



# CLAUSE 4.6 VARIATION REQUEST

34 Walker Street Rhodes

Prepared for  
**THIRTY FOUR WALKER STREET PTY**  
13 April 2022

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# 1. INTRODUCTION

## 1.1. OVERVIEW

This Clause 4.6 variation request (**variation request**) has been prepared by Urbis Pty Ltd (**Urbis**) on behalf of Thirty Four Walker Street Pty (**the applicant**) to accompany an Amending development application (**Amending DA**) lodged to City of Canada Bay Council (**Council**). The Amending DA seeks alterations and additions to DA/2017/0544 (as modified) for mixed use development (**the proposal**) at 34 Walker Street Rhodes (**the site**). The applicant seeks to 'amend' DA/2017/0544 via the provisions of Section 4.17 of the Environmental Planning and Assessment Act 1979 (**EP&A Act**) which enables the retention of an existing consent whilst amending a component of that consent through a separate 'amending' application.

This request seeks a variation to the height of building development standards that apply to the two portions of the site on which buildings referred to as Tower D and Tower E are located. The site is subject to a part 136.5 metres (which applies to the Tower D portion) and part 151.5 metres (which applies to the Tower E portion) maximum building height development standards under Clause 4.3 of the Canada Bay Local Environmental Plan 2013 (**LEP**). This variation request is made pursuant to Clause 4.6 of the LEP.

The proposed building heights on the two portions of the site are:

- Tower D portion – **143.8 metres** (measured from the existing ground level at RL 8.5 to the topmost element of the lift motor room at RL152.3); and
- Tower E portion – **157.1 metres** (measured from the existing ground level at RL 10.7 to the topmost element of the lift motor room at RL167.8).

Accordingly, the proposed alterations and additions result in an exceedance of the building height controls that apply to the Tower D and Tower E portions of the site by 7.3 metres and 5.6 metres respectively.

The exceedance of the building height controls is consequence of the clear discrepancy between the LEP and the Rhodes West DCP height controls, insofar as the DCP correctly identifies double height plant levels above the habitable levels of the two Towers, whereas the maximum building heights in Clause 4.3 of the LEP do not facilitate the plant equipment and lift overrun required to service development of this scale.

## 1.2. HEIGHT OF BUILDING DEVELOPMENT STANDARD

Clause 4.6 (2) of the LEP states provides:

*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.*

The height of building control for the two portions of the site to which this variation request relates are:

- 136.5 metres for the Tower D portion; and
- 151.5 metres for the Tower E portion.

Clause 4.3(2) is to be read in conjunction with the objectives of the height of building control as follows:

*(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*

*(b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of –*

*(i) visual and acoustic privacy, and*

*(ii) solar access and view sharing,*

*(c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*

*(d) to ensure that buildings respond to the natural topography of the area.*

## 2. SITE AND CONTEXT

The site is 34 Walker Street, Rhodes and is legally described as Lot 101 Deposited Plan 624798.

The site is rectangular in shape, has an area of approximately 6,807 sqm and frontages to Walker Street (60.2 metres), Marquet Street (59.8 metres) and Gauthorpe Street (112.8 metres).

The site forms the northern part of the Rhodes Station Precinct and is centrally located within the Rhodes Peninsula (see **Figure 1**). The site is within the City of Canada Bay Local Government Area (**LGA**) and is approximately 14km directly west of the Sydney CBD and 8km east of Parramatta CBD.

Figure 1 Site Location



Source: Urbis

### 2.1. RHODES PENINSULA

The Rhodes Peninsula is defined by a rail corridor (North Shore, Northern and Western Lines) to the east, Parramatta River to the north, and Homebush Bay to the west. The peninsula is served by Homebush Bay Drive/Concord Road and bridges that connect to adjoining areas, including:

- Ryde Bridge (road, cycle, pedestrian) and John Whitton Bridge (rail, cycle, and pedestrian) across Parramatta River connecting the peninsula to the north and northeast; and
- Bennelong Bridge provides bus, cycle, and pedestrian connection to Wentworth Point to the west.

Due to the site's proximity to transport corridors and services, the site has ease of access to employment, services, and recreational facilities, such as those provided at Sydney Olympic Park.



## 2.2. SURROUNDING CONTEXT

To the north of the site a high rise and medium density development has recently been constructed. This built form has a minimal setback to Walker Street and Gauthorpe Street, with a height to 23 storeys at the corner of these streets. The forecourt is landscaped and pedestrian connectivity is provided at ground level.

To the immediate south of the site fronting Marquet Street is a light industrial development and fronting Walker Street, is a residential apartment building which steps up to a height of 8 storeys.

To the west of the site (along Marquet Street), there is a residential development with minimal setback to Marquet Street. This height of buildings for this development range between 6 to 7 storeys.

East of the site is the T1 Northern Line railway corridor, running parallel to Walker Street.

