

GYDE

Amended Clause 4.6 Variation Request

Clause 4.3 Height of Buildings
Canada Bay Local Environmental Plan 2013
25-27 Leeds Street, Rhodes

submitted to the City of Canada Bay Council
on behalf of Billbergia

This report was prepared and reviewed by:

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Report Version: Final - Amended post lodgement

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EXECUTIVE SUMMARY

This amended request has been prepared to justify a variation to Clause 4.3 Height of Buildings of the *Canada Bay Local Environmental Plan 2013* (CBLEP) that is proposed in a development application (DA) for a mixed-use development at the site located at 25-27 Leeds Street, Rhodes.

The objective of the proposal is to seek development consent for a mixed-use development at the site, which will replace the existing warehouse buildings and contribute to the initial stage of transformation of the broader Rhodes East precinct. It is noted that the proposal for which development consent is sought, inclusive of the proposed variation to the height of buildings standard, has been subject to an Architectural Design Competition and a review by the Design Integrity Panel post-competition.

Under Clause 4.3 of the CBLEP, three maximum building heights apply to different parts of the site. This includes 43.4m(RL) in the north-eastern part of the site, 8m(RL) within the northern, foreshore park area and 34.1m(RL) across the remainder of the site.

The City of Canada Bay Council (Council) issued an RFI dated 20 February 2024, in which they requested reconsideration of the variation to the building heights. Justification for the architectural roof features was also requested by Council to be reconsidered. In response to the RFI, the proposed development has been amended to reduce building heights. To reduce the extent of the variation, the architectural roof features and rooftop gardens have been removed from Buildings A and F.

The amended proposal results in the following maximum building heights:

- Area where maximum 43.4m(RL) applies – a maximum building height of 45.30m(RL) is proposed for Building F, equating to a 1.9m height exceedance and 5.76% variation.
- Area where the maximum 34.1m(RL) applies – a maximum building height of 36.0m(RL) is proposed for Building A, equating to a 1.9m height exceedance and 5.57% variation.
- Other minor (and lesser) height variations are proposed in this area relating to lift overruns ranging from 0.5m to 1.45m above the 34.1m(RL) maximum building height (1.47% to 4.25% variation) at Buildings C, D and E.
- Area where maximum 8m(RL) applies – no buildings or structures are proposed within this area.

Building B proposes a maximum height of 33.40m(RL) and therefore complies with the maximum building height standards of 34.1m(RL).

There is no constraint on the degree to which a consent authority may depart from a numerical standard under Clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]. As Commissioner Clay explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, that the application of Clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied (this decision was upheld by the Chief Judge of the Land and Environment Court on appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115).

To summarise the findings of this written Clause 4.6 variation request, the requirement to comply with the height of buildings development standard is unreasonable and unnecessary in the circumstances of this case as:

- The non-compliant built form above the height plane for Buildings C, D and E is limited to the lift overruns. For Buildings A and F, the parapets and plant equipment also exceed the height limit.
- The lift overruns on Buildings D and E above the height limit provide equitable access to the proposed roof level communal open spaces.

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- The parapets and plant equipment on Building A and F are minor in scale and set back from the building edge, where possible, to minimise any impacts on surrounding sites and the public domain.
- The planning controls in both the CBLEP and the CBDP do not appear to entirely accommodate the 5% bonus afforded to the proposal under Clause 7.11 of the CBLEP. This is in part a contributor to the minor height variations.
- The proposed height variation does not increase the intensity of the uses on the site, and no GFA is proposed within the variation. No residential dwellings or habitable floor space are proposed to be located above the maximum building height plane.
- There is minimal environmental impact associated with the minor variation, in relation to overshadowing to adjacent properties, future development, open space, and the foreshore park and the visual amenity of adjacent residents, the wider area and public domain.

This request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposal is consistent with the objectives of the development standard itself.

1. INTRODUCTION

This request has been prepared in accordance with Clause 4.6 of the CBLEP to justify a variation to Clause 4.3 height of buildings development standards proposed in a DA submitted to the City of Canada Bay Council (Council) for a mixed-use development at 25-27 Leeds Street, Rhodes.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development is consistent with the objectives of the particular standard.

2. STANDARD TO BE VARIED

The standard proposed to be varied is the height of buildings development standard which is set out in Clause 4.3 of the CBLEP as follows:

“4.3 Height of buildings

(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.”

