

URBIS

CLAUSE 4.6 VARIATION: HEIGHT OF BUILDING

Amending DA - 122 Herring Rd, Macquarie Park

Prepared for
TOGA
18 May 2023

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director John Wynne
Senior Consultant Jack Kersten
Project Code P%39577
Report Number Draft V1 for client review November 2022
 Final_November 2022
 Final_Employment Zone Reform Update_May 2023

**Urbis acknowledges the important contribution that
Aboriginal and Torres Strait Islander people make in
creating a strong and vibrant Australian society.**

**We acknowledge, in each of our offices, the Traditional
Owners on whose land we stand.**

All information supplied to Urbis in order to conduct this research has been treated in the strictest confidence. It shall only be used in this context and shall not be made available to third parties without client authorisation. Confidential information has been stored securely and data provided by respondents, as well as their identity, has been treated in the strictest confidence and all assurance given to respondents have been and shall be fulfilled.

© Urbis Pty Ltd
50 105 256 228

All Rights Reserved. No material may be reproduced without prior permission.

You must read the important disclaimer appearing within the body of this report.

urbis.com.au

CONTENTS

1.	Introduction	1
2.	Site Context	2
2.1.	Site Description	2
2.2.	Existing Development	3
2.3.	Locality Context	3
3.	Project History	6
3.1.	Concept DA Approval History	6
3.2.	Council and Design Review Panel Pre-Lodgement Feedback.....	7
4.	Proposed Development	9
4.1.	Summary of Proposed Development.....	9
4.2.	Reasons for Amendments to Approved Concept Approval.....	11
5.	Variation of Height of Building Standard.....	14
5.1.	Development Standard	14
5.2.	Extent of Variation to Height of Building	15
6.	Relevant Assessment Framework.....	17
7.	Assessment of Clause 4.6 Variation	18
7.1.	Is the Planning Control a Development Standard that can be Varied? – Clause 4.6(2).....	18
7.2.	Is Compliance with the Development Standard Unreasonable or Unnecessary in the Circumstances of the Case? – Clause 4.6(3)(A)	18
7.3.	Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard? – Clause 4.6(3)(B).....	22
7.4.	Has the Written Request Adequately Addressed the Matters in Sub-Clause (3)? – Clause 4.6(4)(A)(I)	22
7.5.	Is the Proposed Development in the Public Interest? – Clause 4.6(4)(B)(II).....	22
7.6.	Has the Concurrence of the Planning Secretary Been Obtained? – Clause 4.6(4)(B) and Clause 4.6(5)	24
8.	Conclusion.....	25
	Disclaimer.....	26
	Figure 1 Aerial Photograph.....	2
	Figure 2 Built and Approved, Surrounding Developments	4
	Figure 3 Approved Concept DA LDA/2019/0264 – Landscape Concept Site Plan.....	6
	Figure 4 Stamped Concept Elevations	7
	Figure 5 Approved and Amended Concept Plan	10
	Figure 6 3D Render of Proposed Development	11
	Figure 7 Approved Concept Envelope and Proposed Envelope Comparison	12
	Figure 8 Proposed Stage 1 West Elevation.....	13
	Figure 9 Maximum Building Height.....	14
	Figure 10 Height Plane Diagram Showing Height Variation (Blue: 45m RLEP 2014 height plane) (extract).....	15
	Figure 11 Proposed Height Variation in Elevation and Section View.....	16
	Figure 12 Shadowing Diagrams Comparing Proposed (Blue) and Approved Envelope (Orange Outline)	20
	Picture 1 Neue Apartments to the South-West, (street view looking south from Herring Road).....	4
	Picture 2 Macquarie Park Village to the South-West, (aerial view looking south-west).....	4

Picture 3 Midtown at Macpark to the South (aerial view looking south-west)	4
Picture 4 120 Herring Road to the South-West (street view looking north from Herring Road).....	5
Picture 5 1 & 2 Saunders Close to the North (street view looking north from Herring Road	5
Picture 6 Approved Concept Approval Layout (LDA2019/0264)	10
Picture 7 Proposed amended concept (this Amending DA).....	10
Picture 8 Proposed Amended Site A Building Envelope South-West Elevation (extract) – Stage 1 proposal in black, approved envelope outlined in blue and 45m height line shown in red	16
Picture 9 Proposed Stage 1 Works Section AA Plan (extract).....	16
Picture 10 Winter Solstice 9am	20
Picture 11 Winter Solstice 10am	20
Picture 12 Winter Solstice 11am	21
Picture 13 Winter Solstice 12pm	21
Picture 14 Winter Solstice 1pm	21
Picture 15 Winter Solstice 2pm	21
Table 1 Proposed height variations	15
Table 2 Assessment of Consistency with Clause 4.3 Objectives.....	19
Table 3 Assessment of Compliance with Land Use Zone Objectives	23

1. INTRODUCTION

This Clause 4.6 Variation Request (**the Request**) has been prepared on behalf of TOGA (**the applicant**) and accompanies an Amending Development Application (**Amending DA**) for a mixed-use development at 122 Herring Road, Macquarie Park (**the site**).

On 24 November 2020 a Concept DA (**masterplan**) LDA2019/0264 was granted consent by the Sydney North Planning Panel for a mixed-use development at the site across two development areas referred to as 'Site A' and 'Site B', allowing a total GFA of 60,633sqm.

The proposed Amending DA seeks consent for an amended concept envelope approval for the overall site development, and approval for the detailed development of Site A including a portion of the new Road 3, referred to as Stage 1

The Request seeks an exception from the 45-metre maximum 'Height of Building' (**HOB**) prescribed for the site under clause 4.3 of the Ryde Local Environmental Plan 2014 (**RLEP 2014**). The variation to the proposed maximum building height arises predominantly by small increases in the proposed floor to ceiling heights of the podium and towers enhancing amenity for occupants and addressing new construction requirements of the Design and Building Practitioners Act 2020 (DBP Act).

The variation request is made pursuant to clause 4.6 of RLEP 2014 and should be read in conjunction with the Statement of Environmental Effects (**SEE**) prepared by Urbis and supporting appendices.

Following a request from Council (via email) dated 17 May 2023, this variation request has been updated to align with the new land use zoning and objectives for the MU1 zone resulting from the recent Employment Zone Reform implemented by the Department of Planning and Environment (**DPE**).

The following sections of the report include:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** summary of the project's history including the original Concept DA approval and Council Pre-DA feedback.
- **Section 4:** brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 5:** identification of the development standard, which is proposed to be varied, including the extent of the contravention.
- **Section 6:** outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 7:** detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 8:** summary and conclusion.

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The Morling College site is known as 122 Herring Road, Macquarie Park and is legally described as Lot 41 in Deposited Plan 1247523. The site has a total area of 27,307m² (2.7ha) The site has a total area of 27,307m².

