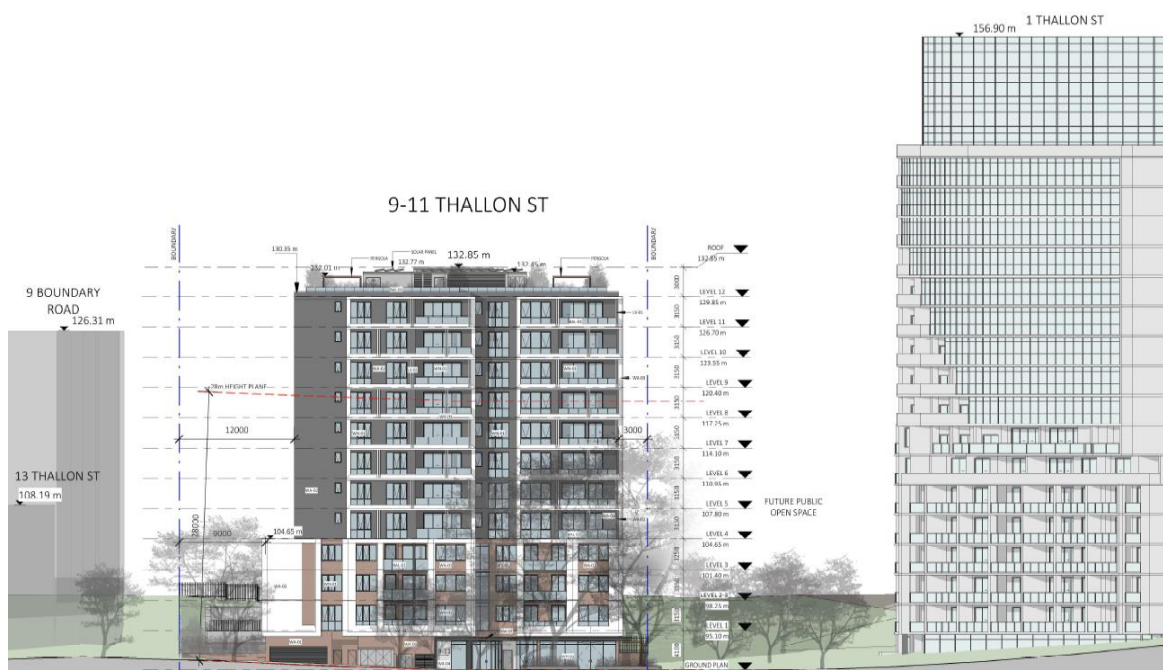


Figure 8: Streetscape elevation, DA-0-300

## Loss of Privacy

The development is consistent with (b) regarding loss of privacy due to the following:

- The proposed residential development is setback from the northern boundary by 9m up to four storeys and 12m above four storeys, meeting the ADG criteria for protecting privacy of adjoining sites.
- The ground level driveway is enclosed behind the front setback so no impact on acoustic or visual privacy shall arise from the driveway.
- The proposed COS near natural ground level at the rear of the site is appropriately located at the rear of the site and will not create overlooking of any adjoining site due to its level in relation to adjoining sites.
- Generous separation is achieved to residential developments to the south and west, consistent with ADG criteria, and privacy is not impacted.
- Casual surveillance of public open spaces by the proposed development is a positive planning outcome.

## **2.2. Sufficient Planning Grounds for Justifying the Non-Compliance (Clause 4.6(3)(b))**

The strength of the relevant grounds ought to be a balancing factor when assessing the reasonableness of the variation to a standard. This is because the word “sufficient” is included in clause 4.6(3)(b). Environmental planning grounds will be “sufficient” having regard to the circumstances of each case such that matters will have different weight in different circumstances.

A large breach with many impacts must have weighty and strong environmental planning grounds. A relatively minor breach without real amenity impacts, such as that proposed in this application, will require a different weighing of factors and therefore a different approach to what may constitute that which is “sufficient” (see Initial Action at paragraphs 23 and 24).

There are sufficient environmental planning grounds to justify contravening the development standard due to the following:

- The breach of the height control promotes the orderly and economic development of the land (object (c) of the *Environmental Planning and Assessment Act 1979*). The non-compliance with the height control allows for an infill development maximising its capacity to deliver residential and non-residential development in a precinct that is an urban renewal area with high public transport accessibility and which responds to the site's unique transitional location between the key sites to the south, south west and west and the lower scale development to the north, north east and east.
- The height of the building could be reduced by having a building form that extends over more of the site. The footprint is also constrained by the large existing trees at the southwest of the site which are proposed to be protected. The rear portion of the site is also not ideal for a building due to its narrow width. The proposal concentrates the proposed tower to the western edge of the site with increased setbacks to the existing trees in the front setback which pushes built form up higher. An L-shaped building could extend through the narrow eastern part of

the site to reduce building height but this would be a poorer planning outcome. Adjoining buildings to the east and north-east would overshadow this part of the building. The building would cast shadow on the public open space south of the site and more of the public open space would be overshadowed than in the proposed built form where the footprint is restricted and height is increased. An L-shaped building would also give rise to increased potential privacy impacts on neighbouring sites to the north, north east and east. The concentration of the building on the western part of the site limits impacts and is a better planning outcome than an alternative design which lowered the building and extended built form towards the rear of the site.