Figure 2 Site Context



Source: SJB Architects

### 3. PROPOSED DEVELOPMENT

This Clause 4.6 variation request has been prepared to accompany an Amending DA which seeks alterations and additions to an approved development pursuant to the consent to DA/2017/0544 (as modified). Specifically the Amending DA seeks the following alterations and additions:

- Infill slab voids to Basement Levels 03, 05, and 07 to accommodate an additional 218 x parking spaces, comprising 204 x residential spaces (including 41 x accessible spaces) and 14 x visitor spaces);
- Minor changes to Basement Levels 03 – 09 (car parking configuration and vehicle circulation);
- Additional storage cages at Basement Levels 03 – 09 (resulting in a total of 673 storage cages);
- Additional 21 residential levels to Tower D (Levels 20 – 40) providing 178 x residential apartments;
- Additional rooftop level to Tower D (Level 41) comprising a private communal open space and a double height plant zone (to accommodate cooling towers and a lift motor room);
- Additional 11 residential levels to Tower E (Levels 35 – 45) providing 95 x residential apartments;
- Additional 1 x apartment at Level 25 and removal of 2 x apartments at Levels 26 and 27 at Tower E; and
- Additional rooftop level to Tower E (Level 46) comprising a private communal open space and a double height plant zone (to accommodate cooling towers and a lift motor room).

A description of the development is provided in the SEE prepared by Urbis Pty Ltd. The proposal is detailed within the architectural and landscaping drawings and technical documentation that accompany the DA.



## 4. PROPOSED VARIATION TO DEVELOPMENT STANDARD

### 4.1. HEIGHT OF BUILDING DEVELOPMENT STANDARD

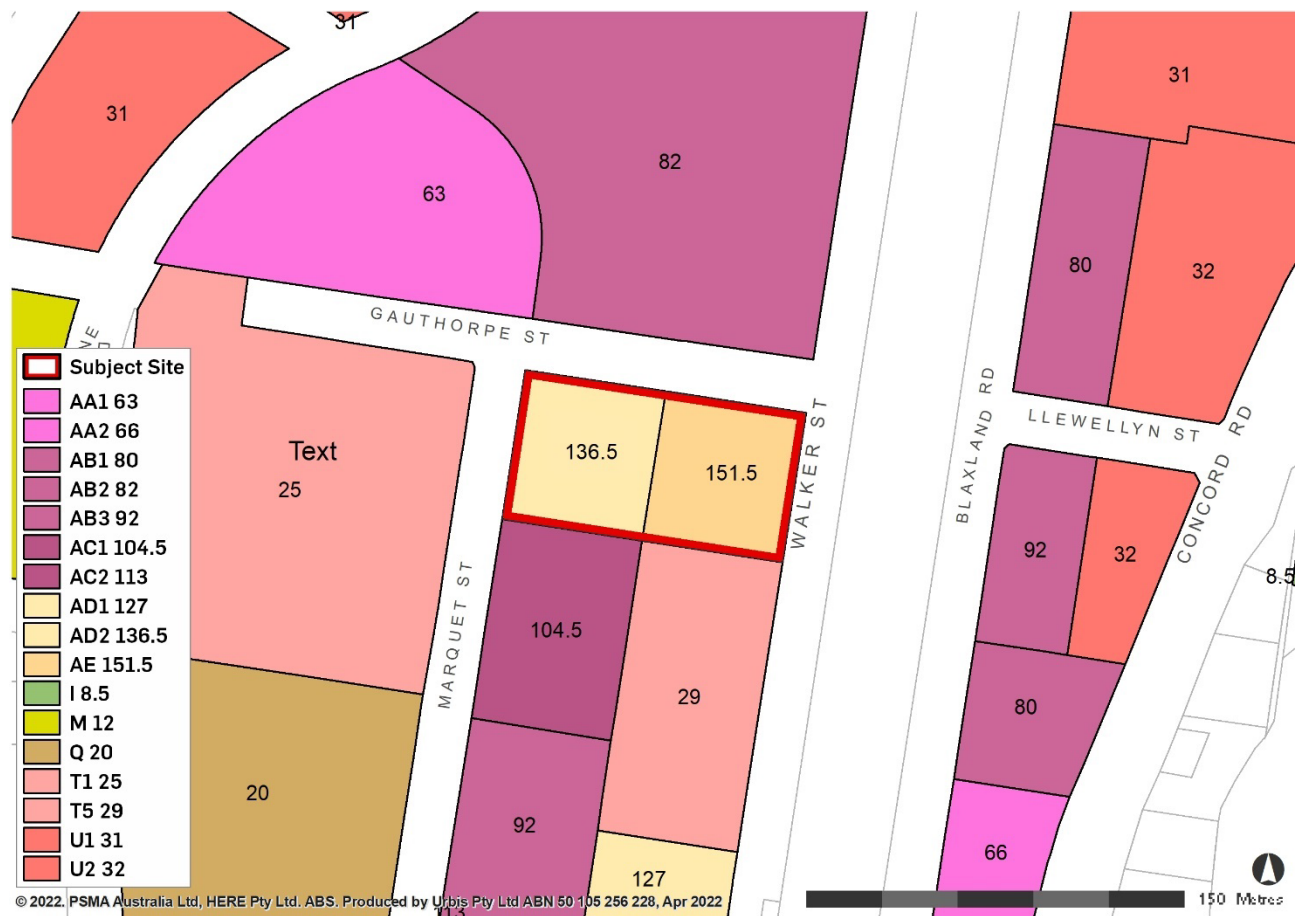
This variation request relates to land legally described as Lot 101 Deposited Plan 624798.

