

Clause 4.6 Written Request to Vary a Development Standard

Bayside Local Environmental Plan 2021

Applicant's name	Open Space
Site address	594 Princes Highway Rockdale – Lot 1 DP 1244720 596 Princes Highway Rockdale – Lot 2 DP 1244720 598 Princes Highway Rockdale – Lot 3 DP 1244720 600 Princes Highway Rockdale – Lot 4 DP 1244720
Proposal	Demolition of existing structures and construction of a nine (9) storey mixed used building, consisting of a centre-based child care facility and residential apartments over three (3) levels of basement parking
Environmental Planning Instrument	<i>Bayside Local Environmental Plan 2021</i>
Development standard to be varied	Clause 4.3 – Height of buildings

Introduction

This Report contains a written request to vary the building height development standard in accordance with Clause 4.6 of the *Bayside Local Environmental Plan 2021* (BLEP 2021) which provides the framework for consideration of proposed variations to development standards.

This variation sought under Clause 4.6 of the BLEP 2021 has been prepared having regard to appropriate case law, including but not limited to *Initial action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*.

Clause 4.3 of the BLEP 2021 provides that the height of a building is not to exceed the maximum height specified on the Height of Buildings Map. The site is identified on BLEP 2021 Height of Buildings Map - Sheet HOB_005 as having a maximum building height of 22m and identified within 'Area 9'. Subclause 2A(i) of BLEP 2021 outlines that despite subclause 2, the height of a building may exceed the maximum height shown for the land on the Height of Buildings Map by an additional 9m, if the land to which an application relates has an area of at least 2,000m². As the site has an area of 2,665.8m², an additional 9m applies and the maximum building height permitted for the land is 31m.

The proposed development exceeds the maximum height standard when measured in accordance with the BLEP 2021 definition of building height, which is:

building height (or height of building) means—

- (a) 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*
 - (b) 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.*

Clause 4.6 provides flexibility to vary the BLEP 2021 development standards where it can be demonstrated the development standard is unreasonable or unnecessary in the circumstances of the case, and where there are sufficient environmental grounds to justify the contravention. Clause 4.6 provides the following:

- (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.*

The justification for the contravention of the building height controls applicable under the BLEP 2021 is set out below.

It is noted that Clause 4.6(8)(bd) of the BLEP 2021 expressly excludes clause 4.3(2A) from the operation of clause 4.6 of the BLEP 2021, unless it is for a demonstrable public benefit. With the granting of consent to DA-2019/312, it has previously been confirmed that the development provides a sufficient public benefit through the provision of a public park for the purposes of clause 4.6(8)(bd). With the proposed development maintaining the provision of this public park, it follows the public benefit associated with the development continues. This is discussed in detail below.

Definition of development standard

Section 1.4 ‘Definitions’ of the *Environmental Planning and Assessment Act 1979* (the Act) provides the following definition of a development standard.

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which

requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,***
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

Emphasis added.

The proposed variation to the building height under Clause 4.3 of the BLEP 2021 satisfies the definition for a development standard under the Act, meaning the provisions of Clause 4.6 of the BLEP 2021 apply.

Height of Buildings Standard

Clause 4.3 of BLEP 2021 prescribes a maximum building height for land to which the plan applies. The relevant provisions of clause 4.3 are reproduced below:

- (1) The objectives of this clause are as follows—*
 - (a) to ensure that building height is consistent with the desired future character of an area,*
 - (b) to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,*
 - (c) to nominate heights that will provide an appropriate transition in built form and land use intensity.*
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*
- (2A) Despite subclause (2), the height of a building may exceed the maximum height shown for the land on the Height of Buildings Map by an additional—*

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- (i) 9 metres—if the building is in Area 9 identified on the Height of Buildings Map and on land having an area of at least 2,000 square metres,

The Height of Buildings Map (**Figure 1**) prescribes a maximum building height of 22m at the subject site and is located within Area 9. Land having an area of at least 2,000 square metres within Area 9 is permitted an additional 9m, which applies to the land and allows for a maximum building height of 31m.

