



Woollahra LEP 2014 Clause 4.6 Exceptions to Development Standards – HEIGHT OF BUILDINGS

Demolition of Existing Building and Construction of a
Shop-top Housing Development at

**Nos. 19-27 Cross Street,
Double Bay**

Prepared for:

Tri-Anta Pty Ltd

C/- SDH & Associates

Suite 1.02, Level 1

22-24 Atchison Street

St Leonards NSW 2065

Prepared by:

GSA PLANNING

Urban Design, Environmental & Traffic Planners

(A.B.N 18 003 667 963)

95 Paddington Street, Paddington NSW 2021

p: 02 9362 3364

e: info@gsaplanning.com.au

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WOOLLAHRA LOCAL ENVIRONMENTAL PLAN (LEP) 2014
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: **Tri-Anta Pty Ltd**
 C/- SDH & Associates

SITE ADDRESS: Nos. 19-27 Cross Street, Double Bay

PROPOSAL: Demolition of existing building and construction of a shop-top housing development

1. (i) Name of the applicable planning instrument which specifies the development standard:

Woollahra Local Environmental Plan (LEP) 2014

(ii) The land is zoned:

B2 Local Centre. The objectives of the zone are stated as follows.

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To attract new business and commercial opportunities.*
- *To provide active ground floor uses to create vibrant centers.*
- *To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

(iii) The number of the relevant clause therein:

Clause 4.3 – Height of Buildings. Clause 4.3 states as follows.

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

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,*
- (b) to establish a transition in scale between zones to protect local amenity,*
- (c) to minimise the loss of solar access to existing buildings and open space,*
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.*

(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) and clause 4.3A, the maximum height of a dwelling house, dual occupancy or semi-detached dwelling on land in Zone R3 Medium Density Residential is 9.5 metres.

(2B) Despite subclause (2) and clause 4.3A, the maximum height of a building on a battle-axe lot on land in Zone R3 Medium Density Residential is 9.5 metres.

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

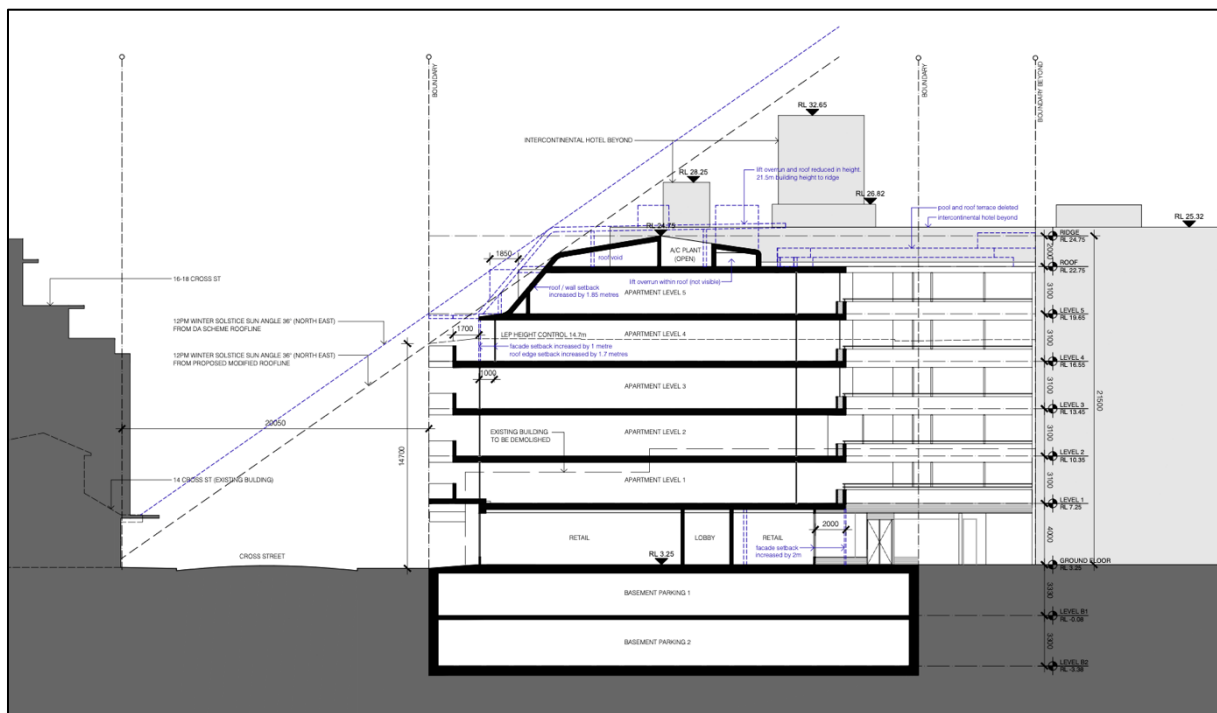
2. Overview

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation achieves the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds.

3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP Height of Buildings. This Clause operates in conjunction with the Height Map which indicates a maximum 14.7m applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The site is subject to a 14.7m maximum building height. The proposed six storey mixed use development will have a maximum building height of 21.5m. While this is 6.8m of additional height and a variation of 46.3%, this report demonstrates the proposal is consistent with the numerous six storey buildings on the opposite side of Cross Street (see **Figure 1**).