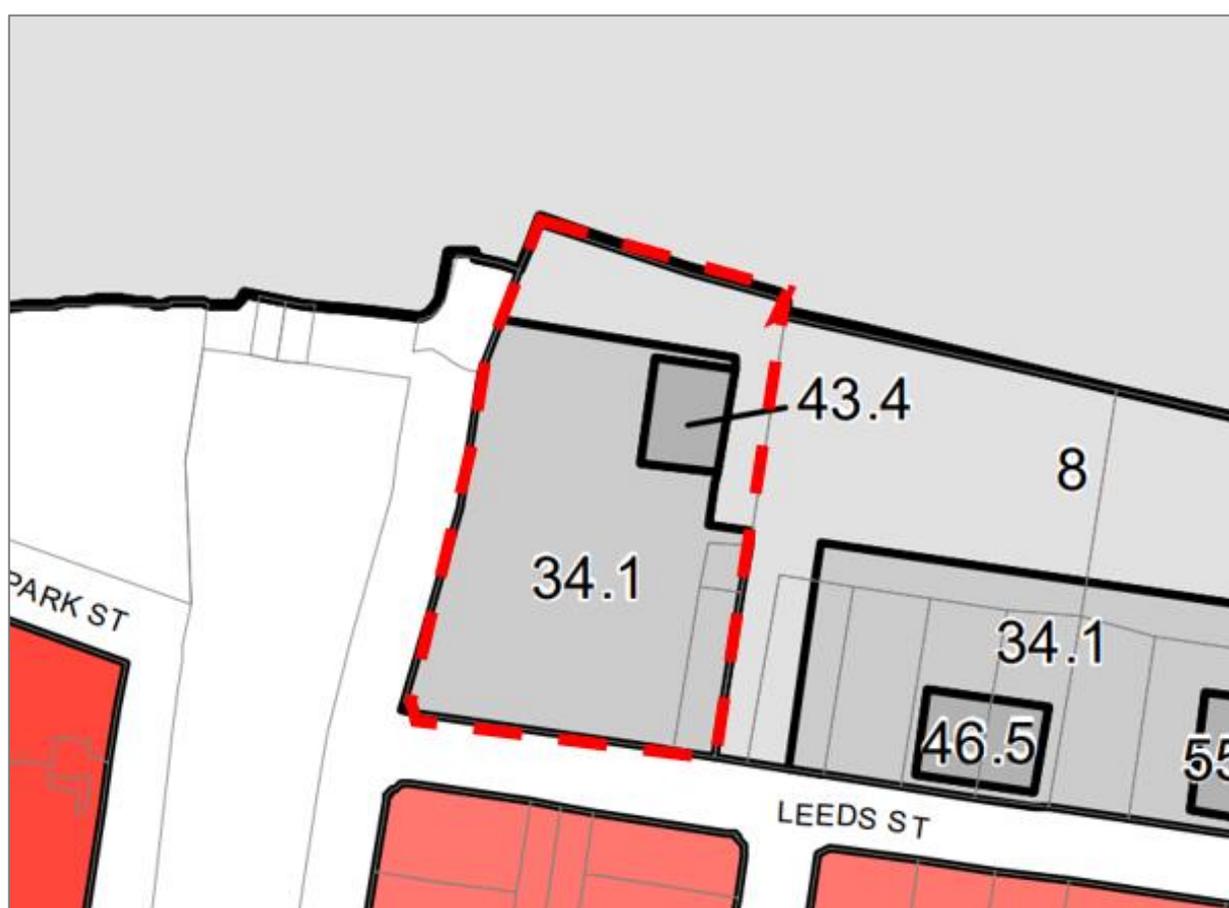


Figure 1: CBLEP height of buildings map, site outlined in hatched red line (Source: NSW Legislation)

The numerical values of the development standard proposed to be varied are 34.1m(RL) and 43.4m(RL). The proposal complies with the 8m(RL) maximum building height that applies in the northern and part of the eastern portions of the site.

The height of buildings development standard is not excluded from the operation of Clause 4.6 of the CBLEP.

3. EXTENT OF VARIATION

3.1. Overview

Under Clause 4.3 of the CBLEP, three maximum building heights apply to different parts of the site (43.4m(RL) to the north-east tower, 8m(RL) to the foreshore park area and 34.1m(RL) in the remainder of the site. The proposed development results in the following maximum building heights, described in Table 1 and Figure 2 below.

Matters to note when examining the height plane diagram are:

- No gross floor area is proposed above the maximum building height, nor is it reasonable capable of modification to include floor space.
- The main structures, being the lift core and plant spaces are centrally located limiting their visibility and containing shadow impact. They are not the subject of the height variation when they were excluded from the previous CI4.6 due to them being incorporated in the Architectural Roof features.
- Variation of the parapets and planters to Building A and F have been reduced where possible.

Table 1: Extent of variations

BUILDING HEIGHT STANDARD	MAXIMUM HEIGHT PROPOSED	PROPOSED VARIATION	PART(S) OF BUILDING THAT EXCEED DEVELOPMENT STANDARD
43.4m(RL)	45.90m(RL)	1.90m 5.76%	Building F roof level including: <ul style="list-style-type: none"> • Lift overrun • Hot water plant and screening • Parapets and planters
34.1m(RL)	36.00m(RL)	1.9m 5.57%	Building A roof level including: <ul style="list-style-type: none"> • Lift overrun • Hot water plant and screening • Parapets and planters
	35.5m(RL)	1.4 metres 4.11%	Building C lift overrun
	35.55m(RL)	1.45 metres 4.25%	Building D lift overrun and mechanical plant zone
	34.6m(RL)	0.5 metres 1.47%	Building E lift overrun
8m(RL)	N/A no buildings or structures located in this area		

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Building B proposes a maximum height of 33.40m(RL) and therefore complies with the maximum building height standards of 34.1m(RL). The height plane diagram prepared by SJB (Drawing No. DA-6041) has been amended, the red clouded areas on the drawings outline the areas that have been amended from that of the original application.