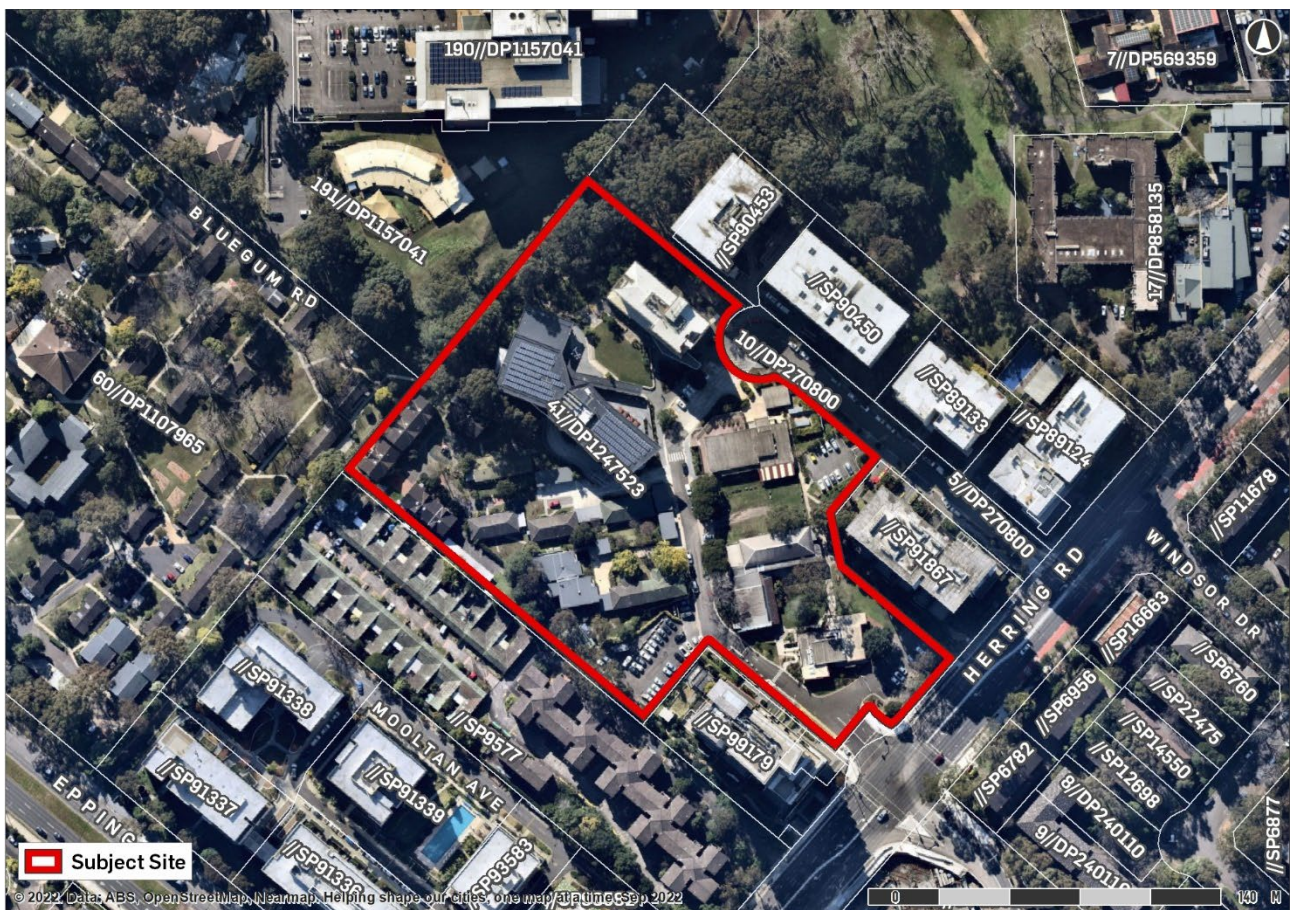
The site fronts Herring Road and has a maximum depth of around 230m, extending from Herring Road back to Kikkiya Creek (also known as University Creek) at the rear of the property. The site also has a frontage to Saunders Close, a short cul-de-sac off Herring Road to the north which serves as the primary vehicular entry to the site.

A portion of land at the site's intersection with Herring Road, identified as Lot 46 in DP 1247523 (126R Herring Road, Macquarie Park), previously formed part of the subject site. In accordance with Transport for NSW (TfNSW) requirements, this land has been dedicated for Herring Road intersection upgrade works and no longer forms part of the site the subject of this DA.

The site falls from its south-eastern corner on the Herring Road frontage to the north and rear of the boundary (near Kikkiya Creek), with a fall of approximately 10m.

The site contains the vegetated Kikkiya Creek riparian corridor along the northern property boundary as well as remnant and planted mature trees sparsely distributed across the site.

Figure 1 Aerial Photograph



2.2. EXISTING DEVELOPMENT

The site is currently developed and used for the purposes of the Morling College Baptist Theological college campus. This comprises a number of buildings including the recently constructed Residential College and the Ministry and Learning Centre (MALC) in the north-western portion of the site, administrative and community service buildings (offices) in the central-eastern portions (including the recently altered Eldridge and Gilbert Wright Buildings). There are also various 1-2 storey College residences located in the western portion of the site that currently provide affordable / subsidised residential accommodation for students and families. These residences are important to the ongoing operations and housing opportunities provided by Morling College and which are to remain during the construction and operation of the proposed Stage 1 development.

All buildings on site are serviced by an internal access road which runs from Herring Road, through the site and connecting too Saunders Close.

2.3. LOCALITY CONTEXT

The site is located approximately 15km north-west of the Sydney CBD and 12km from Parramatta within the Macquarie Park Strategic Centre. Macquarie Park has been identified by the Greater Sydney Commission as a Strategic Centre and health and education precinct. It comprises the largest non-CBD office market in Australia and has grown as a major centre for knowledge-intensive employment.

Macquarie Park is continuing to undergo significant change with recent residential, mixed-use developments, new commercial developments and light industrial developments within the surrounding MU1 Mixed Use area, as well as the broader E2 Commercial Centre and E3 Productivity Support zones.

The site is situated less than 500m from the Macquarie town centre / shopping centre and University train station, which services the North Shore line. The line was upgraded to Sydney Metro in late 2018 as part of the State governments Sydney Metro Northwest project. Local and regional bus routes operate throughout the area along Herring Road and Epping Road, and various bus stops are located in front of the site along Herring Road. Pedestrian and cycleway networks are also available in the Macquarie Park locality.

The surrounding development within the area has recently undergone substantial growth in accordance with the applicable strategic priorities, the area's proximity to major public infrastructure and services and subsequently, the relevant built form provisions and zoning applicable to the area. The recently approved and constructed development surrounding the site has been built to a scale similar to that approved under LDA2019/0264 and this development proposal. The scale of recent development in the area is demonstrated in **Figure 2** below and the immediately surrounding development is detailed in the points below.