- The green roof elements and shading structures to the communal open space proposed is a space that is consistent with SEPP 65 and contemplated in the ADG because the site is in a general residential zone which encourages mixed use geared towards the local community and rooftop communal open spaces are considered a reasonable solution (ADG, 3D-1 Guidance vi.) providing a high quality facility for future residents. In *MGT 6 Pty Ltd v The Council of the City of Sydney [2017] NSWLEC 1211*, Martin SC and Dixon C considered a similar request to vary the building height standard that arose from the extension of the lift to the roof in order to provide accessible access. Dixon C found at [50]

*"Without the lift overrun and the breach of the standard the communal open space would need to be accessed by a chair lift (and stair) which is less equitable access to the area. Maintaining the standard would result in a sub-optimal outcome for all residents, with a reduction in the amount and type of communal open space provided in the development."*

Similarly, the proposed development would result in a sub-optimal outcome for all residents if strict compliance with the standard was required.

- The proposed development meets the objectives of Clause 4.3 and the objectives of the R1 General Residential Zone.
- The strategic location of the site very near the light rail station means that the site is highly suited to a development with a density and scale consistent with the principles of Transit Orientated Development (TOD). The HOB breach allows for a density on the site which is suitable for the site because of its close proximity to public transport and its location within the core of an identified Urban Renewal precinct as set out in the Region Plan and District Plans. This reduces demand for development of more sensitive land such as land at the urban fringe, and serves to better satisfy object (a) (b) and (c) of the *Environmental Planning and Assessment Act 1979*.
- The proposed development establishes appropriate built form incorporating increased setbacks to the front boundary to protect trees, a setback not contemplated in the DCP, thus constraining the building footprint. The additional building height facilitates these additional setbacks.
- The proposed development establishes appropriate built form incorporating increased lower level setbacks at Level 1-3, to the northern boundary, thus constraining the building footprint. These additional setbacks allow for more landscape and reduced bulk and scale as the built form negotiates its transitional setting from 18-21 storey buildings towards the south and west and the more sensitive interface with the four storey building to the north which has a significant number of strata lots and is fairly unlikely to be redeveloped in the near future.
- The non-compliance relates to achieving amenity on the site, without adversely impacting surrounding sites and ensuring that the subject site and surrounding sites maintain

reasonable privacy and solar access.

- The proposed height non-compliances give rise to a building which better meets the objectives of the zone than a building which complied with the height limit. In particular this is maximising housing in close proximity of the light rail, providing non-residential floor space with an active edge to the public domain to meet the day to day needs of the community, providing conveniently located parking for non-residential uses while addressing the sloping topography of the site, providing additional setbacks to the front boundary at the south west corner of the site and providing a very large setback to the western rear setback of the site.
- The height exceedance contributes to the building creating a transition in scale from the south to the north and from west to east.
- The additional density proposed which results in height non-compliances increases housing and activity on a site immediately adjacent to a large open space corridor. Co-locating higher densities and open spaces achieves a more sustainable urban structure.
- The proposed development achieves increased densities with greater height while maintaining high quality open spaces on the site and minimising adverse impacts on surrounding sites.
- The proposal is considered orderly and economic development of the land and there is a public benefit in developing the site to the height proposed maximising the provision of retail space and residential housing while maintaining a high quality streetscape, wide footpath and deep soil landscaped setback to the rear boundary.

### 3. The Public Interest

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The site is zoned R1 – General Residential Zone. The zone objectives are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

The proposal is consistent with the objectives for development within the zone as explained below.

#### 3.1.1. Zone Objective 1

- *To provide for the housing needs of the community.*

The proposed development satisfies Objective 1 of the zone despite the height non-compliance for the following reasons:

- The proposed development provides high amenity, high density development within almost immediate proximity of public transport.

- The proposed development provides a mix of housing that responds to demand and considers the unit sizes delivered in other nearby buildings. In this regard, the proposal provides a mix of 2, 3 and 4 bedroom units.
- Adaptable housing and liveable housing (to a silver level of service) is provided.
- Residential car parking which meets the RMS's sub-regional rates is provided on site.
- The increased height allows for additional dwellings to be located on a site with excellent access not only to public transport, but goods and services and immediate access to public open space.
- The proposal, while being a high density residential development, achieves high amenity in terms of access to open space and recreation with 49% of the site area used as common open space which includes BBQs, seating, shade, soft landscaping and a pool, supporting the high density housing type which is proposed to be delivered. The additional building height assists with maximising open space and amenity for the site.
- The proposed non-compliance arises in part to provide a high quality and fully accessible rooftop communal open space which is a crucial amenity for future residents of the building.