Source: Luigi Rosselli

Figure 1: Section A-A Showing Additional Height

The additional height will accommodate the two upper residential levels and will complement the evolving streetscape of both Cross Street and Transvaal Avenue. The proposal will be compatible with the scale of surrounding development and will maintain privacy and solar access for adjoining properties. The proposal will provide a well-designed building, built to the street boundaries which contributes to the spatial definition of the corner site.

4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6(1) and our planning response are as follows:

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

The proposal seeks flexibility in the application of the Height development standard to the development in the circumstance of this particular case. The additional height will allow a well-designed building that will be consistent with and contribute to the evolving character of the Double Bay Centre. Many of the existing buildings in the locality are subject to development applications to construct five to six storey mixed use developments in Double Bay, many with approvals from the Council and Court.

This includes three approved six-storey, mixed use developments along the southern side of Cross Street, at Nos. 16-18, 20-26 and 28-34 Cross Street, all which exceed the height development standard and contribute to the transitioning density and future character of Cross Street. Also important to note is the sheer height of the six to seven storey Intercontinental Hotel directly adjoining the subject site, particularly as the ground and first floor levels have significantly higher floor to ceiling heights.

The six-storey shop-top development at Nos. 28-34 Cross Street with a height of 21.21m was approved in the Court in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (*SJD*), by Clay AC on 12 March 2020. This determination was appealed by Council and was later dismissed in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (*SJD DB2*) by Preston CJ on 18 August 2020.

Importantly, this judgment confirms that six storey development of such height is appropriate for this area of Double Bay, and also that compatibility with other approved buildings of similar heights contributes to the desired future character of Cross Street.

Strict compliance would force a building to be incompatible with the height of surrounding developments, which would be discordant in the streetscape. This would be a negative outcome for the Double Bay Centre. Strict compliance would prevent construction of two upper levels of residential accommodation and the common area swimming pool. This would reduce further residential accommodation within a local centre with a recognised demand for new apartments.

Flexibility in this circumstance will provide a better outcome for development. The proposed additional height will allow the built form to be more consistent in the streetscape, particularly in comparison with the nearby existing and future development. The proposed built form will provide visual benefit while maintaining amenity for neighbouring development.

Importantly, the proposal complements the existing and future commercial and mixed-use character of the locality, with a height that is compatible with adjacent and nearby buildings.

To refuse this application would prevent the orderly and economic use and development of the land. Accordingly, in our opinion, as the proposal is consistent with the objectives of Clause 4.6, the variation is acceptable in this instance.

5. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause is stated, inter alia:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

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

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

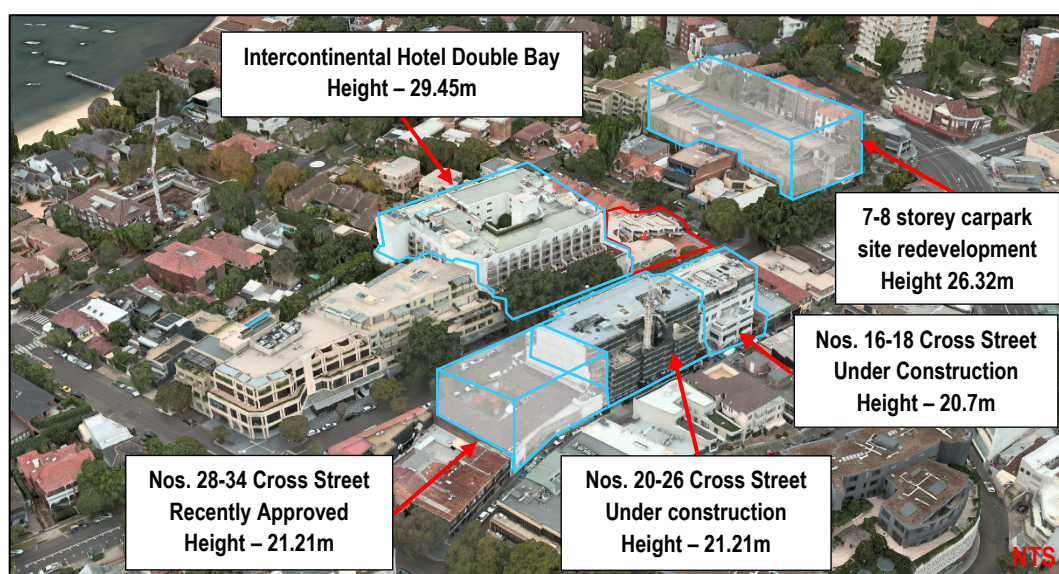
Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. Despite the additional height, the proposal is consistent with the desired density character of the area. The proposal provides a height, bulk and scale that is generally consistent with that buildings nearby. Consistency with the objectives of the LEP Height of Buildings development standard will now be discussed.