- **North:** Neighbouring the site on the northern property border is 1 Saunders Close (see **Picture 9** below) as well as Macquarie Central, a master planned development comprised of five residential buildings with 618 apartments. These buildings are generally consistent in terms of height and scale to that of the approved masterplan under LDA2019/0264. Further to the north-east of the site is Macquarie University metro station and Macquarie Centre.
- **East:** To the east of the site is Herring Road. On the opposite side of Herring Road are residential areas generally characterised by 3 and 4 storey walk-up apartment buildings and townhouses generally constructed in the last 20 to 30 years. Further to the east of the site is the Macquarie Park commercial centre and business park area.
- **South:** Immediately south of the site is 120 Herring Road, a 23-storey mixed-use building approved by Ryde Council in September 2016 (LDA2016/0020) (see **Picture 8**). Further south of the site are similarly scaled developments at the Macquarie Park Village and Neue Apartments (at 139 Herring Road, see **Picture 5**). The Macquarie Park Village is a residential mixed-use development incorporating 640 residential apartments in seven buildings and mixed-use retail/commercial space (see **Picture 6** below).

Further south-east of the site is a mixed-use residential development comprising seven buildings of comparable scale, identified as the 'Midtown at Macpark' (see **Picture 7** below).

- **West:** Adjoining part of the western property boundary of the site, and on the other side of Kikkiya Creek is the Baptist Care Willandra Village Retirement Complex, which is operated by Baptist Care Services and includes a number of single and two storey buildings. The Macquarie University is situated to the north-west of the site.

Figure 2 Built and Approved, Surrounding Developments



Picture 1 Neue Apartments to the South-West, (street view looking south from Herring Road)



Picture 2 Macquarie Park Village to the South-West, (aerial view looking south-west)



Picture 3 Midtown at Macpark to the South (aerial view looking south-west)



Picture 4 120 Herring Road to the South-West (street view looking north from Herring Road)

Source: Google



Picture 5 1 & 2 Saunders Close to the North (street view looking north from Herring Road)

Source: Google

This part of Macquarie Park suburb is occupied by a number of recent large scale mixed-use commercial and residential developments which are compatible with the scale of the amended concept masterplan building envelopes proposed, and in many cases are of larger scale.

3. PROJECT HISTORY

3.1. CONCEPT DA APPROVAL HISTORY

On 24 November 2020 the Sydney North Planning Panel granted development consent for LDA2019/0264 which provided concept planning approval for mixed use commercial, retail and residential development at the site across two development precincts identified as 'Site A' and 'Site B' allowing a total GFA of 60,633sqm. Key components of the concept approval included the following:

- Site A (Buildings 1 and 2) includes the provision of two mixed-used envelopes inclusive of two 14 storey residential building forms above a varied 3 to 5 storey activated commercial mixed use podium to Herring Road extending to the rear of 1 Saunders close. This also includes the provision of a central public domain or plaza area to the north of the new road corridor.
- Site B (Buildings 3, 4 and 5) includes the provision of three 14 storey residential building envelopes along the south-western boundary of the site.
- Provision of a new 20m wide road corridor through the site in an east-west direction.

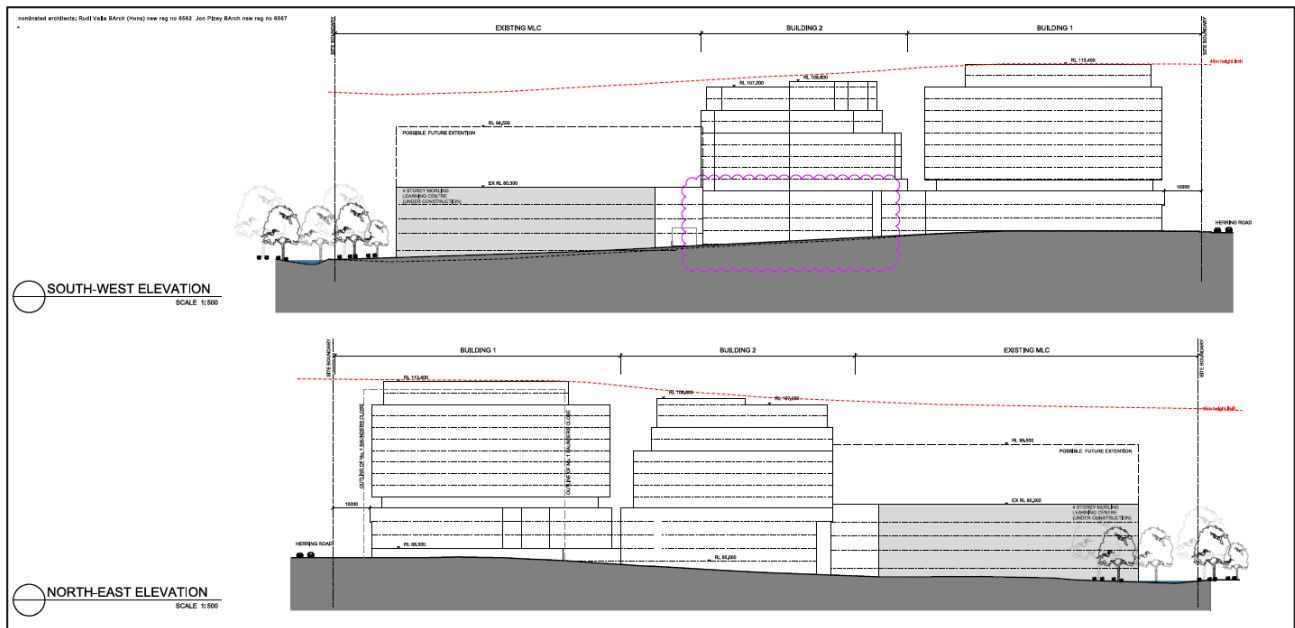
The site layout including the development precincts and buildings are identified in **Figure 4** below. As demonstrated in **Figure 5** below, the approved concept envelope was approved for 13 to 14 storey towers built up to the maximum building height plane (45m) with no allowance for lift overruns and stair cores.

Figure 3 Approved Concept DA LDA/2019/0264 – Landscape Concept Site Plan



Source: DEM – as marked by Urbis

Figure 4 Stamped Concept Elevations



3.2. COUNCIL AND DESIGN REVIEW PANEL PRE-LODGE MENT FEEDBACK

A pre-lodgement meeting was held with Council officers in the planning assessments team and the Urban Design Review Panel (UDRP) on 11 August 2022. Council and the UDRP comments have been considered in finalising the proposed development plans. The comments raised by council and the UDRP and the relevant responses is provided within the SEE as well as the response table at **Appendix D**.

In relation to the proposed building height, UDRP has provided in principle support of the building height strategy as presented on the 11 August 2022 meeting.

'Building heights appear to be generally compliant with the permissible height plane with the exception of lift overruns and stairs. Tower 1A at Herring Road includes a proposed open perimeter wall at level 14 above the height plane. The Panel offers in principle support to this proposed building height strategy.'