### 3.1.2. Zone Objective 2

- *To provide for a variety of housing types and densities.*

The proposed development satisfies Objective 2 of the zone despite the height non-compliance for the following reasons:

- The site is only a short walk to the light rail station. It is also immediately adjoining the east-west open space link and the key sites at the light rail station and to the west of the light rail station.
- The proposal has a density which is compatible with the adjoining sites, representing a transition from the 4:1 FSR area to the south, southwest and west and the 1.99:1 FSR area to the north, north east and east. The proposal provides 2, 3 and 4 bedroom units, adding to the diversity of dwelling types in Carlingford, noting many recent developments have delivered smaller sized units. The proposed density adds to the diversity of housing types and densities in the area.

### 3.1.3. Zone Objective 3

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

The proposed development satisfies Objective 3 of the zone despite the height non-compliance for the following reasons:

- The site is in very close proximity to the light rail station. It also has a long frontage to the east-west public open space network that forms a spine within the precinct, making it ideal for mixed use development that activates the park and provides non-residential space that caters to meeting the day-to-day needs of the local residents. The proposed neighbourhood shop and restaurant will enhance amenity and convenience for local residents living in the

immediate vicinity of the site.

- The proposed non-residential space is optimally located with good visibility from Thallon Street and the Public Open Space.
- The proposed development provides employment generating space within a short walking distance of the light rail station and bus stops.
- The proposed non-residential floor space is flexible and use can change over time to meet demand.
- The ceiling height of the non-residential space is 3.9m (except where it reduces to 3.1m for structural beams), providing a ceiling height suited to a wide range of uses and in particular cafes and lifestyle type uses that can help to create a vibrant, functional high density precinct.

The proposed non-residential floor space activates the street and the public domain. This is a significant improvement to the key sites on Thallon Street which while providing non-residential floor space achieve limited public domain activation. The proposed development achieves a superior outcome in comparison to its neighbours.

- The proposed development is located in a walkable location with the non-residential floor space being easily accessible without the use of a private motor vehicle, close to public transport and within easy walking distance of numerous apartments. The quantum of non-residential floor space is in keeping with its character to cater to the immediate population and not compete with existing retail and commercial spaces and zones nearby.
- The height non-compliance is in part arising from the increase ceiling heights sought for the proposed non-residential floor space.
- The proposed development provides secure bicycle parking to encourage cycling.

#### 3.1.4. Zone Objective 4

- *To enable other land uses that support the adjoining or nearby commercial centres and protect the amenity of the adjoining or nearby residential areas.*

The proposed development satisfies Objective 4 of the zone despite the height non-compliance for the following reasons:

- The proposed development provides flexible non-residential spaces with public domain activation and good visibility from the public domain.
- The proposed non-residential spaces will cater to the day-to-day needs of residents in immediate proximity of the site. They are of a size that supports nearby commercial centres, rather than competing with them.
- The non-residential uses are located at the southwestern part of the site, facing the public open space such that they will not adversely impact adjoining residential buildings to the north, northeast and east of the site.
- The height non-compliance relates in part to providing non-residential floor space in a high quality setting which shall enhance the amenity of adjoining and nearby residential areas.

All in all, the proposed development meets each of the objectives of the R1 zone. The height non-compliance contributes to the satisfying the objectives.

## 4. Clause 4.6(4)(b) and (5) Concurrence of the Planning Secretary

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We have assumed that the consent authority has delegated authority from the Secretary to concur to this request, but will defer to the consent authority (The Sydney District Planning Panel) regarding whether concurrence of the Secretary is necessary in this case, given the extent of non-compliance.

## 5. Conclusion

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The proposed variation from the LEP HOB of 28 m is justified as the proposed development meets the objectives of the height control in Clause 4.3 and the requirements of Clause 4.6. Further, the proposed development meets the objectives of the zone notwithstanding the non-compliance.

The height exceedance is directly related to the following factors and site constraints:

- irregular and sloping topography of the site;
- increased setbacks to the front boundary;
- irregular shape of the site;
- site's close proximity to the new light rail station
- site being overlooked in master plan due to it being strata titled, and whereby master plan did not consider its potential for uplift given its proximity to rail transport and open space;
- site's adjacency to key sites with significantly greater height and density than what is set out for the subject site;
- site's significant frontage to public open space;
- provision of additional floor space commensurate with the site's particular level of public transport accessibility and access to public open space;
- concentrating built form at the western end of the site, resulting in large common open spaces at ground level;
- provision of a highly articulated built form and a bulk and scale compatible with the site's transitional location while allowing for high levels of amenity for the proposed apartments;
- achievement of a built form that is fully compatible with its particular context being in a transitional location within the southern precinct of Carlingford;
- provision of non-residential floor space with increased ceiling heights;
- provision of greater floor-to-floor heights than what was typical at time that planning controls were formulated; and
- provision of accessible roof top common open space with lift access.

With multiple site-specific reasons, the height non-compliances are reasonable in this case.

The exceedance results in a building that is fully compatible with the site's built form context while delivering housing and supporting non-residential floor space commensurate with the sites' strategic location within the Carlingford Precinct.

For these reasons, the proposed non-compliance accords with well-considered development overcoming the unique constraints of the site and relating the development to its immediate site context. The variation does not result in any unacceptable level of environmental impact; rather the variation is preferable to a development which was to fully comply with the LEP height limit.

The consent authority should be satisfied that the request is justified.