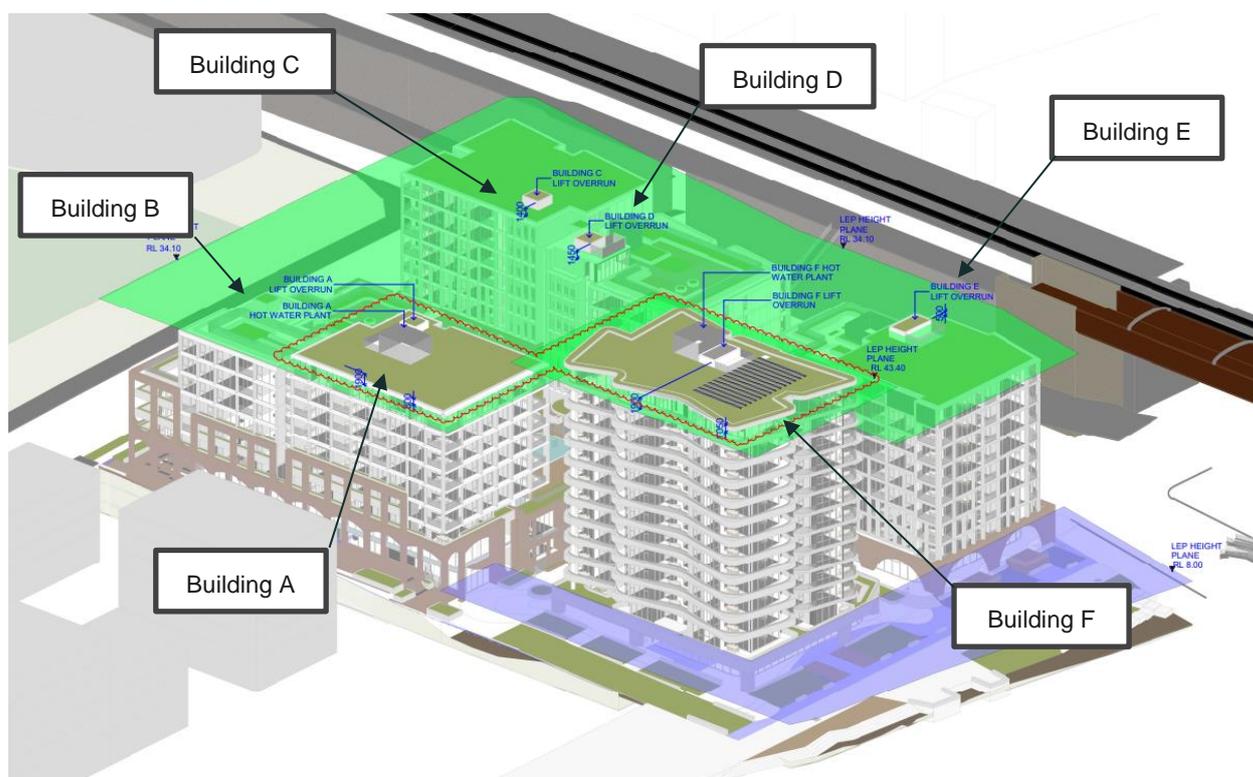


Figure 2: Height plane diagram, height planes shown in green, amended areas outlined with red cloud (Source: SJB)

As outlined above, no variation to the height of Building B is proposed, whilst the variation for Buildings C, D and E is limited to the lift overruns and minor hot water plant on Building D.

As outlined in the figure below, the variation for Buildings A and F is limited to the lift overrun, hot water plant and screening, mechanical plant zone and parapets and planters. It is important to note that no habitable floor space is proposed to be located above the maximum building height.

Clause 4.6 Variation Request – Height of Buildings

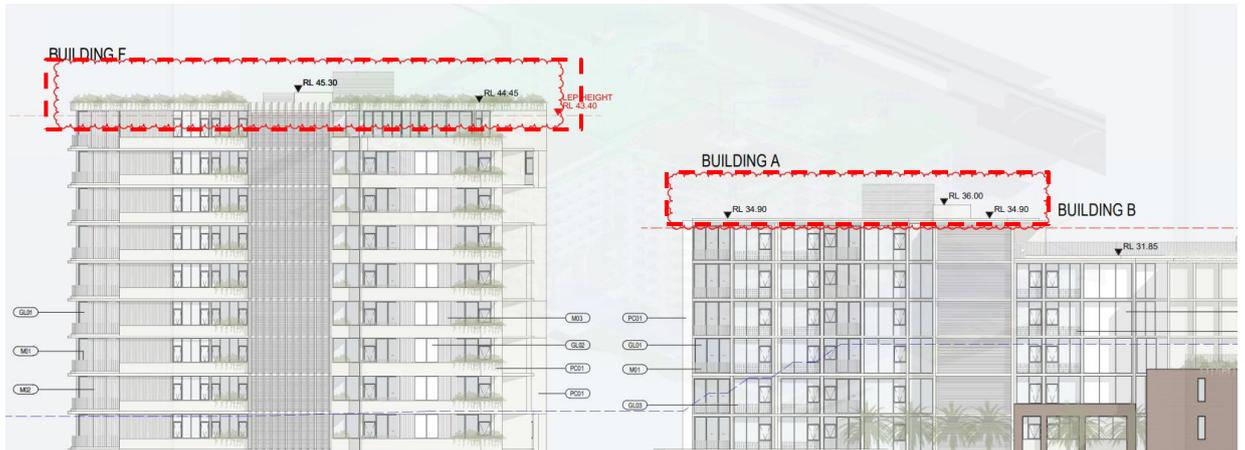


Figure 3: Section Buildings A and F(Source: SJB)

4. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the CBLEP.

The Court has held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated, thwarted or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate.

It is sufficient to demonstrate only one (1) of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated that Test 1 has been satisfied.

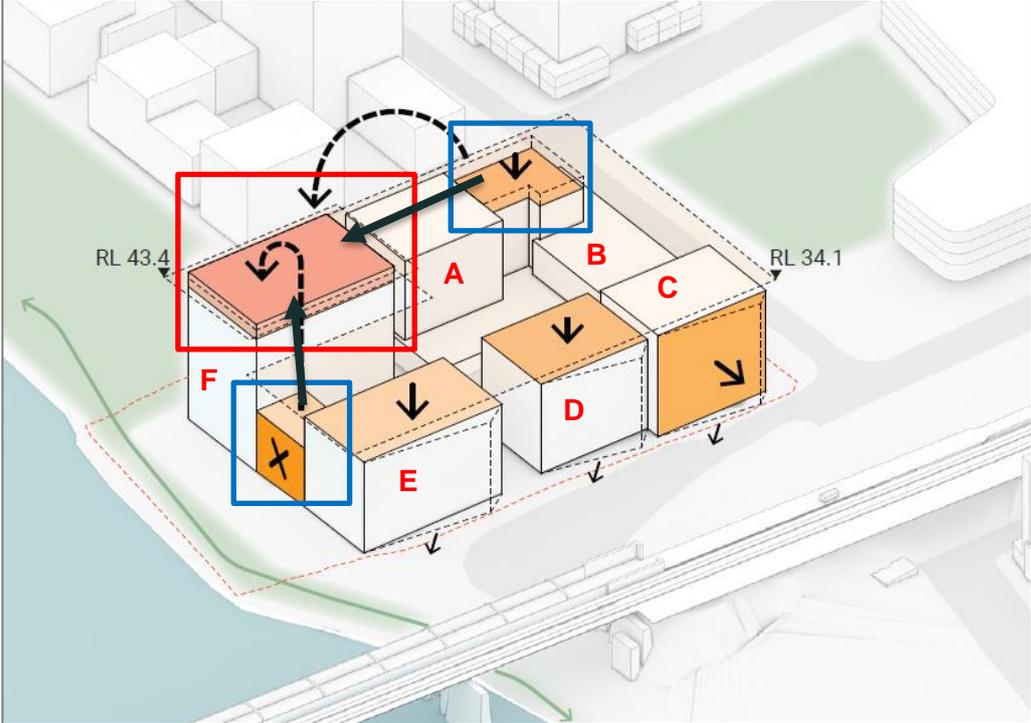
4.1. The objectives of the development standard are achieved notwithstanding the non-compliance with the standard