Under Clause 4.3 of the LEP, the maximum building heights that apply to the two portions of the site are:

- 136.5 metres for the western portion ('Tower D portion'); and
- 151.5 metres for the eastern portion ('Tower E portion').

The maximum building height development standards for the two portions are identified in **Figure 3**.

Figure 3 Maximum Building Height Control



Source: Urbis

### 4.2. PROPOSED VARIATION TO DEVELOPMENT STANDARD

The LEP defines 'building height' (or 'height of building') to mean as follows:

**building height** (or **height of building**) means—

- in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

**Table 1** identifies the maximum building heights for the two portions of the site (measured in accordance with the above definition) and the extent of exceedance with the respective building height controls.

Table 1 Proposed Building Heights

	LEP Control	Proposed Building Height	Exceedance
<b>Tower D Portion</b>	136.5 meters	<b>143.8 metres</b> (measured from the existing ground level at RL 8.5 to the topmost element of the lift motor room at RL152.3)	<b>7.3 metres (5.3%)</b>
<b>Tower E Portion</b>	151.5 meters	<b>157.1 metres</b> (measured from the existing ground level at RL 10.7 to the topmost element of the lift motor room at RL167.8).	<b>5.6 metres (3.7%)</b>

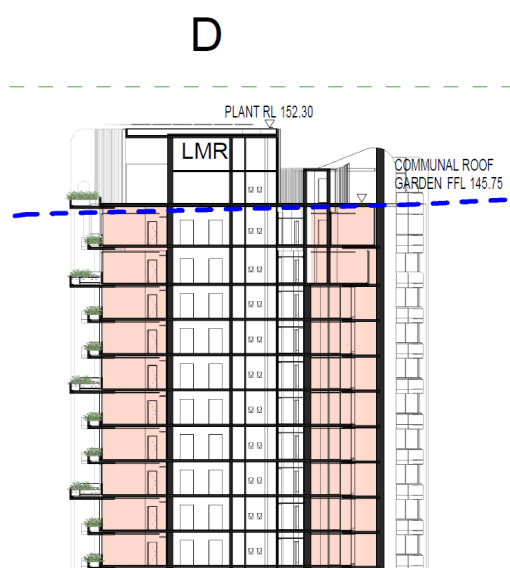
Accordingly, the proposed alterations and additions result in an exceedance of the building height controls that apply to the Tower D and Tower E portions of the site by 7.3 metres and 5.6 metres respectively. The exceedance of the building height controls is consequence of the requirement for each Tower to be serviced by a double height plant zone to accommodate plant equipment, cooling towers, and a lift machine room.

The built elements associated with double height plant zones to each Tower are summarised below:

- The provision of a lift machine room is a technical necessity in circumstances where the travel distance of lifts within each Tower is greater than 150 metres. This triggers the requirement for lift machine rooms to be provided 9.4 metres above the last level serviced to accommodate the overrun.
- The cooling towers serve the proposed centralised mechanical system and are required to be appropriately located on the rooftop of each building (rather than within podium levels).
- The location of plant equipment on the rooftop of each Tower optimises the provision of communal open spaces, the podium level recreation centre, and other commercial floor areas.

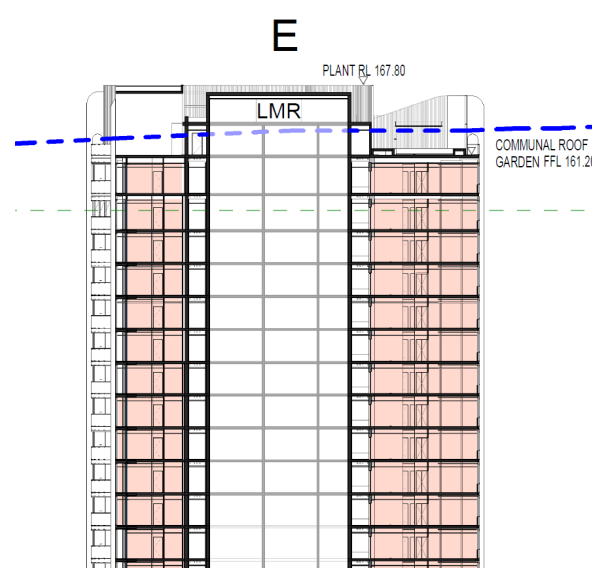
**Figure 4** indicates the built form extent of the double height plant zones for each Tower that exceed the maximum building heights for the two portions of the site (indicated by the dotted blue line).