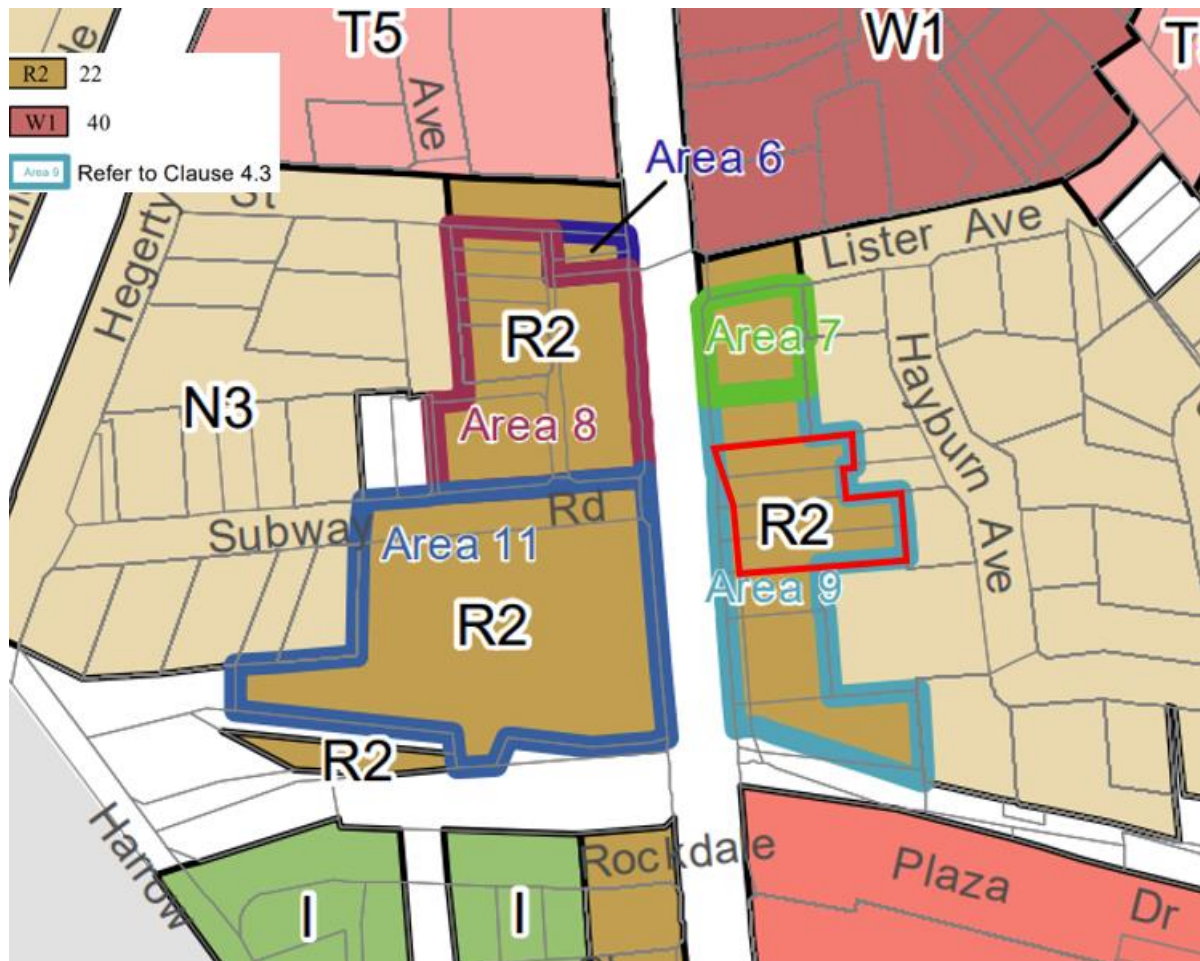


Figure 1 An extract of the Height of Buildings map with the subject site indicated by red outline.
Source: www.legislation.nsw.gov.au

Proposed Variation

The location of the building height contravention and variation proposed is outlined in Table 1 and Figure 2 below.