In the following section we consider whether the objectives of the development standard in Clause 4.3(1) are achieved notwithstanding the proposed contravention (Test 1 under Wehbe). The objectives of the development standard are as follows:

Table 2: Consistency with development standard objectives

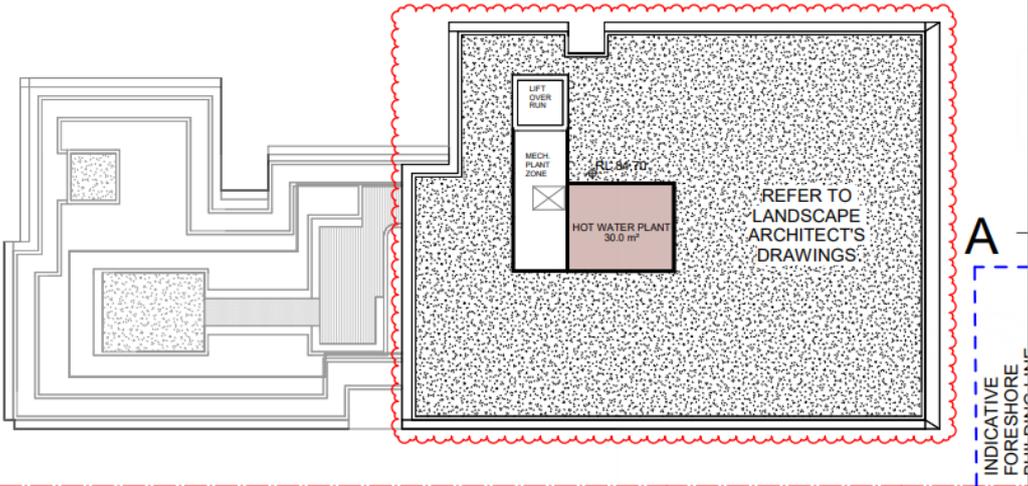
OBJECTIVES OF CLAUSE 4.3	DISCUSSION
<p>(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,</p>	<p>In the first instance, it is important to note, as well established in the Land and Environment Court (LEC)¹, that development does not need to be the same to be deemed to be compatible. Compatibility is different from sameness. It is generally accepted that buildings can exist in harmony together without having the exact same density, scale, or appearance. In the circumstances of this case, and as demonstrated below, the variations to the height standard are related to isolated built structures at the upper most levels of the proposed new buildings. They are not in a location, or of a scale, that would create any outcome that result in the development being incompatible with future buildings in the Leeds Street Character Area. Importantly, they do not create any difference in perceived character of built form, or any impact at streetscape level as discussed further below.</p> <p>The desired future character of the built form in the Leeds Street Character Area is described in the CBDPC as responding to the northern aspect of the character area through the sensitive location of height combined with block permeability and building separation, to promote pedestrian level views of Parramatta River from the centre of Rhodes East.</p> <p>Height envisaged under the CBLEP and CBDPC within the Leeds Street Character Area is generally 8 storeys, with landmark towers ranging from 11 to 18 storeys. The proposal includes heights of up to 13 storeys and is therefore consistent with the height of building/storey objectives under the CBDPC. The proposal generally maintains the scale of buildings envisaged on the site, and provides a pedestrian link to the east, active street frontages and facades to the west, public open space to the north, and the landmark height to the northeast of the site as per the CBDPC vision for the site. Elements of variation to the maximum height standards prescribed in the CBLEP are limited to non-habitable components, plant rooms, parapets, and lift overruns. They do not materially change the built form outcome on the site or the relationship of the site contextually with any existing or future sites to the east and south.</p> <p>The building mass has been “massaged” to respond to the surrounding context, provide opportunities to increase sight lines through the site and further break the built form into smaller portions to create a village feel and scale, particularly at the ground floor plane.</p>

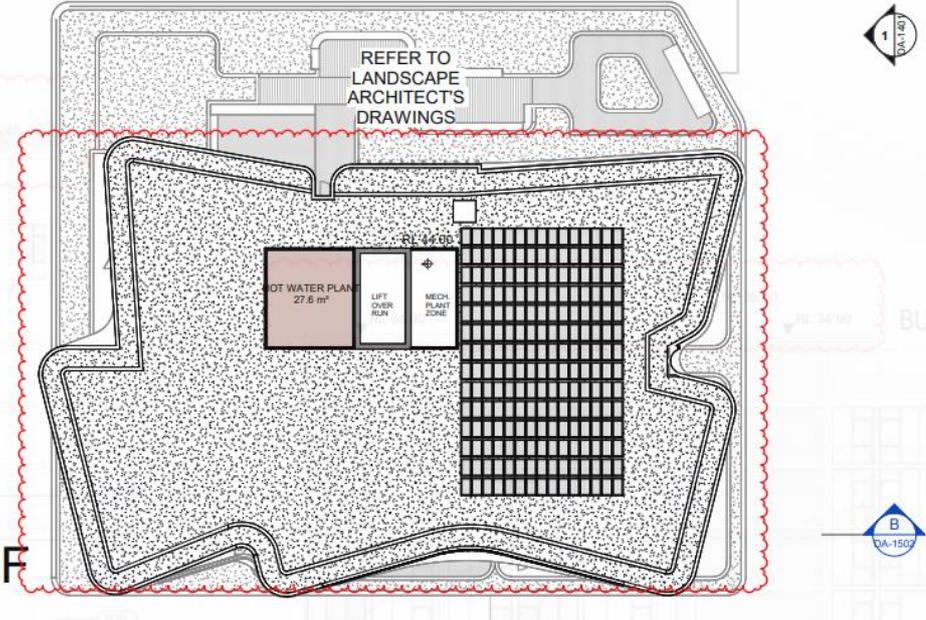
¹ *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	<p>As shown in Figure 4, building mass has been taken from the north and south-eastern corner of the site and redistributed to Building F in the north-eastern corner of the site, which is nominated as a “landmark building” under the CBDCP.</p> <p>This ensures compliance with the CBLEP and CBDCP shadow restrictions/controls relating to the future foreshore park and the future school on the southern side of Leeds Street. This has resulted in lower scale buildings addressing Leeds Street, below the maximum building heights permitted under the CBLEP.</p>  <p><i>Figure 4: Relocation of building mass (Source: SJB)</i></p> <p>The following figures illustrate that the parts of the building above the maximum height limit are not clearly discernible from the public domain and do not contribute to any unreasonable additional bulk or scale. In relation to Building F, the parapet assists in accentuating the curved building form and the planting at the roof softens any additional built elements in this location.</p>