Figure 4 Proposed Building Heights



Picture 1 Tower D

Source: SJB Architects



Picture 2 Tower E

Source: SJB Architects

## 5. RELEVANT STATUTORY ASSESSMENT FRAMEWORK

this section outlines the provisions of the environmental planning instrument which applies to the height of building development standard and allows for its variation.

### 5.1. CLAUSE 4.6 OF CANADA BAY LEP 2013

Clause 4.6 of the LEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives prescribed in Clause 4.6(1) of the LEP are:

*(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.*

Clause 4.6(2) provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

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

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with Clause 4.6(3), the applicant requests that the height of building development standards that apply to the two portions of the site be varied.

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

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

*(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.*

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

The concurrence of the Secretary can be assumed for the purpose of this request as the DA is declared regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

This variation request demonstrates that compliance with the maximum height of building development standards prescribed for the site in Clause 4.3 of the LEP are unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation, and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standard relating to the maximum height of buildings in accordance with clause 4.6 of the LEP.

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

- *Varying development standards: A Guide*, prepared by DPE (dated August 2011); and
- Relevant planning principles and judgements issued by the Land and Environment Court (**LEC**).

The following sections of the variation request provides detailed responses to the key questions required to be addressed within the above considerations and Clause 4.6 of the LEP.

This variation request has been informed by an assessment of the proposal on:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- Whether there are sufficient environmental planning grounds to justify contravening the development standard; and
- Whether the proposed development is in the public interest.

This assessment concludes that the variation request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standards.

### 6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

The height of building development standards prescribed by Clause 4.3 and are development standard capable of being varied under Clause 4.6(2). The proposed variation is not excluded from Clause 4.6(2) as it does not comprise any of the matters listed within Clause 4.6(6) or Clause 4.6(8) of the LEP.

### 6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

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

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

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

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

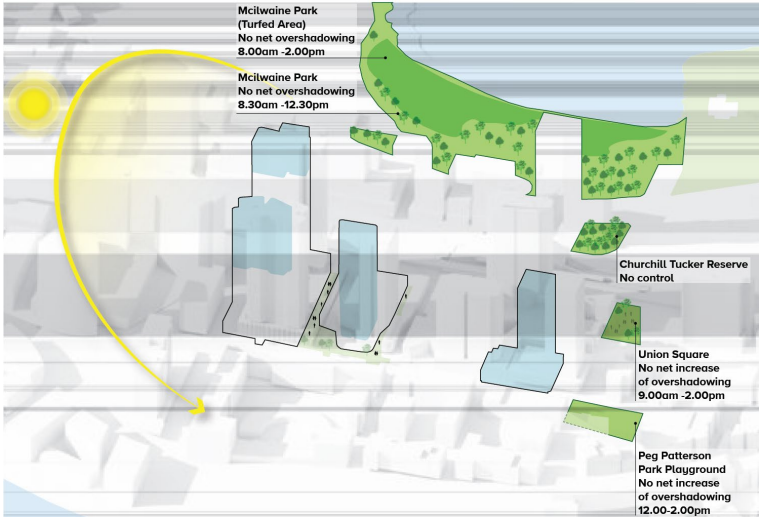
This variation request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development.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

## ***The objectives of the development standard are achieved notwithstanding non-compliance***

The objectives of the height of building development standard in Clause 4.3 are detailed in **Table 2** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 Assessment of Consistency with Clause 4.3 Objectives

Clause 4.3 Objectives	Assessment
<i>(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,</i>	<p>The proposal is compatible with the height, bulk, and scale of the desired future character of the Rhodes Station Precinct in the following regards:</p> <ul style="list-style-type: none"> <li>▪ The development aligns with the built form statutory planning controls that apply to the site under the recently gazetted amendment to the LEP. The proposed density uplift and additional residential levels signal a contemporary and vibrant architectural landmark for new development in the Rhodes Station Precinct. The built form of development is commensurate with its location insofar as it acts as a visual marker and urban landmark element from the train station.</li> <li>▪ The proposal delivers highly articulated, well-modulated additional levels to the approved mixed use building and exhibits high quality design excellence and appearance. The floor plates and external appearance of the proposal replicate the lower (approved) levels of Towers D and E. The proposal has a positive impact on the built environment and desired future character of the Rhodes Precinct, in the context of the site's location within the Rhodes Station Precinct.</li> <li>▪ The alterations and additions respond to and are compatible with the vision and aspiration of the Rhodes Place Strategy to increase density and '<i>contribute to a sense of a gateway area while also creating an interesting and diverse skyline</i>'.</li> <li>▪ The built form of the alterations and additions have been designed to be viewed both close up at pedestrian level and also from distant vantage points across Sydney. The proposal utilises a combination of colours, vertical and horizontal breakups, scales, and high quality external materials and finishes to provide a variety to the built form.</li> <li>▪ The podium height, massing and level of articulation responds to the prevailing surrounding context and provides a high level of active frontage. The bulk and scale of the additional tower levels has been deemed appropriate to the future desired character of the precinct and effort has been made to articulate the building shapes to provide visual amenity from close range and from district view-points.</li> <li>▪ The lower towers along Marquet Street present a natural gradation in height from the adjacent built form to the west. This is consistent with developments to the north and south. These measures act to create appropriate scale and variance in height to provide a strong marker.</li> <li>▪ The bulk and scale of the proposal is consistent with the aesthetic, built form, and articulation of the approved lower Tower levels and creates a sense of slenderness. The towers have been designed to be read as a combination of shapes, as opposed to one singular built form which would present an overbearing mass and scale.</li> </ul>