Table 1 – Proposed height variations to Clause 4.3 of BLEP 2021

BLEP 2012 building height standard: 31m	Location of height breach	Proposed Height	Percentage (%) of Variation to Clause 4.3
	The topmost portion of the ninth storey. The maximum point of the	37.25m	6.25m or 20.16%

	contravention relates to the location of the lift overrun which has an RL43.98 with EGL below at RL6.73		
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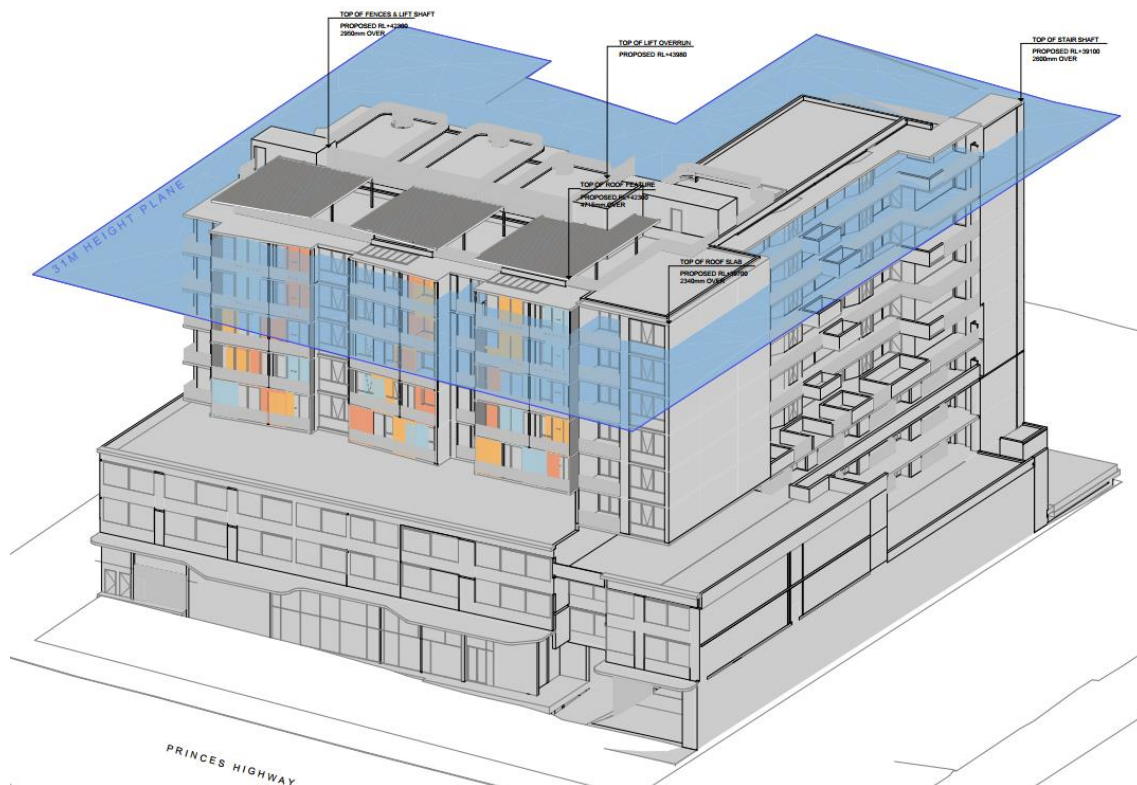


Figure 2: Height Plane Diagram. The portion of the building that contravenes the 31m building height standard is shown above the blue plane.

Source: Fuse Architects dated 17 April 2024

The building height development standard has been contravened for the following reasons:

- i) Floor to Floor Heights – The building adopts floor to floor heights of 3.1m for the residential floors of the building. Compared to the building design as originally lodged, the additional 100mm per floor over the 9-storey building height contributes to the building height contravention.

The necessity for floor to floor heights of at least 3.1m arises from changes to the National Construction Code (NCC) which necessitate increased floor to floor heights to ensure minimum 2.7m ceiling heights are achieved for habitable rooms, and 2.4m ceiling heights for non-habitable rooms.

The Council and Bayside Design Review Panel has requested that the development apply floor-to-floor heights of 3.1m. The amended plans respond to this request.

- ii) MRV – DA-2023/106 was accepted by Council on 8 May 2023 and was prepared in accordance with Rockdale Development Control Plan 2011 (RDCP). The RDCP required a minimum vertical clearance distance of 3.5m for the driveway entrance to allow for SRV vehicles to collect waste from the site.

The new Bayside Development Control Plan 2022 (DCP) became effective on 10 April 2023, which included the provision of amended controls relating to collection vehicles. One of the changes within the new DCP that applies to the development is control C4 of part 3.5.7, that prescribes, where collection vehicles are required to enter inside a building, the design of the building shall provide for a minimum vertical clearance of 4.5m for MRV vehicles.