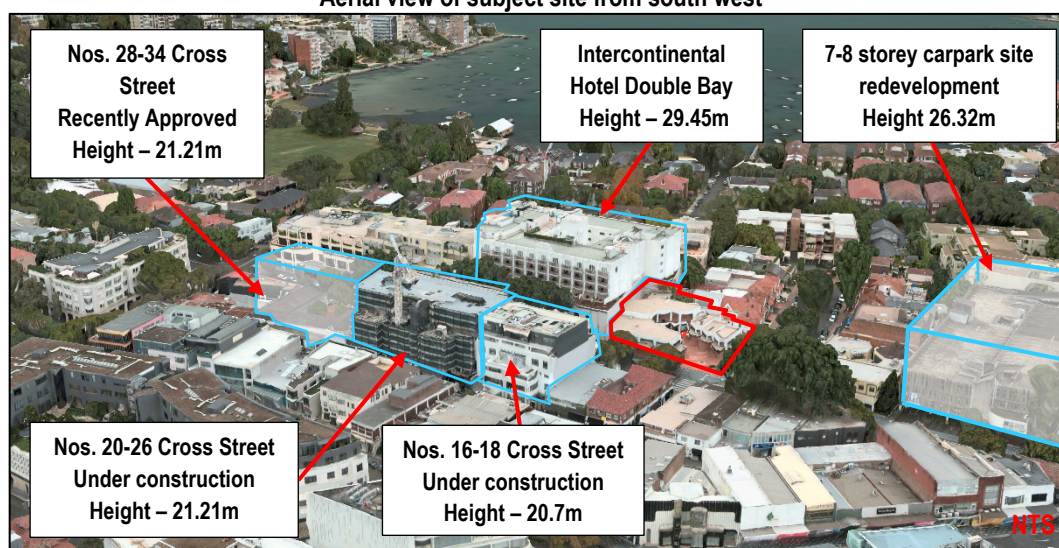
Height Objective (a): To establish building heights that are consistent with the desired future character of the neighbourhood,

Response: Cross Street and the Double Bay Centre are evolving towards an increased intensity of mixed use within this central, accessible and well-connected location. The existing building is inconsistent and disconnected with this desired future character.

The subject site is currently underdeveloped for its position as a corner site in Cross Street next to the Intercontinental Hotel Double Bay. The height and density of surrounding buildings compared to the existing built form on the subject site is displayed through **Figure 2**.



Aerial view of subject site from south west



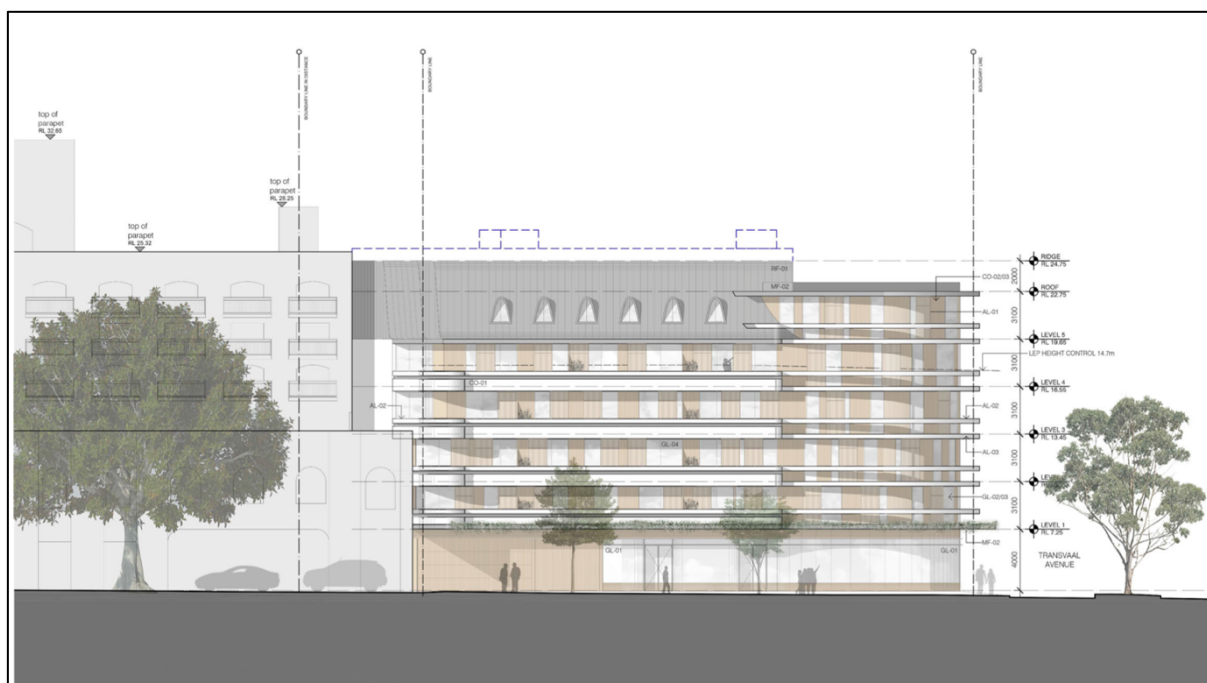
Aerial view of the subject site from the south east

Source: Woollahra 3D Mapping

Subject Site

Figure 2: Aerial View Showing Height of Development in the Double Bay Centre

The proposal has an appropriate height in the streetscape, as the mansard roof aligns with the adjoining hotel to the west (see **Figure 3** on the following page).



Source: Luigi Rosselli

Figure 3: South Elevation Showing Alignment with Adjoining Hotel

There have been a number of large new developments which have sought to provide floorplates that respond to the needs of the growing area and modern businesses. These are generally six storeys along Cross Street and contribute to the transitioning locality. This includes Nos. 16-18 Cross Street which is a six storey mixed use development with an approved height of 20.7m (see **Figure 4**).



APR Architects

**Figure 4: Approved Development at No. 16-18 Cross Street
(Height – 20.7m)**

Adjoining this property is Nos. 20-26 Cross Street, a large six storey mixed use development is currently under construction with an approved height of 21.21m (see **Figure 5**). The six storey proposal will be consistent with the heights of such development with a distinctive curved built form that will address the site's prominent corner location to enhance the local character.