Following the pre-lodgement meeting, the raised wall at the top of Building 1A has been reduced to a parapet reflecting Council's advice. Otherwise, the building heights and the proposed variation to the permissible height plane has been generally maintained from the revision provided to UDRP for review on 11 August 2022.

Council's commentary from the 11 August 2022 meeting included the following:

'Clause 4.3 of the RLEP 2014 does apply to the site, with a maximum permitted height of 45m applies to the site. It's understood that the proposal seeks to breach the maximum height limit across all three towers varying in extent of breach. The height exceedance varies from 3.3% to 13.1% across the site as illustrated in Figure 3.'

The future application will require to be supported by a clause 4.6 variation request justifying the breach. Council may be able to support minor breaches associated with stairs and lift overrun exceedances, however Building 1A appears to have an entire floor (Rooftop open space) elevated above the 45m height control.'

Council recommends for the Applicant to revisit the design of building 1A rooftop open space, to try and minimise the extent of the height exceedance or sufficiently demonstrate that the breach is acceptable through a clause 4.6 variation request.'

As detailed in Section 5.2 of this variation request, the revised building design has been refined to minimise exceedance of the maximum permitted height to 9%. Consistent with Council's recommendation, the design of the buildings have been updated to remove any usable floorspace above the height control and minimise

the extent of the height exceedance while facilitating the necessary infrastructure, servicing and access elements for the building.

This Clause 4.6 variation demonstrates that the breach of the variation request will not result in any adverse environmental impacts and is acceptable. The following sections of the variation request demonstrate that Council's commentary and requirements are appropriately addressed and the exceedance of the HoB control is appropriately justified.

4. PROPOSED DEVELOPMENT

4.1. SUMMARY OF PROPOSED DEVELOPMENT

This Clause 4.6 Variation Request has been prepared to accompany an Amending DA which seeks consent for two components, being:

- An amended concept masterplan approval for the overall site establishing building envelope configuration, site access and layout and development staging for the future development.
- Detailed development of Stage 1 as it relates to 'Site A' of the masterplan which is located in the northern and eastern portions of the site. The extent of development contained in the Stage 1 area is outlined in blue in **Figure 6** below.

A detailed description of the proposed development is provided in the Statement of Environmental Effects (**SEE**) prepared by Urbis. The proposal is supported with architectural, engineering, landscape plans and other technical reports.

A summary of the key features of the proposed development is provided below:

- **Vision**

The overall vision is to integrate existing educational uses and residences associated with Morling College into a vibrant setting with new residential, commercial and retail uses located adjacent to new streets and embellished public domain areas.

- **Amended Concept Proposal**

The Amending DA seeks consent for revised concept approval (LDA2019/0264) reflecting the proposed detailed Stage 1 development. The proposed Concept approval component of the Amending DA is altered to reflect the layout of the podium, towers and public domain in the Stage 1 area as demonstrated in **Figure 6** below.

- **Stage 1 Works**

The Stage 1 component of the proposed Amending DA seeks approval for the demolition of existing buildings, construction of a two-storey mixed use podium, three residential towers as well as the construction of the supporting open space, basement carpark and the partial construction of new Road 3.

- The key quantum figures of the intended development to be reflected in both the concept envelope and Stage 1 works is as follows:

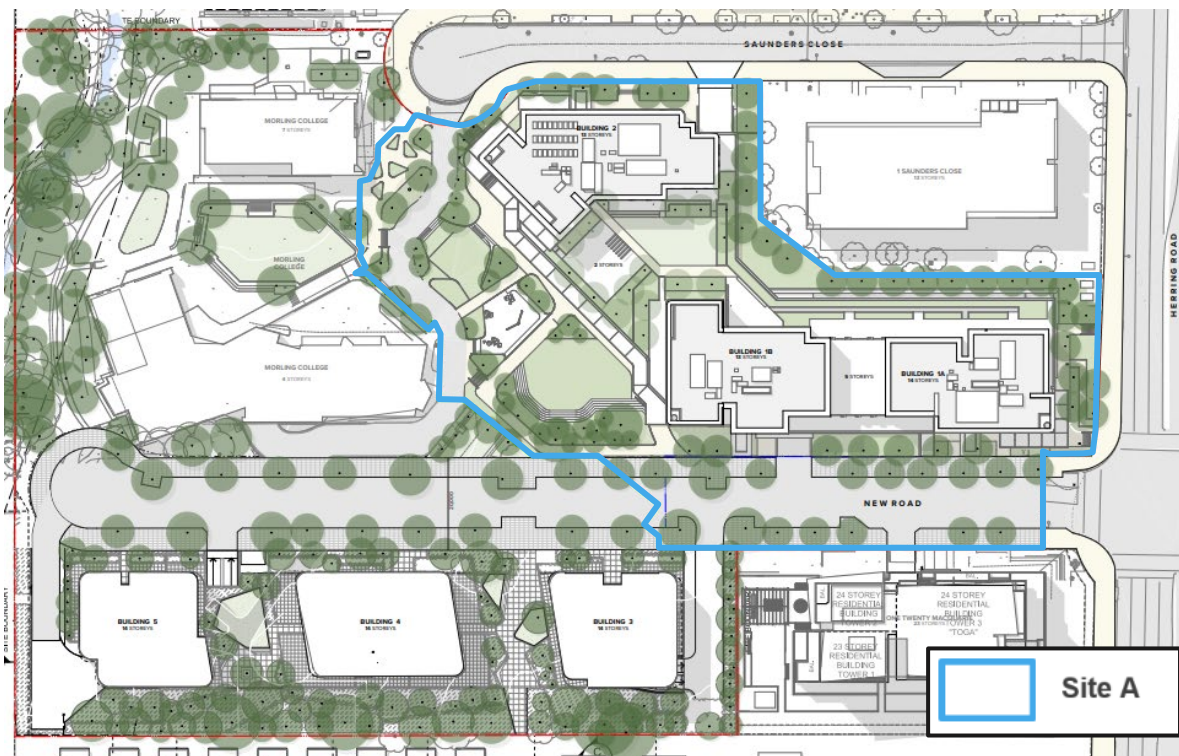
- GFA – 28,354sqm (Retail: 1,097sqm, Commercial: 7,573sqm, Shared: 127sqm, Residential: 23,504sqm)
- Height of Building – Building 1A: 50.9m (lift overrun), Building 1B: 48.95m (lift overrun), Building 2: 48.84m (lift overrun)

- No changes are proposed to the approved concept envelope under LDA 2019/0264 for Site B.

Figure 5 Approved and Amended Concept Plan



Picture 6 Approved Concept Approval Layout (LDA2019/0264)



Picture 7 Proposed amended concept (this Amending DA)
 Source: Turner Studios – as marked by Urbis

Figure 6 3D Render of Proposed Development



Source: Turner Studios

4.2. REASONS FOR AMENDMENTS TO APPROVED CONCEPT APPROVAL

The proposed revised concept envelope and the Stage 1 works seek some minor variations to the approved building envelope approved in LDA2019/0264.