As per Council's request, a minimum vertical clearance of 4.5m is provided for the basement to allow MRV vehicles to service the development. As a result, the overall height of the building has increased.

The design response required to address the floor-to-floor heights and MRV clearance requirements justify why compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Further discussion in response to clause 4.6(3) of the BLEP 2021 is provided below.

Clause 4.6(3)(a) – Is the development standard unreasonable or unnecessary?

In *Wehbe v Pittwater Council (2007) NSW LEC 827*, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded.

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Emphasis added.

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above points. In this instance, the first way (point 1 above) is investigated and considered well founded for the proposed development.

The objectives of the height of building development standard under clause 4.3 of BLEP 2021 are provided below, and followed by a response on how that objective is achieved notwithstanding noncompliance with the standard:

(a) to ensure that building height is consistent with the desired future character of an area

Contextually the site is located within the Rockdale town centre, where the area's urban fabric exhibits significant diversity. Part 7.2 of the DCP identifies that Bayside is undergoing change, and Council are seeking to create opportunities for growth and improvement. In response, *Council prepared the Rockdale Town Centre Masterplan and Public Domain Plan (2012) from the community's aspirations and vision for Rockdale to guide the transformation of the town centre through redevelopment and placemaking. To realise Council's commitment to provide economic and jobs stimulus and deliver a legacy of safe, quality public and open space, Council has led various urban design investigations for the Rockdale Town Centre to establish appropriate built form and public domain outcomes.*

The studies considered the Masterplan, the character of redevelopment that has occurred since its adoption, the Centre's high levels of public transport service, the need to accommodate population growth and the constraints placed on redevelopment by the topography, airport restrictions, parking and servicing requirements. The controls in this section of the DCP are based on the outcomes of these studies to unlock urban renewal on sites yet to be redeveloped by providing more certainty and making the centre a more attractive place for investment and residents by improving the quality of built form and public domain outcomes.

To the north of the site at 588 - 592 Princes Highway, development consent (DA-2020/39) was granted for construction of part 10 and 12 storey mixed use building, comprising 101 residential units, 453m² ground level commercial floor area and 4 basement levels. The development on this site was approved with a building height of 41.8m which exceeded the building height development standard by 20%.

The development to the north and north-east of the site include several residential flat buildings, some of which have been newly constructed. Located to the west are car dealerships consisting of showrooms and at grade vehicle display yards. Within the Rockdale town centre more broadly, there are established restaurants, shops and community services with accessibility to public transport.

Clause 4.3(2A) of the BLEP 2021 establishes a 31m building height standard for the site, as the land is located within Area 9 and has an area greater than 2,00m².

It is also important to note that, higher buildings are possible on the site when having regard to provisions provided within other environmental planning instruments. For example, *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) provides a building height bonus of up to 30% for projects that include 15% of the gross floor area (GFA) as affordable housing. In this circumstance it is possible for a building to be constructed on site with a compliant height of 40.3m. When considering the reasonableness of the proposed variation, along with the environmental planning grounds to support the contravention, the future character of the area envisioned by these environmental planning instruments must be taken into consideration.

With a building height of 37.25m, the proposed development is 3.05m, or 8.19%, lower than the maximum building height achievable under the applicable environmental planning instruments for the site.

It is also acknowledged, that to the north of the site along the eastern side of Princess Highway a maximum building height ranging from 34m – 40m can be achieved under BLEP 2021, which is reflected within DA-2020/39. Across the road on the western side of Princess Highway, a maximum building height ranging from 25m – 47.15m can be achieved under BLEP 2021. These building height limits can be further increased based upon the 30% height bonus that could be obtained via the affordable housing provisions under the Housing SEPP.

Baring the above in mind, the building height to sought for the proposed development is contextually appropriate and consistent with the desired future character of an area.

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

The proposed development includes a nine (9) storey building on the site, with all habitable floor levels generally contained within the 31m height plane. Given the 9 storey form contemplated by the controls, the exceedance will have no measurable impact on the natural and built environment. In fact, at that scale, the exceedance will be barely perceptible from the public domain or adjoining properties.

The site benefits from potential eastly views towards Botany Bay. As this view corridor is located at the eastern aspect of the site, the proposed development will not impact upon established residential flat buildings to the east of the site. Development to the west of the site consists of vehicle sales premises which do not currently benefit from water views. As such, the development respects the potential view corridors of neighbouring sites.