Source: Bates Smart

Figure 5: Nos. 20-26 Cross Street mixed use development currently under construction (Height – 21.21m)

Adjoining Nos. 20-26 Cross Street is Nos. 28-34 Cross Street which has been approved by the Court for a six storey mixed use development with a height of 21.21m (see **Figure 6**).



Source: Bates Smart

Figure 6: Recently Approved Nos. 28-34 Cross Street mixed use development (Height – 21.21m)

The proposal has the potential to create economic multipliers and stimulate further renewal of the area in accordance with the desired future character.

Cross Street Character

Importantly, the proposal is consistent with the objectives relating to the Cross Street in Part D5.4.7 of Council's DCP. The relevant objectives of this area and our responses are as follows:

- Objective:** *Unify the street on the north side by building to the street boundary*
Response: The proposal builds to the Cross Street boundary to align with the adjoining hotel. The proposed mansard roof form will align with the height of the roof of the adjoining hotel to the west to provide a unified height line along this part of Cross Street. The proposed height which will allow six storeys, is compatible with Nos. 16-28, 20-26 and 28-34 Cross Street which are all six storey mixed use buildings.
- Objective:** *Retain street level connections to Knox Lane.*
Response: As the proposal is on the northern side of Cross Street and does not have a frontage to Knox Lane, this objective is not relevant.
- Objective:** *Allow 4 storeys on 50% of each site frontage to Knox Lane.*
Response: The proposal is on the northern side of Cross Street and does not have a frontage to Knox Lane, therefore, this objective is not relevant.
- Objective:** *Encourage arcades and courtyards on the south side that cater for outdoor eating and informal gathering.*
Response: As the proposal is on the northern side of Cross Street, this objective is not relevant. However, the proposal's mansard roof has been designed to maintain solar access to outdoor dining areas on the southern side of Cross Street.
- Objective:** *Strengthen built form on corner sites*
Response: The proposal is located on a corner site that is current occupied by a one-to-two-storey building that with little street presence. This existing height is not compatible with the scale of adjoining developments and creates a 'missing tooth' streetscape on the corner allotment.
- The proposal will replace this development with a notable, contemporary mixed-use building. The proposal will strengthen the built form and presence of the subject site through providing six storeys. Together with the cylindrical corner element, the height of the building provides a strong built form that cements this allotment as a gateway to this section of Cross Street.
- Indeed, the height is necessary improve the unity of Cross Street through aligning with the height of the adjoining hotel to the west (see **Figure 7**).



Source: Google Maps, 2020



Source: Luigi Rosselli

Figure 7: Existing and Proposed Built Form

Accordingly, in our opinion, the proposed height is consistent with the desired future character of the area and aligns with the desired future character objectives of the Cross Street Precinct.

Height Objective (b): To establish a transition in scale between zones to protect local amenity,

As the proposal is not in the vicinity of other zones, this objective is not relevant.

Height Objective (c): To minimise the loss of solar access to existing buildings and open space,

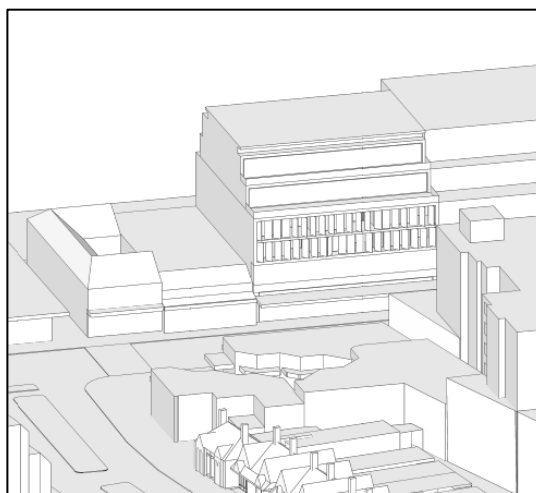
The proposed apartments within the areas of additional height have been designed to ensure maximum solar access to habitable room and private open space. This is supported in the Urban Design Report prepared by GMU, which states, as follows.

According to the compliance table (ADG Part 4 Amenity) prepared by the architects, 15 units out of 18 (83.3%) will receive 3-4 hours direct sunlight between 9am and 3pm in mid-winter exceeding the min. 2 hours requirement.

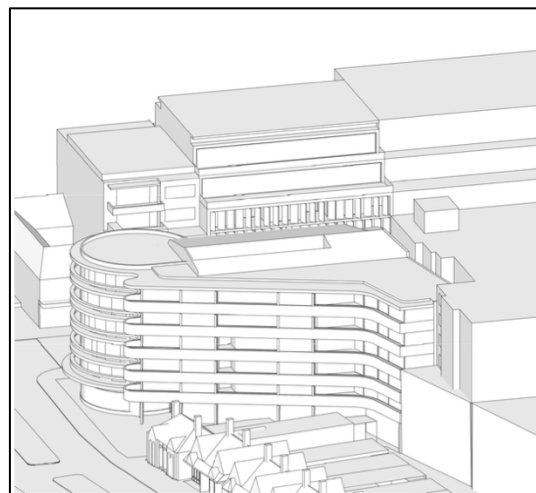
The proposed areas of additional height also maintain compliant levels of solar access to north facing windows and private open space of Nos. 14 & 16-18 Cross Street to the south. These sites have approvals for mixed use buildings with residential upper levels (see **Figure 8** on the following page).