As demonstrated in **Figure 8** below, the proposed re-arrangement of the podium, tower and open space areas facilitates increased separation between towers through the provision of more slender tower envelopes. The proposal has been informed by a detailed design and massing analysis for the Stage 1 works which provides an improved built form outcome, balanced with ensuring appropriate solar/overshadowing, wind, view, amenity and sustainability outcome.

In addition to the changes in the envelope layout the proposed variation to the maximum building height arises predominantly by small increases in the floor to ceiling heights of the podium and towers enhancing amenity for occupants, along with addressing new construction requirements of the Design and Building Practitioners Act 2020 (DBP Act).

Proposed changes to the floor-to-floor heights in the proposal compared to the concept approval are described as follows:

- **Residential Floors (Tower Forms):**
 - Floor-to-floor heights are increased from 3.1m to 3.15m to accommodate the DPB Act and associated waterproofing requirements.
 - Floor-to-floor heights are increased at some levels from 3.1m to 3.25m to accommodate the DPB Act requirements as well as additional insulation and set downs.
 - Increased floor-to-floor height for the top residential level to the roof accommodate the DPB Act requirements, insulation, falls, a 250mm slab (compared to the 200mm slab on a typical level) and parapets.
- **Commercial Floors (Podium Form):**
 - Floor-to-floor height of 3.8m at some levels (increase from 3.6m) to accommodate required service zones.

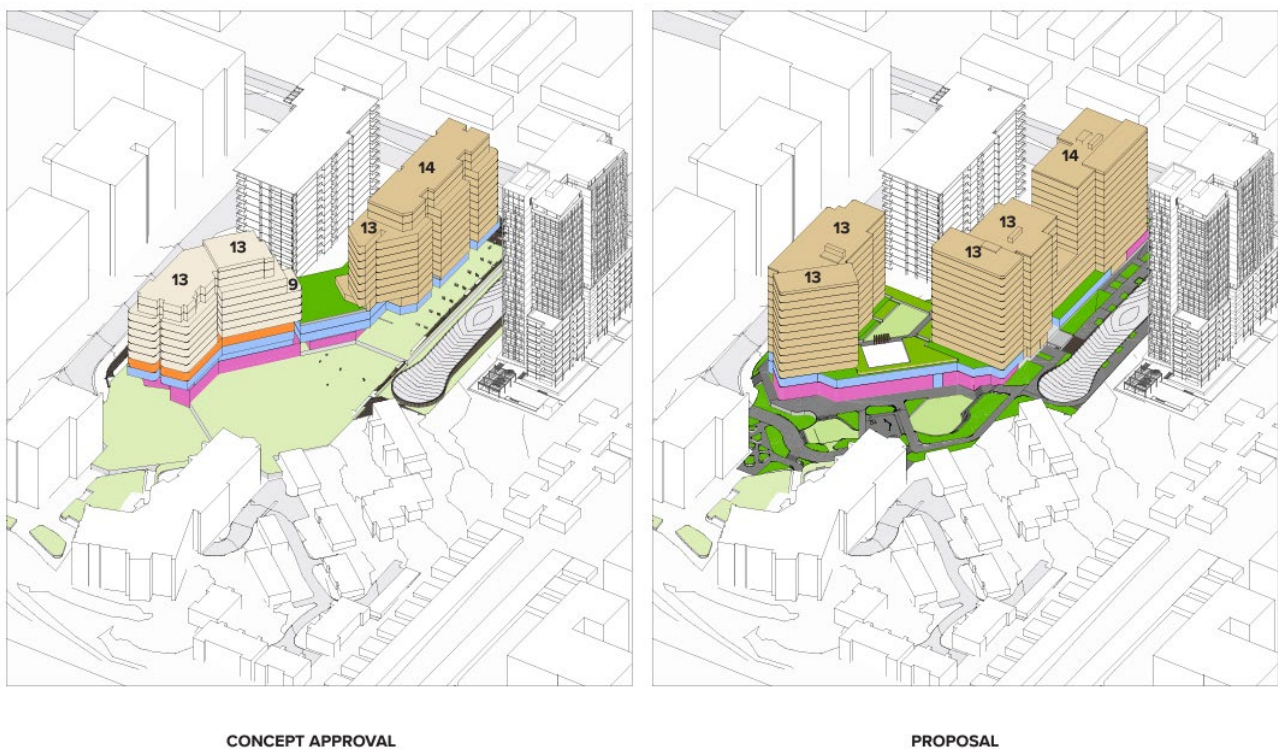
In addition to the adjusted floor-to-floor heights in accordance with the DPB Act and plant/servicing requirements of the building, the proposed concept envelope features an adjusted RL for the upper ground floor to accommodate access for overland flow/stormwater infrastructure (updated RL typically at RL69.2 instead of 68.5) and due to the new Road 3 crest being set at RL 69.

The approved concept envelope was built to the maximum HOB plane and did not include any allowance for lift/stair overruns. The proposed amended development seeks to provide the required lift overruns and rooftop plant installations that support the operations and accessibility of the building.

The proposed increase to the maximum building height is to support the building services required to operate the development. The combined impacts of the adjusted floor levels (to facilitate DPB Act requirements, insulation, set downs, falls, parapets, service zones and water management infrastructure) as well as the rooftop lift/stair overruns and plants, subsequently increases the maximum building height compared to the approved concept envelope.

As such, portions of the proposed rooftop parapet, rooftop plant and lift/stair overruns will exceed the 45m building height control under the RLEP 2014 (see **Figure 9** below). No usable floorspace is proposed above the 45m height control.

Figure 7 Approved Concept Envelope and Proposed Envelope Comparison



Source: Turner Studios

Figure 8 Proposed Stage 1 West Elevation



5. VARIATION OF HEIGHT OF BUILDING STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention.

5.1. DEVELOPMENT STANDARD

This Clause 4.6 Variation seeks variation to Clause 4.3 of RLEP 2014. As shown below in **Figure 10** the relevant Height of Building (HOB) map contained in the RLEP 2014 identifies a maximum HOB of 45m for the site.