The separation distances provided to the eastern and southern boundaries along with the treatments to the facades of the building allow the privacy of neighbouring sites to be retained. The eastern boundary of the site is also further enhanced by generous landscaping which softens the appearance of the building as viewed from neighbouring property and the public domain.

The shadow and solar access diagrams provided in the architectural package demonstrate good solar access is maintained to neighbouring residential receivers because of the proposed development. Based on the solar analysis undertaken, which is provided within the architectural package, the aspects of the building that exceed the building height standard will not result in gross overshadowing impacts to the natural and built environment.

(c) to nominate heights that will provide an appropriate transition in built form and land use intensity.

The Rockdale town centre site is undergoing transformation which has been facilitated through part 7.2 of the DCP and BLEP 2021. The subject site is zoned MU1 mixed use and borders the R4 high density residential zone to the east, which is mirrored on the opposite side of Princess Highway as illustrated within Figure 3.

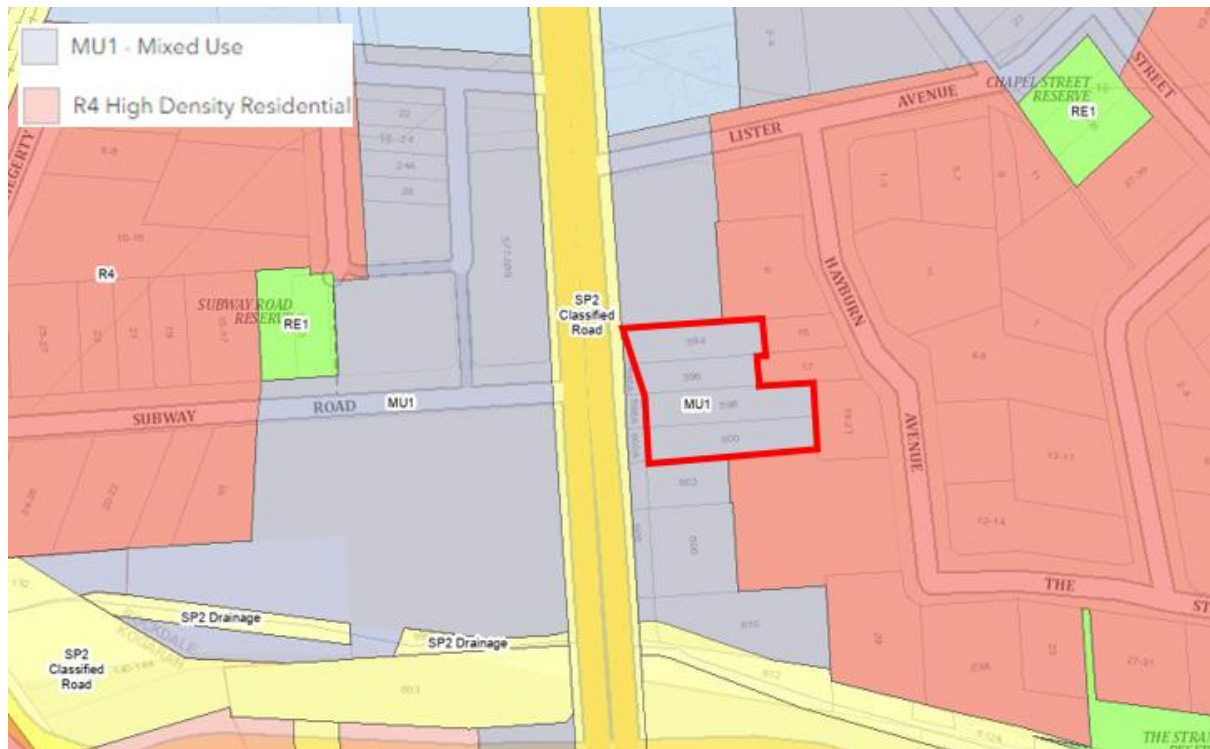


Figure 3 BLEP 2021 land zoning map with site identified by red outline.

Source: NSW Planning portal spatial viewer.

As discussed above, the Height of Buildings Map for the MU1 Mixed Use zone located on the opposite side of Princess Highway allows for a maximum building height of 22m as illustrated within Figure 1. When applying the building height bonuses available under the BLEP 2021 and the Housing SEPP, compliant building heights ranging between 32.5m – 61.295m are possible on these sites.