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	 <p data-bbox="451 1375 1513 1440"><i>Figure 5: View of Buildings E and F from future foreshore promenade at north west of site (Source: SJB)</i></p>

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	 <p data-bbox="451 1615 1110 1644"><i>Figure 6: View of Buildings B and C from south (Source: SJB)</i></p> <p data-bbox="451 1675 1514 1877">The areas of non-compliance, including lift overruns and plant rooms, are not visible from the public domain along the eastern elevation forms, due to their location toward the centre of the building. The amended variation does not impact the proposed development’s potential to comply with objective 4.3(a) of the CBLEP. The proposal maintains compatibility with the height, bulk, and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces.</p> <p data-bbox="451 1908 1514 1973">Notwithstanding, the framed rhythmic design of the structure is open to minimise associated bulk and scale, but rather, create visual interest through architectural expression.</p>

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
<p>(b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—</p> <p>(i) visual and acoustic privacy, and</p>	<p>Visual</p> <p>The proposed lift overruns on Buildings C, D and E will not result in any visual privacy impacts. As illustrated in Figure 5 to Figure 6 above and on the roof plans below, each of the lift overruns on Buildings C, D and E are setback from the building edges and will not be visible from the public domain. The lift overruns form a small component of the overall built form. Refer to the architectural drawings prepared by SJB for further details (Drawing No. DA-1009 to DA-1015).</p> <p>The remaining height variations on Buildings A and F are associated with hot water plant, mechanical plant zone, roof parapets and planting and therefore will not result in any visual privacy impacts to surrounding land uses. Refer to Figure 7 and Figure 8.</p>  <p><i>Figure 7: Building A Roof Plan (Source: SJB)</i></p>

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	 <p><i>Figure 8: Building F Roof Plan (Source: SJB)</i></p> <p>Acoustic</p> <p>In relation to the lift overruns, the Noise and Vibration Impact Assessment prepared by E-LAB recommends mechanical equipment acoustic treatments to ensure the relevant noise criteria is complied with. Further, the lift overruns are centrally located on the eastern buildings, therefore separated from any future planned residential uses to the east within the Leeds Street Character Area, as set out in the CBDP.</p>
(ii) solar access and view sharing,	<p>Solar Access</p> <p>Updated shadow diagrams have been prepared by SJB and extracts of the 9am, midday and 3pm mid-winter diagrams are provided below. Refer to the architectural drawings prepared by SJB (DA-6011 to DA-6019). As a result of the amended height across the development, the shadow caused from the variation has decreased from that of the original development application.</p> <p>The red clouded areas on the architectural drawings direct to the amended areas, however, the actual areas of overshadowing from the height variation are only the pink areas.</p>

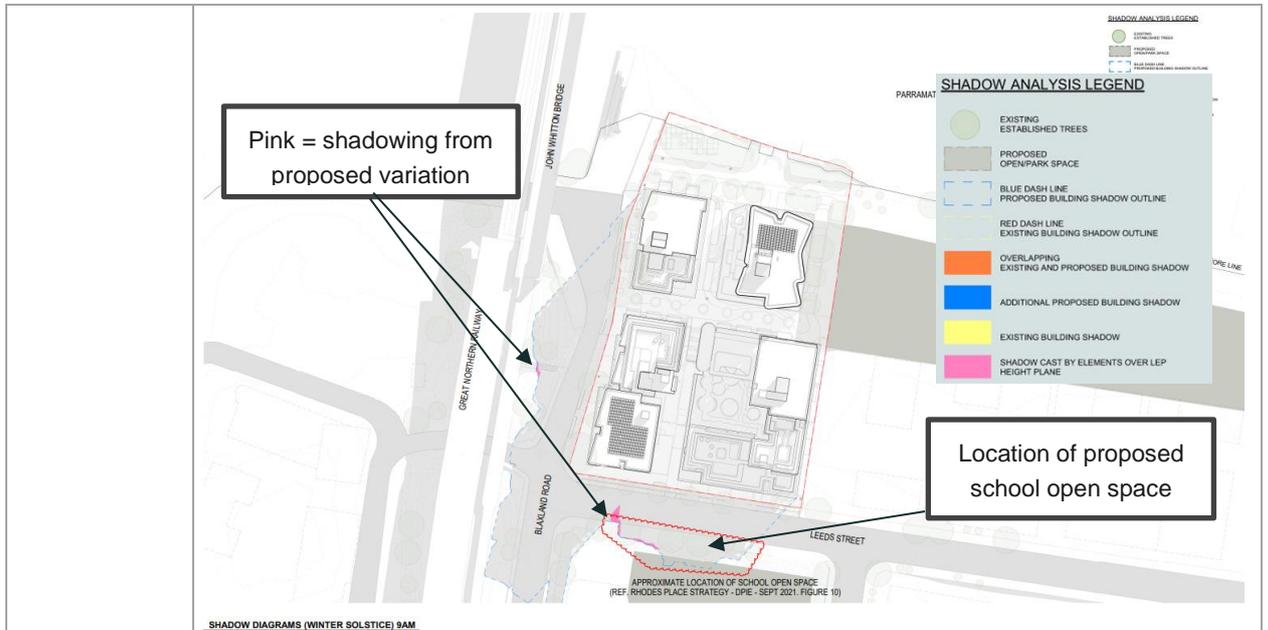


Figure 9: Shadows 9am mid winter (Source: SJB)