The Dictionary of the RLEP 2014 defines building height as:

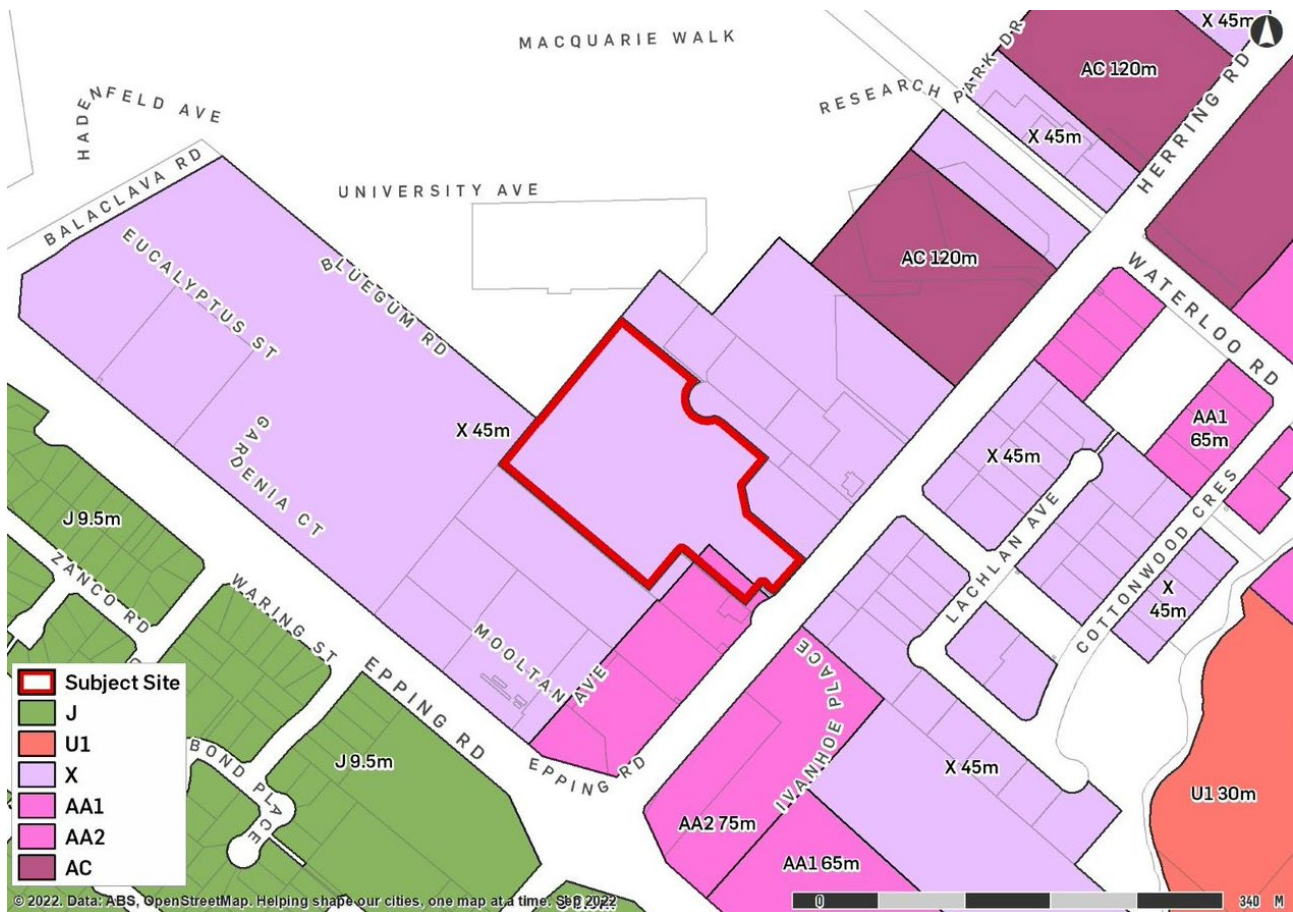
building height (or height of building) means—

(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.

Figure 9 Maximum Building Height



5.2. EXTENT OF VARIATION TO HEIGHT OF BUILDING

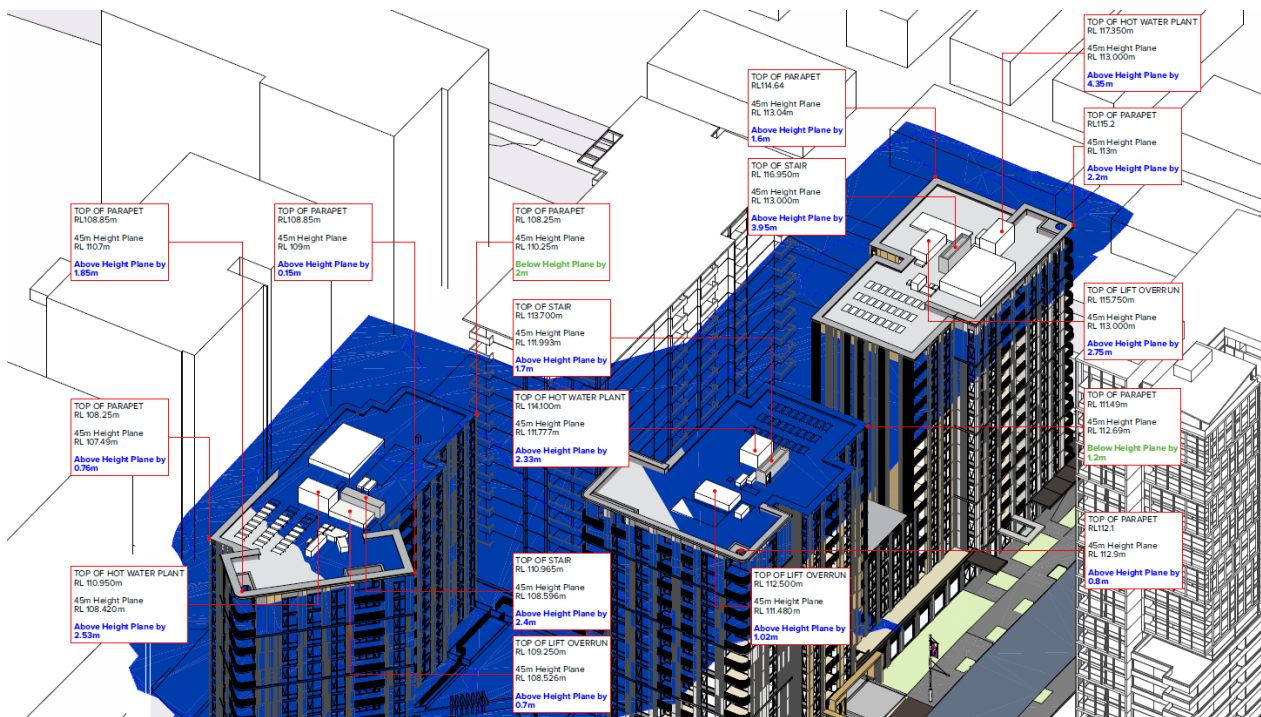
The proposed development seeks approval for exceedances to the 45m height plane across the three proposed tower as follows:

Table 1 Proposed height variations

Building	Component	Proposed Height (RL & metres)	Proposed Variation
1A	Rooftop plant (hot water) (max HOB)	49.35m / RL117.35	4.35m (approx. 9.5%)
	Top of Roof parapet	47.2m / RL115.2	2.2m (approx. 4.9%)
1B	Rooftop plant (hot water) (max HOB)	47.33m / RL114.10	2.33m (approx. 5.2%)
	Top of Roof parapet	45.8m / RL112.1	0.8m (approx. 1.8%)
2	Rooftop plant (hot water) (max HOB)	47.53m / RL110.95	2.53m (approx. 5.6%)
	Roof parapet	46.85m / RL108.85	1.85m (approx. 4.1%)