Clause 4.3 Objectives	Assessment
	<p>The proposal relates to an approved mixed use development which positively contributes to the street and public open spaces as follows:</p> <ul style="list-style-type: none"> <li>provision of future through-site links for pedestrians and bicycles;</li> <li>connectivity and integration with the Marquet Street forecourt;</li> <li>a highly programmed recreation centre (which contains substantial internal public space);</li> <li>iconic public face for the recreation centre along Gauthorpe Street;</li> <li>integration of public art and lighting to the public domain;</li> <li>defined and strong street and podium presence; and</li> <li>a safe, secure, and accessible pedestrian environment.</li> </ul>
<p><i>(b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—</i></p> <p><i>(i) visual and acoustic privacy, and</i></p> <p><i>(ii) solar access and view sharing,</i></p>	<p>The additional residential levels replicate the floor arrangements and built form of the lower (approved) residential levels. The design protects the amenity of residential accommodation, neighbouring properties, and public spaces. The Design Report identifies the following in relation to visual and acoustic privacy and solar access and view sharing:</p> <ul style="list-style-type: none"> <li>The proposal retains the 37 metre building separation between the two towers as per the approved consent (as modified). The towers are designed such that the primarily face away from each other. Tower D splits in two, angling its inner walls away from Tower E.</li> <li>There is no net increase in overshadowing to surrounding public places (including Union Square) during the prescribed times:</li> </ul>  <ul style="list-style-type: none"> <li>The additional residential levels to Tower D and Tower E are consistent with ADG and DCP design quality and amenity criteria.</li> <li>Approximately 72.7 % of apartments receive 2 hours direct sunlight in mid-winter. The design optimises the number of apartments receiving sunlight to habitable rooms, primary windows, and open spaces.</li> <li>Approximately 69% of apartments achieve natural cross ventilation.</li> </ul>



Clause 4.3 Objectives	Assessment
	<ul style="list-style-type: none"> <li>Visual privacy allows residents within surrounding buildings to use their private spaces without being overlooked. The proposal balances the need for views and outlook with the need for privacy. The building elements respect the required setbacks and separation distances and ensure adequate privacy and daylighting are achieved.</li> <li>Acoustic amenity has been provided through the use of appropriately rated glazing suites and by isolating apartments from noisy elements such as vehicle and truck entry points, plant, and machinery.</li> </ul>
<p><i>(c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,</i></p>	<p>Notwithstanding the minor exceedance of the building height controls (to accommodate the lift overrun), the proposal is compliant with the scale of development envisaged in the Rhodes Place Strategy and the recently gazetted statutory planning instrument. The proposal aligns with the 40 and 45 storey residential towers envisaged in the Place Strategy.</p> <p>The Design Report considers the scale and transition of the proposal in the context of surrounding development. The lower towers along Marquet Street demonstrate a natural gradation in height from the adjacent built form to the west of Marquet Street. This transition is consistent with other developments to the north and the south of the site and acts to create appropriate scale and height variance to provide a strong and legible marker for the Rhodes train station and community buildings. The image below indicates the context and sitting of the proposal within the skyline.</p> 
<p><i>(d) to ensure that buildings respond to the natural topography of the area.</i></p>	<p>As detailed above, the proposal presents an appropriate response to the height and scale of surrounding development and natural topography of the area. Notwithstanding the minor exceedance of the building height controls (to accommodate the lift overrun), the height and number of storeys proposed is consistent with the Rhodes Place and the recently gazetted statutory planning instrument. These building heights have been established to respond to the natural topography of the site and context.</p>

This assessment demonstrates that the proposed development is both consistent with (as required by clause 4.6(4)(a)(ii)) and will achieve (as required by clause 4.6(3)(a)) the objectives of the height of building development standard, notwithstanding the non-compliance with the development standard.