To the north of the site along the eastern side of Princess Highway a maximum building height ranging from 34m – 40m can be achieved under BLEP 2021, and when applying the height bonuses available under the Housing SEPP, compliant building heights ranging between 44.2m – 52m are possible on these sites.

To the east of the site, a maximum building height of 14.5m can be achieved. When applying the building height bonuses available under the Housing SEPP, a compliant building height of 18.85m is possible on these sites.

The proposed development will include a 37.25m building height, which provides a physical and visual transition between the taller buildings possible on the opposite side of Princess Highway, to the north of the site and to the east of the site.

The proposed development will allow for a nine storey mixed use development consistent with the height strategy identified for the site at Figure 30 of part 7.2.5.2 of the DCP (provided at Figure 4). As such, the proposed building height will provide an appropriate transition in built form and land use intensity.

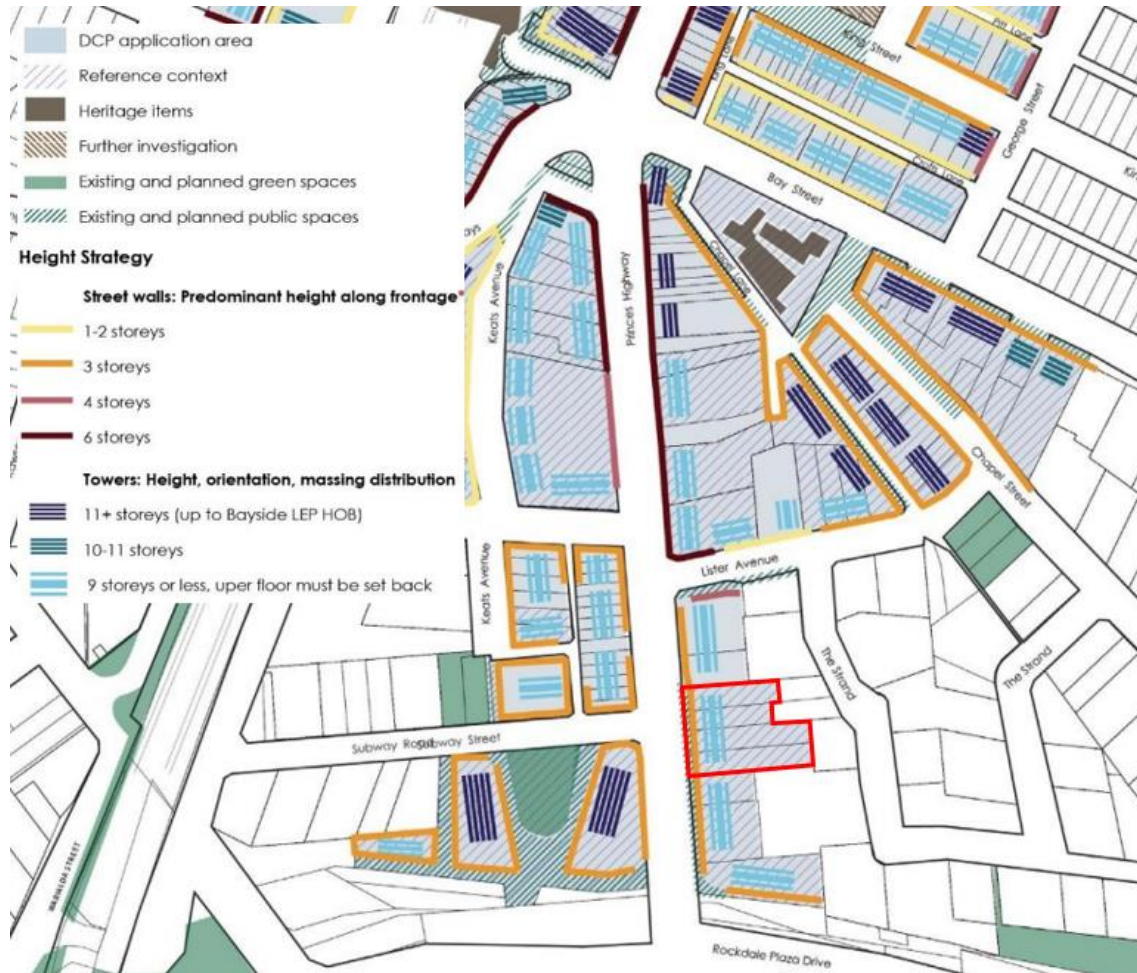


Figure 4 Extract of Figure 30: Height hierarchy and building massing distribution of the DCP with site outlined in red.