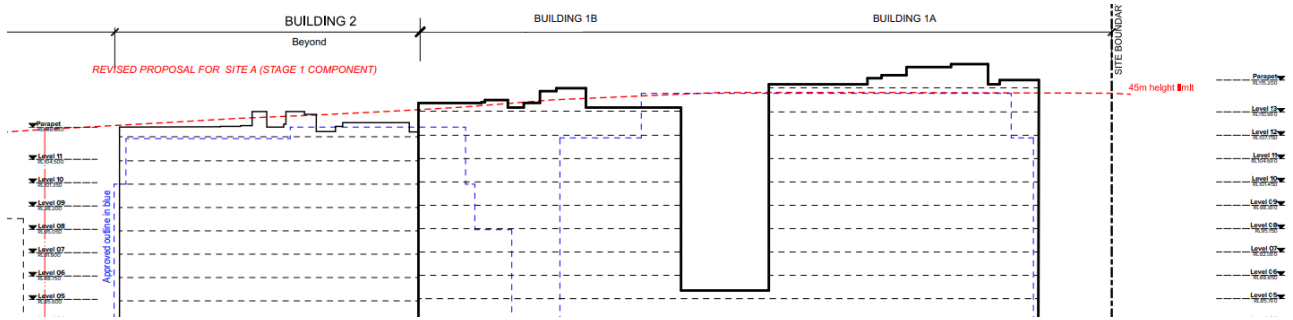
With consideration of the sloped nature of the site, the vast majority of Building 1B and Building 2 rooftop area is below the 45m HOB plane. **Figure 11** demonstrates the areas of the proposed development that will exceed the 45m HOB plane.

Figure 10 Height Plane Diagram Showing Height Variation (Blue: 45m RLEP 2014 height plane) (extract)



Source: Turner Studios

Figure 11 Proposed Height Variation in Elevation and Section View



Picture 8 Proposed Amended Site A Building Envelope South-West Elevation (extract) – Stage 1 proposal in black, approved envelope outlined in blue and 45m height line shown in red



Picture 9 Proposed Stage 1 Works Section AA Plan (extract)

Source: Turner Studio

6. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of RLEP 2014 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of RLEP 2014 are:

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

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

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

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

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

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

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (d) the public benefit of maintaining the development standard, and*
- (e) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under Clause 55(1) of the *Environmental Planning and Assessment Regulation 2021* and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the height of building prescribed for the site in clause 4.3 of RLEP 2014 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the HOB development standard be varied.

7. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the HOB in accordance with clause 4.3 of RLEP 2014.

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

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the RLEP 2014.

7.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The HOB prescribed by clause 4.3 of RLEP 2014 is a development standard capable of being varied under clause 4.6(2) of RLEP 2014.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of RLEP 2014.

7.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

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

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

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

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

The objectives of the standard are achieved notwithstanding non-compliance with the standard (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the HOB as specified in clause 4.3 of RLEP 2014 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 Assessment of Consistency with Clause 4.3 Objectives

Objectives	Assessment
<p><i>(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development.</i></p>	<p>The proposed built form is consistent with surrounding developments as demonstrated in Section 2.3, as well as the building form approved under the original concept approval LDA2019/0264.</p> <p>The proposed rooftop plant, lift and stair overruns are proposed to be located near the centre of the rooftop floor and setback from the roof parapet so as to minimise visibility from the street frontages. A number of developments across Macquarie Park have also been approved with minor variations to the HOB control at 9 Peach Tree Road, 14-16 Cottonwood Crescent and 2 Cottonwood Crescent. These developments were approved to deliver a similar built form as the proposed development with 2.7% - 9.7% exceedances to their respective maximum building height control as a result of the lift overrun and rooftop plant installations. As such, the minor building height variation at the site is consistent with the built form character of the area and the minor exceedance of the rooftop plant and lift overrun is similar in scale and character as other developments in the area.</p>
<p><i>(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area.</i></p>	<p>Overshadowing</p> <p>The proposed building height variations are minor compared to the approved concept DA and subsequently result in minimal increases to the overshadowing compared to the approved development. As demonstrated in the Overshadowing Diagrams prepared by Turner Studio (refer Figure 12 below), the proposed increase to building height will not result in any perceivable overshadowing impacts to the following areas:</p> <ul style="list-style-type: none"> ▪ Solar access to neighbouring properties (including 1 Saunders Close, 120 Herring Road and the Ivanhoe Estate Building) will see negligible changes to their solar access as a result of the proposed building height. The development will maintain the required 2 hours of solar access to neighbouring buildings. ▪ Proposed communal public open space will receive sunlight from 12 noon to 3pm and the proposed building height will not affect the solar access to this space. More than 50% of the proposed communal areas on the site and the neighbouring 116-118 Herring Road will achieve a minimum of 2 hours sunlight between 9am and 3pm in mid-winter. ▪ The proposed building height will see a minimal increase in overshadowing to the affected pedestrian streets and roads. However, the exceedances to the HOB provision is generally located on the plant, lift and stair overrun structures, these smaller structures will result in minimal additional overshadowing as they have been designed to be setback from the roof parapet. The proposed height of the roof parapet at Building 1A will be approximately 5% over the maximum building height. This minor

Objectives	Assessment
<i>(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure.,</i>	<p>exceedance in height will not result in any perceivable change to the overshadowing impacts to the surrounding streets/roads.</p> <ul style="list-style-type: none"> ▪ A minimum of 70% of dwellings will receive solar access to their living rooms and private open spaces in midwinter. <p>The proposal facilitates mixed use development within walking distance from the Macquarie University Metro Station and bus interchange.</p>
<i>(d) to minimise the impact of development on the amenity of surrounding properties.</i>	<p>Specifically, it is noted that the proposed variation to the building height control are minor and located in a manner that will not result in any unacceptable overshadowing or view impacts, nor will it compromise the development's consistency with pedestrian wind comfort requirements.</p>
<i>(e) to emphasise road frontages along road corridors.</i>	<p>The proposed 2-storey podium and towers will deliver the appropriate scale and emphasis to the road frontages at Herring Road, Saunders Close and the New Road. The proposed tower heights will slope away from Herring Road which will serve to create a visual scaling down of development height forms when viewed from the street. The rooftop elements that exceed the 45m height plane will not be discernible and will not impact the visual distinction of the road corridors.</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

Figure 12 Shadowing Diagrams Comparing Proposed (Blue) and Approved Envelope (Orange Outline)