While the proposal results in some additional shadow over portions of Cross Street and the footpath to the south, existing levels of solar access are generally retained from 2:00pm to 3:00pm (see **Figure 8** on the following page). Importantly, the area of additional height will not affect solar access to adjoining private open space.

Accordingly, the area of additional height does not significantly impact upon solar access to existing buildings and open space.

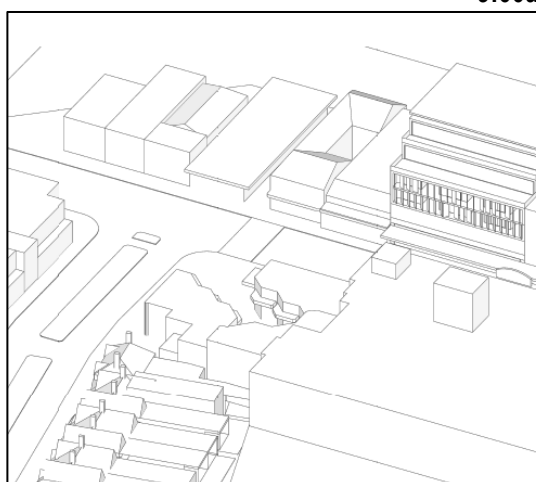


Existing

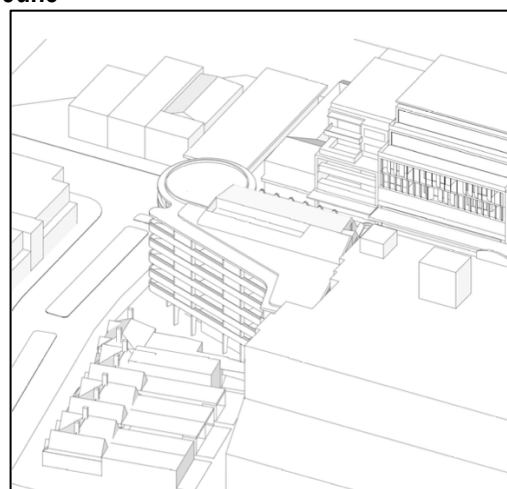


Proposed

9:00am on 21 June

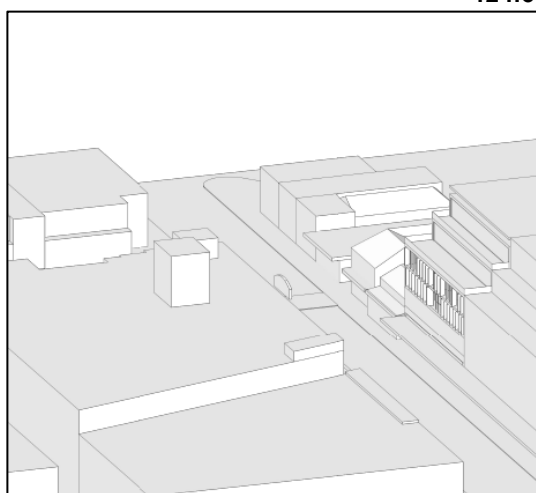


Existing

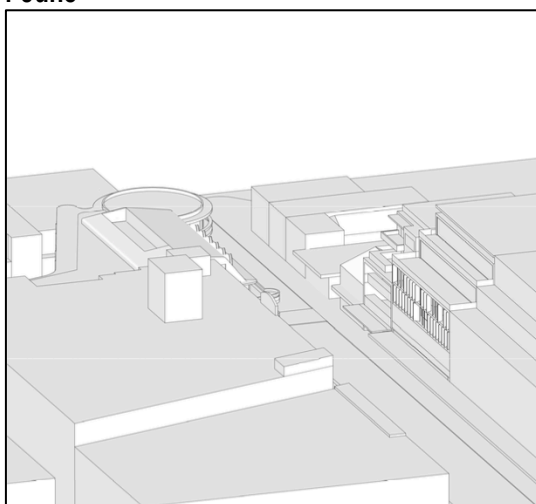


Proposed

12 noon on 21 June



Existing



Proposed

3:00pm on 21 June

Source: Luigi Rosselli Architects

Figure 8: Proposed Sun Eye Diagrams

Height Objective (d): To minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

Views

The proposal is likely to maintain existing view from nearby residential accommodation in the surrounding area. Due to the existing density of Cross Street and its surrounds, there are not likely to be significant views from residential developments within the immediate vicinity of the subject site that would be significantly affected by the proposal. Visual Analysis Advice has been prepared by Richard Lamb & Associates, which concludes, as follows.

The private domain visual catchment is limited to the south, south-west and south-east and is unlikely to have access to items that are highly valued in Tenacity terms.

The wider private domain visual catchment, that could have access to views beyond the site is limited and isolated to dwellings at high level in residential towers that are some distance from the site. Access to scenic features that are highly valued in Tenacity, are unlikely to significantly be affected by the visual effects of the proposed built form or view loss.

In the majority of private domain views the proposed built form would be visible in the context of the commercial-retail core of Double Bay including the Intercontinental Hotel of the same and greater height.

As a guide, the proposed built form is likely to generate an analogous level of view loss, as the adjacent Intercontinental Hotel, notwithstanding the subject site is smaller and built form proposed is lower overall in relation to it.

The proposed development would not generate any significant negative visual effects in relation to public domain views.

In summary in our opinion, potential private domain view loss is unlikely to be a significant issue and the planning proposal as reviewed, can be supported on this basis.