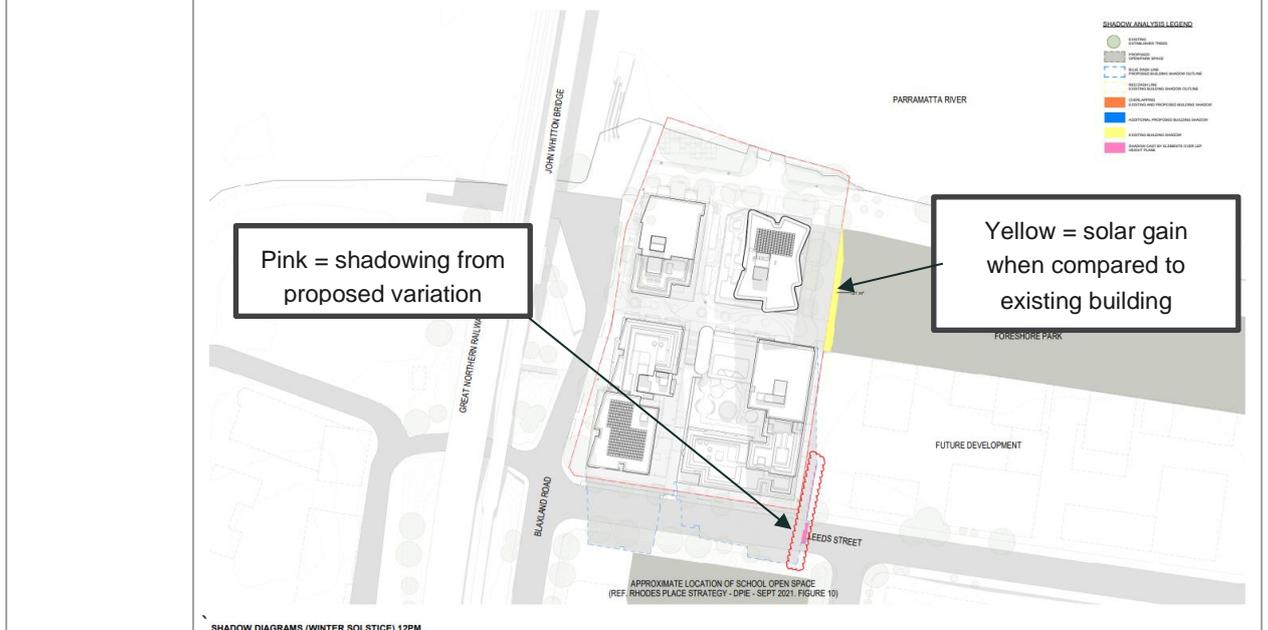


Figure 10: Shadows midday mid-winter (Source: SJB)

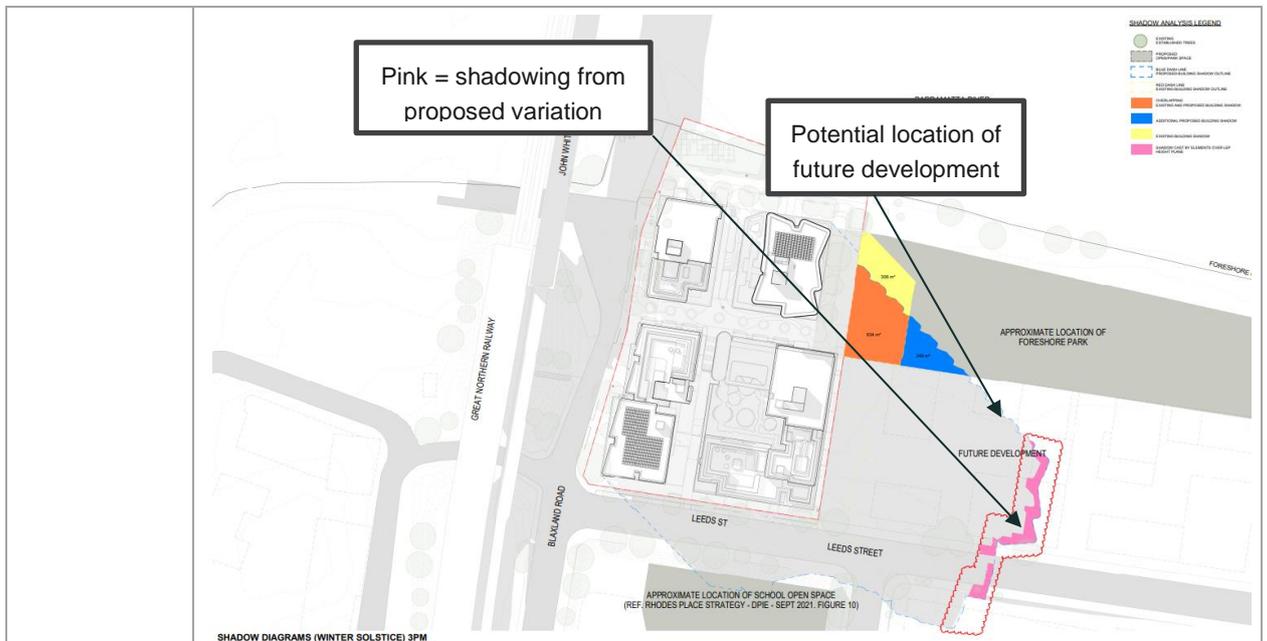


Figure 11: Shadows 3pm mid winter (Source: SJB)

As illustrated in the shadow diagrams, overshadowing as a result of the parts of the building above the height plane (shown in pink) are fast moving and contextually minor. Additionally, overshadowing due to the amended variation and decreased height is significantly minimised from the original application.

At 9am (during mid-winter) the extent of the overshadowing as a result of the variation is limited to the Leeds Street road reserve and the southern side of Leeds Street, where the open space of a future school could potentially be located. This, however, only lasts for approximately 1 hour, with shadowing to the school eliminated by 10am.

By 12pm, when the school's open space will likely be in use, additional shadowing falls on the Leeds Street road reserve and the site's boundary with the adjacent site to the east.

By 3pm, the additional shadowing falls within the Leeds Street road reserve and the adjacent future development site to the east.