Source: Bayside Development Control Plan 2022.

As the site is currently located within a transitioning area, it is expected that some degree of irregularity with the existing character is to be expected in terms of existing building heights and the building heights permitted under the planning controls. This is consistent with the planning principles associated with *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, which recognises that compatibility between proposed and existing is not always desirable, and that there are situations where the planning controls envisage a change of character, in which case compatibility with future character is more appropriate than with existing character.

Clause 4.6(3)(b) There are sufficient environmental planning grounds to justify contravening the development standard

The environmental planning grounds to justify contravention of the development standard are detailed as follows:

Floor to Floor Heights

The building adopts floor to floor heights of 3.1m, rather than 3m as originally lodged, which can satisfy the floor to ceiling heights of 2.7m prescribed by Part 4C of the Apartment Design Guide. The additional 100mm per floor over the 9-storey building height contributes to the building height contravention but ensures a better amenity outcome for occupants.

A combination of factors is resulting in the need for increased floor-to-floor heights.

Firstly, in 2019 the National Construction Codes (the Building Code of Australia) changed to require all apartment buildings to be sprinklered. Even though low-rise residential sprinklers are smaller than high-rise residential and commercial sprinklers, they still require space between the ceiling and the slab and this takes up space that could previously be taken up by other services (such as electrical, plumbing, ventilation etc.). The coordination of services is a key element of construction that adds complexity and cost to the construction of formwork.

Secondly, the increased focus on building quality and certification is resulting in a more onerous interpretation of planning controls (including the ADG) for 2.7m ceiling heights. In the recent past, buildings were being constructed with 2.650m ceiling heights, or had set downs and other lower parts of ceilings where there were services above. This also includes many kitchens that the ADG says should have 2.7m high ceilings, but in practice are often 2.4m as provided for by the BCA with air conditioning units above the kitchen.

Thirdly, there is a design desire to achieve level floors, including between interiors and balconies, and between bathrooms and adjacent areas. This is partly fashion, partly good design, and partly universal access driven. Balconies are often set down (i.e. the level of the top of the slab is lower) by 50-100mm to allow tiling and falls in the balcony fall for drainage, or for timber decking, so that the floor finishes are level. Bathrooms are often set down 50mm to allow space for tiles grout and floor falls for draining to the floor waste. In the 2023 amendments to the National Construction Codes (the Building Code of Australia) there was a change to the way these setbacks were treated. While in the past there might have been a 200mm thick slab that was 150mm on the balcony, these are no longer being certified as deemed to comply - now the 200mm is a minimum, so the main slab is 250mm and the bathrooms 200mm, taking up an additional 50mm of the ceiling to floor zone.

Finally, the Australian Standard relating to wind effects on buildings also has an impact on the floor to floor heights for taller buildings. This arises from the way rainwater can be blown horizontally along an outdoor deck to the glazing and can then be blown to rise vertically up the step in the setback of a slab

- this can be as much as 150mm depending on the site-specific circumstances. This would mean that the main slab could be as thick as 350mm to provide for the set down balcony spaces (200mm plus the 150mm set down).

It has always been necessary to take care when designing buildings to achieve 2.7m floor to ceiling heights - usually this is done by 'stacking' floorplates so that non-habitable areas on one floor (bathrooms, laundries, corridors) occur over service areas on the floor below as these areas only require 2.4m ceilings giving an extra 300mm for services and structure. It is also possible to achieve 2.7m in other situations with careful construction coordination in the positioning of services, and in managing slab setdowns, but this is difficult and adds considerable expense to formwork. With the design, planning and certification environment it becomes even harder to achieve 2.7m floor to ceiling heights. In practice it is far easier to pay the cost of additional concrete used in thicker slabs than it is to pay for complex and difficult formwork and coordination. As a result, it is now emerging best design practice that additional floor-to-floor height is needed, and 3.1m is emerging as a reasonable height that should be manageable for most situations given the new design, planning and certification environment.