Consequently, the proposal is expected to maintain views from more distant residential accommodation, which would already have views over the Intercontinental Hotel.

Loss of Privacy and Visual Intrusion

The inclusion of the additional floor above the height control is unlikely to create additional noise impacts given the density of surrounding business uses and noise associated with the Double Bay Centre.

The proposal has retail uses on the ground floor and all residential apartments on the upper levels. Private open space is oriented towards Cross Street and Transvaal Avenue, away from the 'Intercontinental Hotel Double Bay' to the west. Importantly, as the areas of additional height are higher than residential properties on Transvaal Avenue, residents would look only onto the roofs of these buildings.

Overshadowing

As previously discussed, the proposal provides compliant levels of solar access to north-facing windows or private open space of adjoining development.

Height Objective (e): To protect the amenity of the public domain by providing public views of the harbour and surrounding areas

As noted in Dr Richard Lamb's comments (above), the site is not located in an area with recognised views from the public domain to the harbour or surrounding areas. In any event, the height is consistent with nearby developments. The proposed additional height is therefore unlikely to affect views from the public domain.

Accordingly, although the proposal will exceed the height control, it remains consistent with the objectives of the standards, and will provide a consistent built form within the streetscape whilst maintaining amenity.

Test 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

In our opinion, the underlying purpose of the development standard is to present a building that is compatible with the height, context and character of the locality whilst preserving the amenity of adjoining properties.

The subject site is currently underdeveloped, and the proposal replaces the existing one-to-two-storey building with a new mixed-use development of an appropriate height that responds to the desired future character of the area. There is an opportunity to provide an iconic building on a corner site with additional commercial and residential floorspace within the rapidly developing Double Bay Centre. Enforcing strict compliance would prevent the building from reaching its potential, which is inconsistent with the object of the *Environmental Planning and Assessment Act 1979* (EPA Act) to promote orderly and economic development.

Additionally, through the skilful design proposed, this additional floorspace and height can be accommodated on the site without unreasonably affecting the amenity of surrounding properties and the public domain

The proposal satisfies the relevant objectives of the Height of Buildings development standard and the desired future character objectives of Cross Street. Strict compliance would require a shorter building that is not compatible with the adjoining existing and approved properties to the west at the 'Intercontinental Hotel Double Bay' and to the south at Nos. 14 & 16-18 Cross Street. Additionally, requiring compliance would limit the architectural expression of the building to the detriment of the evolving character of the Double Bay Centre.

Accordingly, the proposal is considered to be appropriate as the works are consistent with the height and character of nearby development and has been carefully designed to maintain amenity for surrounding developments.

5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

The proposal is permissible in the B2 Local Centre Zone; is consistent with the zone and Double Bay Centre objectives; the desired future character objectives of the Cross Street Precinct; and with the surrounding density and scale in the area. The proposal satisfies a number of the 'unreasonable and unnecessary' tests established by the Court in *Wehbe*.

This report demonstrates that the proposed additional height is compatible with desired future character the area. The desired future character of this area of Double Bay was discussed in the Judgement for *SJD*, as Clay AC notes at [68]:

The desired future character in my opinion must take into account the form of the buildings to the east [Nos. 16-18 & 20-26 Cross Street] which the Council approved under effectively the same controls as present. Those buildings exceed the height and floor space ratio controls. As the Applicant pointed out in submissions, this is not a case where there is an adjacent development approved and constructed many years ago which sits as an anomaly in the street. The developments under construction represent the recently expressed attitude of the Respondent [Council] to the controls and what is desired in this part of Cross Street.

As noted earlier, this approach was confirmed in the Appeal by Preston CJ, that the desired future character should be informed by the nearby and future development, and not limited by the development standards. Indeed, the Chief Judge linked this to clause 4.6 and stated at [60], inter alia:

...the application of cl 4.6 of WLEP to the height and FSR development standards supports a broader not narrower construction of the term 'desired future character used in those development standards. Clause 4.6 provides an appropriate degree of flexibility in applying certain development standards to particular development (cl 4.6(1)(a)). However, cl 4.6 does not apply to a development standard that is expressly excluded from the operation of the clause (cl 4.6(2)). Neither the height of buildings development standard in cl 4.3 nor the FSR development standard in cl 4.4 is expressly excluded from the operation of cl 4.6. This contemplates that development that contravenes the height and development standards may be approved under cl 4.6.

The additional height is consistent with that of the approved developments at Nos. 16-18, 20-26 and 28-34 Cross Street. Additionally, proposed contemporary design will contribute to the evolving character of the Double Bay Centre and will complement the approved multi-storey mixed use developments opposite the subject site. The Urban Design Report prepared by GMU describes the evolving character of Double Bay and the abandonment of Council's controls, stating, '...even if not envisaged by the existing controls'.

Certainly, a development that complies with the 14.7m LEP height limit would result in a development of a scale and form that is not compatible with the desired future character of the area. *In SJD*, Clay AC quotes the applicant [66] who notes:

A complying development would be discordant in the street he says because the height of development would be reduced from the east to the subject site then increase to the Site to the west when it is redeveloped.

Similarly, the developments opposite to the subject site at No. 10, 12 and 14 are very likely to be redeveloped to a similar height and scale as the six storey developments along the southern side of Cross Street. This, along with the existing scale and mass of the 'Intercontinental Hotel Double Bay' would overpower a compliant development on the subject site, which would result in a negative streetscape outcome for this area of Cross Street.