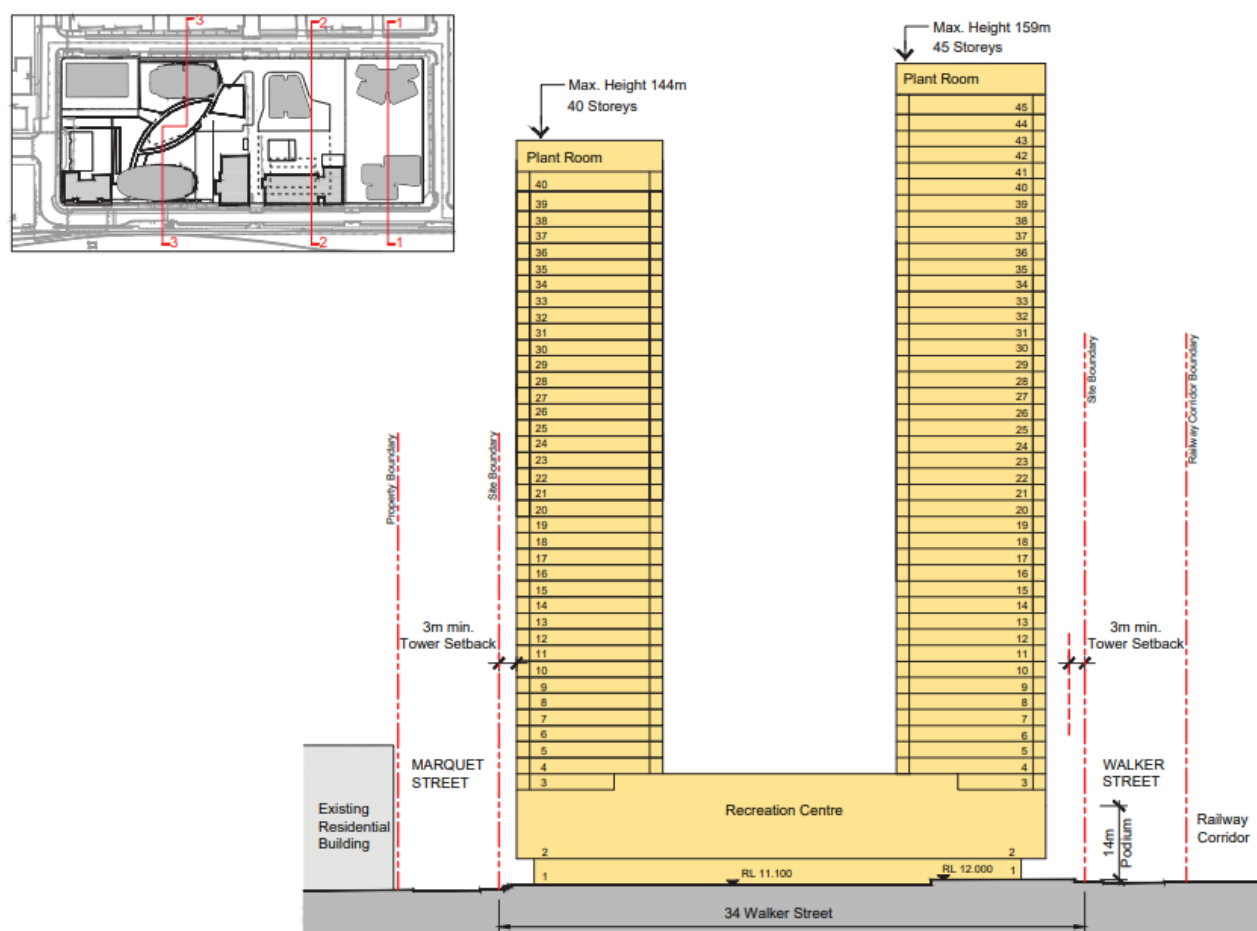
## Objectives of the development standard would be thwarted by a compliant development

As detailed in the SEE, the applicant has held detailed consultation with the NSW Department of Planning and Environment (DPE) regarding the original gazetted amendment to the LEP. The applicant alerted DPE to fundamental errors and technical miscalculations in the gazettal of the new controls, the consequence of which was a significant shortfall in the delivery of new housing in the precinct and the Place Strategy target.

The maximum building height development standards applied to the site were significantly below those identified in the Rhodes Place Strategy and Urban Design Report. Likewise the FSR controls did not correspond to the building heights identified in the Rhodes Place Strategy. Accordingly, DPE proceeded to amend the height of building and FSR controls to align with the intended scale and built form envisaged in the Rhodes Place Strategy. The amended controls were gazetted and came into force on 18 March 2022.

Notwithstanding, the amendment to the height of building controls that apply to the site do not resolve the discrepancy between the LEP and the Rhodes West Development Control Plan (DCP) in relation to the anticipated building height of the development. Figure K2-27 of the Rhodes West DCP depicts the maximum number of residential levels for the site commensurate the new height of building controls (replicated below).

Figure 5 Rhodes West DCP



Source: Rhodes West DCP

This extract demonstrates that the envisaged built form for the site is 40 storeys (+ double height plant level) for Tower D and 45 storeys (+ double height plant level) for Tower E. The proposed alterations and additions achieve a built form and height consistent with the DCP provisions insofar as they present a 40 storey (+ double height plant level) building (Tower D) and a 45 storey (+ double height plant level) building (Tower E).