The proposed variation will not restrict future dwellings to the east from achieving compliance with the ADG's solar guidelines, as the proposed development only casts shadows in the afternoon period (with no shadowing prior to 12pm). Given the orientation of the site, the future development site has the potential to still receive solar access in the northern direction (the location of a future park and the Parramatta River) and the east (dependent on solar access modelling of other future buildings within the precinct). Additionally, given the minor nature of the variation any additional

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	<p>shadowing will be limited to the upper levels (or potentially the roof) of any future adjacent buildings to the east.</p> <p>The future Leeds Street Open space is partially located within the subject site and continues to the east along the waterfront. The proposal, notwithstanding the variation to the height standard, complies with the shadow controls under Clause 7.3 of the CBLEP. Specifically, the amended variation proposal, in particular the variation proposed to Building A and F which shadows from the southwest of the site to the east, does not result in any additional overshadowing of the Leeds Street Open Space between 8:30am and 12:30pm and will not cause overshadowing of more than half of Leeds Street Open Space between 12:30pm and 3pm. The Leeds Street Open Space, as per the CBLEP, is mapped in the SJB architectural drawings as the areas referred to as 'Approximate area of Foreshore Park'. No overshadowing of the amended variation is caused to the Leeds Street Open Space, therefore, full compliance with Clause 7.3 of the CBLEP.</p> <p>Therefore, the variation proposal complies with the ADG guidelines, Clause 7.3 of the CBLEP, and CBDPC guidelines.</p> <p>View Sharing</p> <p>In relation to view sharing, it is acknowledged that the none of the sites in the Leeds Street Character Area have been redeveloped to-date in accordance with the CBLEP and CBDPC. Notwithstanding, the parts of the building above the maximum height plane are minimal and generally relate to parapets, planters and roof top access including stair and lift overruns. All structures, except for the parapets, have been located centrally where possible on the buildings. The buildings are set back on the eastern boundary to ensure that the view shed is over and above the requirements set out in the DCP (refer to figure below). The provision of a colonnade sets the internal space at ground back a further 4m to enhance and celebrate views to the water.</p>

OBJECTIVES OF CLAUSE 4.3 **DISCUSSION**

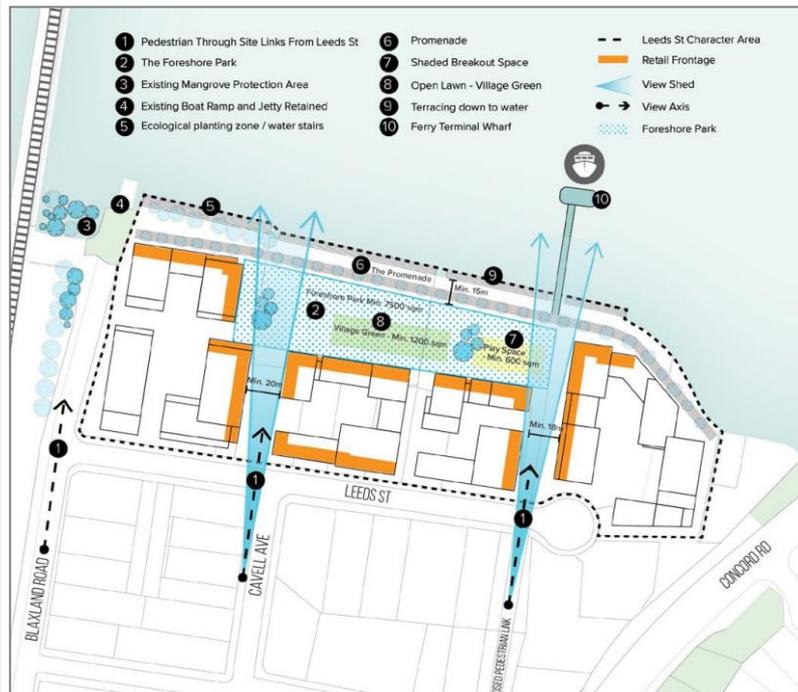


Figure 12: Extract of DCP View Sheds (Source: CBDCP)

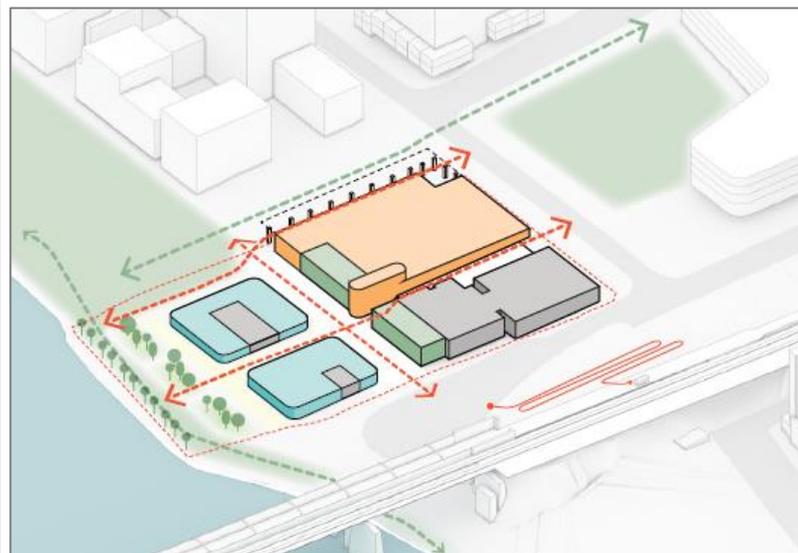
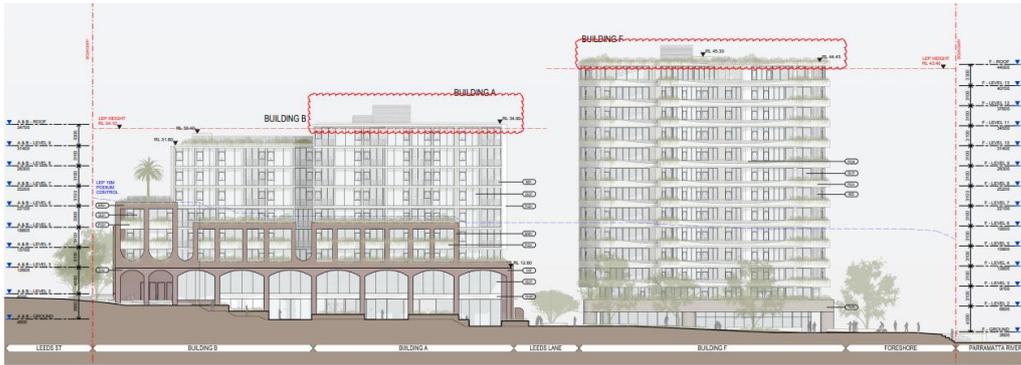
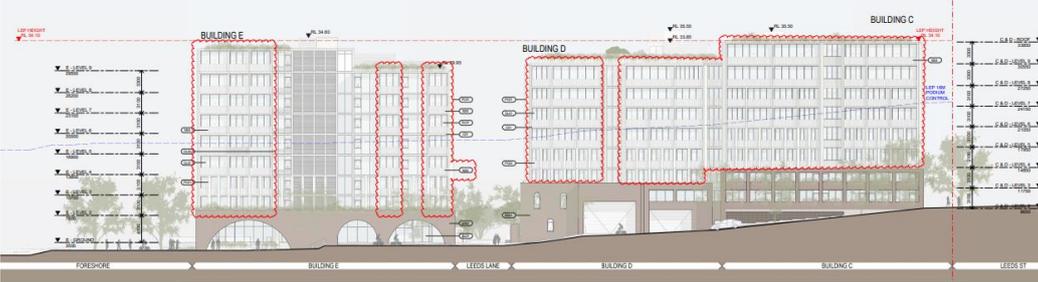