The proposal provides a strong built form that emphasises the subject site's corner position. Additionally, it has been demonstrated that the areas of additional height maintain amenity for joining and surrounding properties through providing compliant levels of solar access and maintaining privacy. The proposed additional height will also maintain the amenity and heritage values of the adjoining Transvaal Heritage Conservation Area through the ground floor layout and design. This is noted in the Urban Design Report, by GMU, which states, inter alia:

The proposed 'peeling back' of the built form offers increased curtilage area to the heritage precinct whilst shielding it from the less attractive side walls of the existing hotel. The activated north facing new public plaza provides desired separation and curtilage to the conservation area whilst also encouraging the integration of the adjacent terrace and the existing eating precinct to the east of Transvaal Avenue.

Through its contemporary and thoughtful design that integrates seamlessly with the public domain, the proposal will contribute to the revitalisation of the Double Bay Area. The proposal will utilise the unique cylindrical architecture to create a landmark building on the corner allotment, designed by the renowned architect, Luigi Rosselli Architects.

As detailed, strict compliance with the development standard would not result in a better outcome for development. The proposed height exceedance facilitates the orderly and economic use by replacing the undeveloped site's existing building with a development of a scale that is compatible with surrounding development.

The proposal improves the site in accordance with Object (c) of the Environmental Planning and Assessment Act 1979, to "promote the orderly and economic use and development of land". The proposal is a contemporary and intricately designed response to a corner site in a well-connected and accessible

location. Importantly, the exceptional quality design has potential to stimulate further renewal in the area. This contributes to the evolving character of the Double Bay Centre. 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. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the Consent Authority's consideration of this Clause 4.6 variation request. It provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out*

The applicant submits that the consent authority can be satisfied that each of the requirements of Clause 4.6(4)(a), have been met for the reasons set out in this request, and having regard to the site and locality.

B2 Local Centre Zone Objectives

In our opinion, the proposal achieves the objective of the Height of Building Development Standard, as already demonstrated; and the B2 Local Centre Zone, as discussed below:

Objective: *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Response: The ground floor has retail/business tenancies of contemporary design which will enhance the range of services in the area.

Objective: *To encourage employment opportunities in accessible locations.*

Response: Retail business tenancies will be at grade with lift access to basement parking and will offer employment opportunities close to public transport.

Objective: *To maximise public transport patronage and encourage walking and cycling.*

Response: The proposal is in a highly accessible location, facing both Cross Street and Transvaal Avenue, close to public transport routes including bus, train and ferry services.

Objective: *To attract new business and commercial opportunities.*

Response: The proposed height contributes to a quality building on a corner location that will be highly attractive for businesses and shops.

Objective: *To provide active ground floor uses to create vibrant centres.*

Response: Retail tenancies within a new contemporary mixed use building will provide active frontages to both streets at the ground floor level.

Objective: *To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.*

Response: The proposal's height and scale align with the adjoining development. This allows the provision of two- and three-bedroom dwellings compatible with the high standard of amenity of nearby mixed use development.

Objective: *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

Response: The proposal's height will be consistent with approved and potential future developments in Cross Street to the south and the existing hotel to the west. The proposed plaza will provide a transition to the adjoining Transvaal Avenue shops of the heritage conservation area.

Double Bay Centre Objectives

The proposal also achieves the objectives of the Double Bay Centre, as discussed below.

Objective 1: *To retain and enhance through block connections which allow pedestrians to move freely within the Double Bay Centre.*

Response: While the proposal does not include through-block connections, as the proposal is on a corner allotment on the intersection of Cross Street and Transvaal Avenue, pedestrians can move freely throughout the centre. The proposal will also widen the footpath to provide a more open public domain.

Objective 2: *To develop the particular qualities of different parts of the Double Bay Centre.*

Response: Cross Street is evolving into a centre of high quality contemporary developments, with the construction and approval of various six storey buildings along the street. The proposal will replace the existing low-rise building with a thoughtful development that at the ridge, aligns with the height of the adjoining hotel and has a street wall that is compatible with development on the southern side of Cross Street. This will contribute to the evolving contemporary quality of this part of the Double Bay Centre.

Objective 3: *To encourage a diverse mix of uses in the Double Bay Centre and maintain retail uses at ground level.*

Response: The proposal is a six storey mixed use development that includes retail tenancies at the ground level to both frontages and residential above.

Objective 4: *To conserve and enhance the visual and environmental amenity of all buildings and places of heritage significance in the Double Bay Centre*

Response: As noted, the proposal is not a heritage item, is not in a heritage conservation area and is not in the vicinity of a heritage item, however, does adjoin the Transvaal Heritage Conservation Area (HCA). In designing the piazza, the proposal will provide a compliant northern setback to the Transvaal HCA, and maintains existing solar access to the heritage area.

The location of the proposal's additional height is also above the commercial properties on Transvaal Avenue and will maintain visual privacy to these buildings. . This is supported by the Heritage Impact Statement prepared by John Oultram Heritage & Design, which is stated, as follows.

The proposed design is well articulated and scaled and uses appropriate materials and details. It will revitalise the site and provide for a high quality development in a prominent location without impacting on the Transvaal Avenue Heritage Conservation Area.

Objective 5: *To enhance the way development contributes to a sense of place.*

Response: The proposal will replace the existing low-rise commercial building with a height that will strengthens the built form of the site as a corner development. This will contribute to the evolving character of Cross Street as a contemporary and high quality centre.