Ongoing servicing and maintenance of the development

It has been demonstrated to Council through DA-2019/312 that the development can be serviced by SRV vehicles to collect waste from the site, whereby the vertical clearance distance was approved at a height of 3.5m. As a result, a vertical clearance distance of 3.5m could be provided for the basement. Although, this would mean that waste collection would need to be provided from a private contractor.

The implementation of the DCP on 10 April 2023, introduced the provision of a minimum vertical clearance of 4.5m for MRV vehicles under part 3.5.7 of the DCP.

Section 3.42 of the Act states that the purpose of a development control plan is to provide guidance only, and the controls within a development control plan are not statutory requirements that must be met. That being said, if a development can meet the aims and objectives provided by an environmental planning instrument (BLEP 2021) as demonstrated by this development, there are no statutory requirements to comply with a control within the DCP, such as a 4.5m basement height clearance.

Notwithstanding, it is understood that control C4 of part 3.5.7 of the DCP, is a new standard that Council wishes to adhere to, to allow residents within residential developments the option on how waste is collected from the site. If the site is provided with a vehicle clearance of 4.5m, the building can be serviced by Council or a private contractor.

Considering the above and discussions with Council to date, the provision of a 4.5m vertical clearance distance has been adopted for the building which will allow the future building owners through the delegation of a strata corporation to decide if the waste collection on the site is serviced by either Council or a private contractor.

As a result of adopting a 4.5m clearance into the basement, the resultant height of the building has increased by 1m. As the building height is increasing to comply with the current DCP, it would be unreasonable not to support a development that is merely trying to comply with the current DCP.

Design and amenity of the built environment

The architectural roof features and landscaping provided on the roof will enhance the building's appearance when viewed from the local area.

Part of the contravention to the building height standard relates to the lift overrun and awning provided over the communal open space. These aspects of the building are located in the central portion of the rooftop. These structures are not clearly visible from the public domain due to their central building location.

The provision of the lift to the roof ensures the communal open space area (which is provided with adequate solar access) is accessible to all residents and visitors. The roof area provides numerous opportunities for passive recreation and also affords the development with views of Botany Bay to the east. As such, the contravention to the standard will deliver positive and inclusive amenity outcomes for residents of the building.

The contravention of the building height development standard for this purpose is considered acceptable as the landscape features on the roof will soften the appearance of the building from the streetscape, ensuring the immediate amenity of the site is improved.

Public benefit

As required by section 4.6(8)(bd) of BLEP 2021, the development may only contravene the building height development standard if it has been demonstrated that the development provides a public benefit.

The development provides a pocket park at the north west corner of the site which will contribute to the green gateway envisaged by the DCP and diagrammatically illustrated at figures 28 and 30 – 33 of the DCP. This pocket park will be provided by way of an easement, with the area maintained by the owners of the site in perpetuity for the benefit of the public.

It was also demonstrated within the assessment carried out by Council as part of DA-2019/312, that contravention of the building height development standard was satisfied via the provision of a pocket park which has been retained as part of this DA. Therefore, it follows the same precedent should be applied to this development, as the redevelopment of the site will continue to provide a public benefit to the surrounding locality and the local government area more broadly.

This development does not seek to increase the FSR that has previously been approved over the site under DA-2019/312, nor does it increase upon the FSR submitted with the original documentation

lodged with this application. As such, the development does not create any additional demand for public services, therefore the comparative public benefit derived from the public park under DA-2019/312 continues with the subject DA.

No significant or unreasonable impacts on surrounding public areas

The variation to the building height development standard will be largely indiscernible when viewed from the surrounding public domain. Especially considering that the development to the north of the site has an approved building height of 41.8m.

The redevelopment of the site will improve the public domain and appearance of the site as viewed from Princess Highway through the provision of a well-designed building. The aspects of the building that contravene the building height standard will not result in significant or unreasonable impacts on surrounding public areas.

No significant or unreasonable impacts on surrounding residences

As demonstrated both above and by the submitted information, the proposal will not significantly nor unreasonably affect adjoining and nearby residences to the north, south, and east of the subject site in terms of visual privacy, overshadowing, view loss, and visual amenity. Visual impacts associated with the proposal will therefore be extremely minor.

For the reasons outlined above, it is evident that there are substantive environmental planning grounds that demonstrate why strict application of the development standard is not appropriate for this proposal.