It is evident that there is a clear discrepancy between the LEP and DCP height controls, insofar as the DCP correctly accommodates double height plant levels above the habitable levels of the two Towers, whereas the maximum building heights in Clause 4.3 of the LEP did not facilitate the necessary plant equipment and lift overrun that is required to service development of this scale.

The objectives of the height of building development standard would be thwarted by a compliant scheme within a built form of 136.5 metres and 151.1 metres for Towers D and E respectively. A reduction in the building height to achieve strict compliance with the controls would compromise the efficiency and amenity of the development given that it would require either reduction in floor-to-ceiling heights for the residential apartments or the removal of an entire storey to each Tower to accommodate the double height plant zone.

The removal of an entire storey to each Tower would compromise the achievement of density envisaged for the site in the Rhodes Place Strategy and as facilitated by the FSR and building height development standards under the recently gazetted amendment to the LEP. A scheme that achieved strict compliance with the building height controls would not enable the utilisation of the allowable GFA across the site.

Taking into account the above and the particular circumstances of the proposal and the subject land it is neither reasonable nor necessary to require compliance with the height of building development standard.

The proposed minor non-compliance with the height of building controls demonstrates a superior planning outcome compared to a compliant scheme and better achieves the objectives of the development standard.

### **6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

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

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

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

There is an absence of environmental harm arising from the contravention and sufficient environmental planning grounds to justify contravening the building height development standard for the following reasons:

- The variation to the building height controls is a result of a mechanical requirement for each Tower to be serviced by a double height plant zone to accommodate plant equipment, cooling towers, and a lift machine room. The built elements associated with double height plant zones are described as follows:
  - The provision of a lift machine room is a technical necessity in circumstances where the travel distance of lifts within each Tower is greater than 150 metres. This triggers the requirement for lift machine rooms to be provided 9.4 metres above the below level to accommodate the overrun.
  - The cooling towers serve the proposed centralised mechanical system and are required to be appropriately located on the rooftop of each building (rather than within podium levels).
  - The location of plant equipment on the rooftop of each Tower optimises the provision of communal open spaces, the podium level recreation centre, and other commercial floor areas.
- The maximum variations are numerically minor (5.3% for Tower D and 3.7% for Tower E) and affect only supporting plant features of the roof top (being the lift overrun) which will have limited external impact.
- Clause 5.6 of the LEP allows minor architectural roof features to exceed building height limits in instances where the feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring properties and where it is considered in and forms an integral part of the design of a building. The alterations and additions propose decorative elements on the uppermost rooftops of Towers D and E. The double height plant zones at the rooftop of Towers D and E are contained within the architectural roof features and fully integrated into the design of the roof feature. These architectural roof features does not comprise advertising structures, do not include floor space area, and are not reasonably capable of conversion to habitable floor space area.
- The built form volumes associated with the areas of exceedance are exclusively associated with the plant zone and are not capable of being converted to habitable accommodation. The areas of exceedance do not in any way contribute to additional residential yield or GFA across either Tower.

- The rooftop Tower levels above the compliant building height plane accommodate communal open spaces which provide external façade green landscape which is visible from the public domain. These rooftop spaces provide passive areas for resident recreation, social gathering, and activities.
- Given the location of the lift overruns and the substantial depths and heights of the two Towers, the non-compliant components of the roof form are indiscernible from the streetscape or public domain. The minor variations will have negligible consequential impacts on the amenity of neighbouring properties uses in terms of visual intrusion, solar access, privacy, and overshadowing. The positioning of the non-compliant roof elements result in the building appearing similar to that of a compliant building envelope.
- The proposal complies with the maximum permitted FSR control that applies to the site (11.6:1), demonstrating that, notwithstanding the minor non-compliance with the building height control, it is highly consistent with what could be reasonably expect in terms of density, site layout, design, and land use intensity of the site. The minor variations to the height of building control do not result in any additional floor area or intensity of development within the site compared to that proposed for the site.
- The minor non-compliances with the building height development standard are not perceptible from the public domain and will have no material impact on solar access to the site or surrounding properties. As detailed above, the solar access analysis contained within the Design Report confirms that there is no net increase in overshadowing to the public places during the prescribed times for each place.
- The proposed non-compliance with the height of building controls achieve a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the building height standard.

Taking into account the above and the particular circumstances of the proposal and the site, it is neither reasonable nor necessary to require strict compliance with the maximum building height controls.

Given the high level of compliance with other key design guidelines and high quality design of the overall proposal, the variation to the development standard is supportable from environmental planning grounds.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the minor non-compliance with the height of building development standard in this instance.

## **6.4. 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 addressed in this variation request, including detailed consideration of whether compliance with the development standards is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposed alterations and additions, to justify the variation to the development standard.

## **6.5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST?**

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

The consistency of the development with the objectives of the building height development standard is demonstrated in **Table 2** above. The proposal is also consistent with the land use objectives that apply to the site under the LEP. The subject land is zoned B4 Mixed Use. The proposed alterations and additions are consistent with the relevant land use zone objectives as outlined in **Table 3** below.