The proposal has ground floor retail tenancies facing both Cross Street and Transvaal Avenue, continuous awning, and seating, and open spaces, to encourage pedestrian activity. This is supported in the Urban Design Report, prepared by GMU which states, inter alia:

The proposed development provides the opportunity to strengthen the 'sense of place' for the centre. It will enhance the existing public domain with renewed vitality to the intersection of Cross Street and Transvaal Avenue. The carefully designed built form and internal layout will provide high- quality amenity outcomes for future residents and minimal amenity and shadow impacts to the surrounding properties.

The proposed maximum scale is comparable with the existing and recently approved development within the centre. It will provide increased residential density and local employment opportunities to support the balanced development of the area and the sculpted curvilinear built form and increased setbacks to the conservation area will create an interesting visual marker to Cross Street without dominating the adjacent lower scale development.

Objective 6: *To ensure a high standard of architectural and landscape design in any new developments within the Double Bay Centre.*

Response: The proposal is a magnificent contemporary development with a signature curved element which strengthen its built form on the corner. Landscape elements will be provided along the Transvaal Street frontage on the ground floor and as spill over planting along the eastern elevation's balconies.

Objective 7: *To preserve and enhance the diversity of uses in the Double Bay Centre.*

Response: The shop-top housing proposal allows retail or business uses at ground floor and in-demand residential accommodation above, which contributes to the diversity of uses in the Double Bay Centre.

Objective 8: *To ensure that new development is compatible with the existing built form, and streetscape and village character.*

Response: As previously demonstrated, the proposed height is compatible with the scale and built form of six storey mixed use developments currently under construction at Nos. 16-18, 20-26 and 28-34 Cross Street. The proposal will present a contemporary six storey development that is compatible with the evolving character of the Cross Street area.

Objective 9: *To encourage view sharing and individual privacy.*

Response: As noted in the Dr Richard Lamb view letter, there is little likelihood of views in this location. The mansard roof hides the additional height from Cross Street and the limited openings within that roof form will maintain privacy to shop top developments on the other side of Cross Street and give a Parisian appearance to the streetscape. This curved element is further from nearby residential development and therefore is unlikely to affect individual privacy. The northern elevation faces commercial areas, and there are no openings to the hotel wall near the site which would affect privacy. Other uses nearby are commercial, and therefore not affected in terms of privacy.

Objective 10: *To ensure new development is designed to be compatible with the heritage significance of listed heritage*

Response: The subject site is not within the direct vicinity of any individually listed heritage items, however, has maximised setbacks from the areas of additional height to the Transvaal Heritage Conservation area. This provides additional breathing space between the earlier development and the evolving character of the area. The relationship of the proposal with the Transvaal Heritage Conservation Area has been outlined in the Heritage Impact Statement prepared by John Oultram Heritage & Design, stating as follows.

....the curvilinear nature of the plan and the formation of the plaza along the Transvaal Avenue frontage are strong positives in heritage terms as the building engages with the shops along Transvaal Avenue rather than presenting a blank wall close to the former houses (as is the current situation).

Accordingly, the proposed additional height addressing Transvaal Avenue is compatible with the streetscape values of the Heritage Conservation Area.

As demonstrated in Test 1, the proposal also satisfies the desired future character objectives of the Cross Street Precinct. From this, we consider the proposal is in the public interest and should be supported.

7. **Clauses 4.6(4)(b) and 4.6(5) Requirements**

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the Consent Authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each Consent Authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. While the proposal exceeds the development standard by over 10%, the Planning Circular provides for the Local Planning Panel to assume concurrence.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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 Secretary before granting concurrence.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The additional height will enhance the amenity and functionality of the proposed shop-top housing development and maintaining streetscape and the amenity of neighbouring properties.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the additional height, the proposal will appear consistent in the streetscape and align with the height and scale of existing development under construction on Cross Street. The increase height will also allow the contemporary development to enhance the quality of the Cross Street streetscape and the Double Bay Centre as a whole.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The additional height contributes to a quality development which is consistent with the B2 Local Centre and Double Bay Centre objectives; and the Cross Street Precinct desired future character objectives.

8. Conclusion

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 1** on the following pages).

In our opinion the Consent Authority can be satisfied the proposed development will be in the public interest because it is consistent with the objectives of the standard and the development objectives of the B2 Local Centre Zone pursuant to the LEP; and the Double Bay Centre and Cross Street Precinct pursuant to the DCP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Requirement	Section	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.4 Height of Buildings	
12	What is the control	1 & 2	14.7m	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	4	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	4.1	The proposal is consistent with Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> • The objectives of the standard are achieved notwithstanding the non-compliance with the standard; • The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> a) The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. b) The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	4.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> • The proposed height facilitates a development consistent with the planning objectives of the area and density of the B2 Local Centre Zone; • The proposed alterations and additions above the height control will be compatible with nearby and future development; • The increased height will improve the capacity and potential of the site, whilst maintaining amenity for nearby development; and • The proposal improves the site in accordance with Object (c) of the Environmental Planning and Assessment Act 1979, to "promote the orderly and economic use and development of land". 	YES
26-27	2nd Positive Opinion –	5	The proposed development is consistent with the objectives of the height standard as addressed under Test 1 of <i>Wehbe</i> . The proposal is also consistent with the objectives of the B2 Local Centre Zone;	YES

	That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.		the Double Bay Centre; and the desired future character objectives of the Cross Street precinct.	
28-29	Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.	6	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES

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