Picture 10 Winter Solstice 9am



Picture 11 Winter Solstice 10am



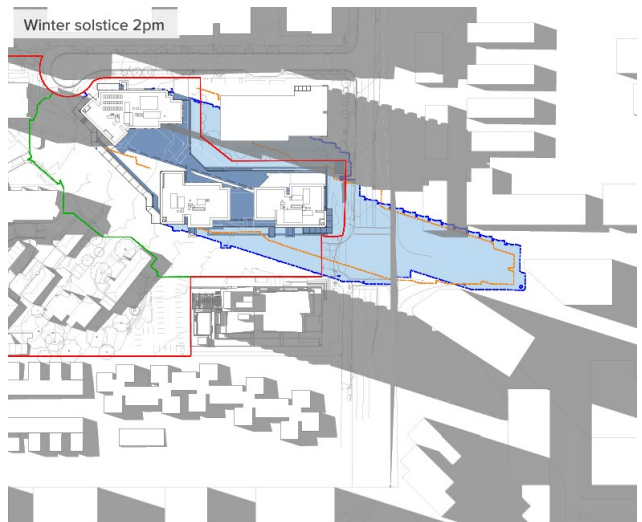
Picture 12 Winter Solstice 11am



Picture 13 Winter Solstice 12pm



Picture 14 Winter Solstice 1pm



Picture 15 Winter Solstice 2pm

Source: Turner Studio

The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

Not relied upon.

The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Not relied upon.

7.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

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

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

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

For the reasons outlined earlier, there are sufficient environmental planning grounds to justify the variation to the development standard because:

- Does not hinder the proposals consistency with the zoning objectives and the HOB objectives, including the intent of the HOB development standard.
- The proposed height variation does not result in any significant overshadowing or view impacts.
- The proposed height variation does not result in additional wind impacts for the pedestrian environment at ground level which has been confirmed by the wind report submitted alongside the development application.
- The proposed variation is minor being a maximum of 4.9% for the portion of the roof parapet and 9.5% for the rooftop plant (hot water plant). There are various examples within the surrounding locality of Macquarie Park where Council has accepted height variations comparable to that proposed in this application.
- The development with the proposed height variation achieves a built form consistent in scale with the surrounding locality of the Macquarie Park (Herring Road) Precinct, as well as that contemplated, assessed and approved under the concept approval LDA2019/0264.
- The height variation facilitates the provision of benefits to future occupants through improved internal amenity outcomes.

7.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

7.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

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

The consistency of the development with the objectives of the development standard is demonstrated in **Table 3** above. The proposal is also consistent with the land use objectives that apply to the site under RLEP 2014. The site is located within the Mu1 Mixed Use zone and the proposed development is consistent with the relevant land use zone objectives as outlined in Table 3 below.

Table 3 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<p>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</p> <p>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</p>	<p>The proposed development supports mixed use development within Macquarie Park including commercial office and retail employment generating uses. The minor height variation facilitates the provision of appropriate floor to floor levels and building services supporting the mixture of uses and optimising internal amenity for future occupants.</p> <p>The proposal delivers the intended development density at the site for mixed use development in a highly accessible location that is embellished with activation to respective street frontages, new road/pedestrian infrastructure (new Road 3) and new public space (central green space). The minor building height variation does not compromise the provision of the beforementioned public benefits which are integral to delivering a seamless interface of public and private space.</p>
<p>To minimise conflict between land uses within this zone and land uses within adjoining zones</p>	<p>The proposal, including the minor height variation, does not result in any conflicts between land uses within the surrounding area which largely comprise the MU1 Mixed Use zone. Specifically, the height variation does not result in any unacceptable overshadowing or view impacts to neighbouring residential and non-residential development in the MU1 zone, nor does it adversely impact the R2 Low Density Residential Zone situated approximately 250m south-west of the site.</p>
<p>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</p>	<p>The design provides non-residential land uses at the ground and second floor of the development. In part, the height variation results from providing larger floor to ceiling distances for these non-residential uses at the lower levels, and also greater floor to floor levels for residential uses above to ensure improved amenity and use of internal spaces.</p>
<p>To ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.</p>	<p>The proposed development is consistent with the approved concept envelope and is designed to integrate with the employment and education activities in the surrounding campus.</p>

Objective	Assessment
To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.	Not applicable.

7.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 55(1) of the *Environmental Planning and Assessment Regulation 2021*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

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

The proposed non-compliance with the HOB will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

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

The proposed development achieves the objectives of the HOB and the land use zone objectives despite the technical non-compliance. The proposed variation will facilitate the required services and floor to floor level compliance with the DPB Act to support the construction and operation of the desired development. As such, strict compliance would also reduce the amenity of the residential floors throughout the development which would be provided by the increased floor-to-floor height.

Strict compliance with the planning control standard would also compromise the delivery of the desired uses, public benefits and development intensity within the site. This would compromise the delivery of these elements within the emerging, densification in the Macquarie University (Herring Road) Precinct which offers integrated, sustainable growth in close proximity to existing public transport, employment opportunities within the precinct.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

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

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

8. CONCLUSION

For the reasons set out in this written request, strict compliance with the maximum building height standard contained within clause 4.3 of RLEP 2014 is unreasonable and unnecessary in the circumstances of the case. There are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the height of the building to the extent proposed for the reasons summarised below:

- The proposed development facilitates the mixed use development of the site consistent with the vision of the approved concept approval. The development is consistent with the desired built form and land use outcomes at the site and will integrate with the emerging growth within the Macquarie University (Herring Road) Precinct. The minor variation to the building height facilitates a built form consistent with the contemporary developments (ranging from 45m-75m) on adjoining sites and across the precinct.
- The variation to the building height is solely to support the required infrastructure, services, insulation and compliance with the DPB Act and will not result in any changes to the overall GFA/FSR of the masterplan development.
- Strict compliance with the development standard is unreasonable and unnecessary as the objectives of clause 4.3 of the RLEP 2014 and the MU1 Mixed Use Zone are achieved.
- Strict compliance with the development control does not promote any identifiable public benefit as it would reduce the amenity for tenants of the building and compromise the delivery of the development. This would compromise achievement of desired housing supply and co-located commercial land uses within the precinct and in proximity to public transport.
- There are sufficient environmental planning grounds to justify contravening the development standard for maximum HOB; there will be minimal environmental impacts stemming from the contravention of development standards. The minor variation will not result in any adverse impacts to the built form character, overshadowing, views or pedestrian wind comfort at the site and across the surrounding area.

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

DISCLAIMER

This report is dated 18 May 2023 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of TOGA (**Instructing Party**) for the purpose of Clause 4.6 (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

In preparing this report, Urbis may rely on or refer to documents in a language other than English, which Urbis may arrange to be translated. Urbis is not responsible for the accuracy or completeness of such translations and disclaims any liability for any statement or opinion made in this report being inaccurate or incomplete arising from such translations.

Whilst Urbis has made all reasonable inquiries it believes necessary in preparing this report, it is not responsible for determining the completeness or accuracy of information provided to it. Urbis (including its officers and personnel) is not liable for any errors or omissions, including in information provided by the Instructing Party or another person or upon which Urbis relies, provided that such errors or omissions are not made by Urbis recklessly or in bad faith.

This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