Figure 13: Extract of proposed built form allowing for view sharing (Source: SJB)

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	<p>The architectural features proposed within the original application created the perception of additional height and bulk, and thus since their removal, further minimise any impact to view sharing.</p> <p>This will assist in limiting any potential view impacts associated with the variations. The variations to the height limit will have no discernible impact on view sharing in the context of the wider built form envelope.</p> <p>The overall development promotes view sharing within the ground plane and public domain incorporating three new through site pedestrian links and the foreshore promenade. The minor height variations do not reduce view sharing opportunities in this regard.</p>
(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,	<p>As discussed above, building mass has been partly redistributed across the site, from the south to the north of the site to ensure compliance with the CBLEP and CBDP shadow controls including providing solar access to the open space of the future school to the south between 10:00am and 2:00pm. This redistribution of mass also assists in creating a transition in scale in enabling the buildings on the site to step down from the north to south where the lower scale school building will then follow further south, on the opposite side of Leeds Street. When considering the sites to the east, the proposal generally maintains the envisaged heights on the site under the relevant environmental planning instrument.</p>
(d) to ensure that buildings respond to the natural topography of the area.	<p>The site slopes from south to north, towards the foreshore and river. The base form of the buildings steps down with the topography of the site. This is shown on the extracts of the east and west elevations below. As contemplated by the planning controls for the site, there is intended to be a taller built form within the north-eastern corner of the site to provide a “landmark” building within the precinct.</p>

OBJECTIVES OF CLAUSE 4.3	DISCUSSION
	 <p data-bbox="464 1025 762 1048">1 ELEVATION EAST ELEVATION SCALE 1:200</p> <p data-bbox="451 1059 879 1088">Figure 14: East elevation (Source: SJB)</p>  <p data-bbox="459 1406 762 1429">1 ELEVATION WEST ELEVATION SCALE 1:200</p> <p data-bbox="451 1487 887 1516">Figure 15: West elevation (Source: SJB)</p>

As demonstrated, the objectives of the height of buildings development standard are achieved notwithstanding the proposed contravention.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 4.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

- 4.3. The objective would be defeated or thwarted (undermined) if compliance was required with the consequence that compliance is unreasonable

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

- 4.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon. Notwithstanding, there is an example of an approved development at 34 Walker Street, Rhodes (DA2022/0162) which included structures above the maximum building height. The parts of the towers in excess of the height limit comprised lift machine rooms and overruns, plant and rooftop communal open space. This application was recommended for approval in the assessment report and ultimately approved by the Sydney Eastern City Planning Panel on 23 December 2022.

DA2022/0162 was granted under the current statutory controls that came into force on 18 March 2022. It was also noted within this application that "*the LEP height does not facilitate plant and lift overrun required to accommodate the development in the height envisaged by the new controls*" (Statement of Environmental Effects, prepared by Urbis, dated 13 April 2022, page 8).

The proposal resulted in an exceedance of the building height controls on the Tower D and Tower E portions of the site by 7.3 metres (5.3%) and 5.6 metres (3.7%) respectively. The exceedance of the controls was a consequence of the requirement to accommodate plant equipment, cooling towers, and a lift motor room to each Tower.

- 4.5. The zoning of the land is unreasonable or inappropriate

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the contravention of the height of buildings development standard are set out below. As discussed above, the non-compliant development does not result in any overall adverse environmental impact and instead provides a built form that achieves the desired future character for the area and is consistent with the objectives of Clause 4.3.

The relevant environmental grounds are as follows:

- The non-compliant built form above the height plane for Buildings C, D and E is limited to the lift overruns. For Buildings A and F, the parapets and plant equipment also exceed the height limit.
- The lift overruns on Buildings D and E above the height limit provide equitable access to the proposed roof level communal open spaces.
- The parapets and plant equipment on Building A and F are minor in scale and set back from the building edge, where possible, to minimise any impacts on surrounding sites and the public domain.
- The planning controls in both the CBLEP and the CBDCP do not appear to entirely accommodate the 5% bonus afforded to the proposal under Clause 7.11 of the CBLEP. This is in part a contributor to the minor height variations.
- The proposed height variation does not increase the intensity of the uses on the site, and no GFA is proposed within the variation. No residential dwellings or habitable floor space are proposed to be located above the maximum building height plane.
- As outlined earlier in this report, there is minimal environmental impact associated with the minor variation, in relation to the overshadowing to adjacent properties, future development, open space, and the foreshore park and the visual amenity of adjacent residents, the wider area and public domain.

For completeness we note that the size of a variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]. Notwithstanding this, we note that the proposed variations are minor, ranging between 1.47 and 5.76%.

Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances, including the circumstances of this case.

For the reasons contained in this application, there are sufficient environmental planning grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b). We therefore consider contravening the development standard to be justified.

6. CONCLUSION

This submission requests a variation, under Clause 4.6 of the CBLEP, to the height of buildings development standards that apply to the site and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention; and

The development achieves the objectives of the development standard (Test 1 under Wehbe).

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.