Table 3 Assessment of Compliance with Land Use Zone Objectives

Zone B4 Mixed Use	Assessment
<ul style="list-style-type: none"> <li>To provide a mixture of compatible land uses.</li> <li>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</li> </ul>	<p>The proposed alterations and additions are consistent with the objectives of the B4 Zone in that they will deliver additional residential accommodation and complement the approved mix of compatible land uses. The site is a highly accessible location which maximises public transport patronage and encourages walking and cycling.</p>

Overall it is considered that the strict maintenance of the height of building development standard in this instance is not in the public interest as:

- The proposal achieves and is consistent with the objectives of the development standard as provided in Clause 4.3 and of the LEP, as outlined in **Table 2** of this variation request.
- The proposal is consistent with the objectives of the B4 Zone as outlined above.
- The proposal achieves a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the relevant development standard (as described in **Section 6.3** above).
- A reduction in the building height to achieve strict compliance with the controls would compromise the efficiency and amenity of the residential apartments and overall development given that it would require either reduction in floor-to-ceiling heights for the residential apartments or the removal of an entire storey to each Tower to accommodate the double height plant zone.

Accordingly, it is considered that, notwithstanding the proposed variation to the building height development standards, the proposed alterations and additions are in the public interest.

## 6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?

The concurrence of the Secretary can be assumed to have been granted in accordance with the DPE Circular PS 18–003 'Variations to development standards', dated 21 February 2018. The DA is declared regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

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

The minor non-compliances with the respective height of building development standards on the two portions of the site will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variations are appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other developments.

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

The proposed alterations and additions achieve and satisfy the objectives of the building height development standards and the land use zone objectives notwithstanding the technical minor non-compliance. Overall it is considered that strict maintenance of the height of building development standards in this instance is not in the public interest. There is no material impact or benefit associated with strict adherence to the development standard and no compelling reason or public benefit derived from maintenance of the standard.

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

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

## 7. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of building development standard contained within Clause 4.3 of the LEP is unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation.

In this regard, it is reasonable and appropriate to vary the height of building development standard to the extent proposed. For the reasons set out in this variation request, strict compliance with the numerical standard in this circumstances is both unreasonable and unnecessary, there are sufficient environmental planning grounds to justify the contravention, and it is in the public interest to do so. In summary:

- The proposal satisfies the objectives of the building height control notwithstanding the minor non-compliances such that to require strict compliance would be unnecessary. The minor variations to the height development standard reflect a technical / mechanical requirement for each Tower to be serviced by a double height plant zone to accommodate plant equipment, cooling towers, and a lift machine room.
- The maximum variations are numerically minor (5.3% for Tower D and 3.7% for Tower E) and affect only supporting plant features of the roof top (being the lift overrun) which will have limited external impact.
- The proposal achieves and is consistent with the objectives of the building height development standard.
- The proposal is consistent with the objectives of the B4 Zone in that it provides additional residential accommodation to complement the approved mixture of compatible land uses. The site is a highly accessible location which maximises public transport patronage and encourages walking and cycling
- The proposal achieves a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the building height control. A reduction in the building height to achieve strict compliance with the controls would compromise the efficiency and amenity of the apartments and overall development given that it would require either reduction in floor-to-ceiling heights for the residential apartments or the removal of an entire storey to accommodate the double height plant zones.
- The built form volumes associated with the areas of exceedance are exclusively associated with the plant zone and are not capable of being converted to habitable accommodation. The areas of exceedance do not in any way contribute to additional residential yield or GFA across either Tower.
- The non-compliant built form elements are indiscernible from the streetscape or public domain. The minor variations will have negligible consequential impacts on the amenity of neighbouring properties in terms of visual intrusion, solar access, privacy, and overshadowing. There is no net increase in overshadowing to defined public places during the prescribed times for each place.
- The proposal complies with the maximum permitted FSR control demonstrating that, notwithstanding the minor non-compliance with the building height control, it is highly consistent with what could be reasonably expect in terms of density, site layout, design, and land use intensity of the site. The minor variations do not result in any additional floor area or intensity of development within the site.
- It is evident that there is a clear discrepancy between the LEP and the Rhodes West DCP height controls, insofar as the DCP correctly identifies double height plant levels above the habitable levels of the two Towers, whereas the maximum building heights in Clause 4.3 of the LEP do not facilitate the necessary plant equipment and lift overrun that is required to service development of this scale.
- The proposed non-compliance with the height of building controls achieve a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the building height standard.
- The application of Clause 4.6 to vary the development standard is not numerically limited. The consent authority has broad discretion under Clause 4.6(2) and Clause 4.6(4)(a)(i) to determine variations of any numeric value above a development standard with the concurrence of the Secretary. This is confirmed in the published planning system circular PS 17-006 'Variations to development standards'.
- In addition, no provision of Clause 4.6(8) restricts the variation sought in this instance. The consent authority can therefore be satisfied that this variation request can be lawfully approved under Clause 4.6.

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





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