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URBIS

CLAUSE 4.6 VARIATION REQUEST: HEIGHT OF BUILDING

9-11 Nelson Street,
Chatswood

Prepared for
VIMG
February 2024

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Stephen White
Associate Director	Andrew Hobbs
Senior Consultant	Sarah Noone
Project Code	P0039713
Report Number	Final

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1. INTRODUCTION

This Clause 4.6 Variation Request (**the Request**) has been prepared on behalf of VIMG (**the applicant**) and accompanies a Development Application (**DA**) for the proposed mixed-use development at 9-11 Nelson Street, Chatswood (**the site**). This request supersedes the previously submitted version prepared for the original lodgement of the DA.

The request seeks an exception from the Height of Buildings (**HOB**) map prescribed for the site under clause 4.3 of Willoughby Local Environmental Plan 2012. The variation request is made pursuant to clause 4.6 of Willoughby Local Environmental Plan 2012 (**WLEP 2012**).

The following sections of the report include:

- **Section 2:** A description of the site and brief overview of the proposed development.
- **Section 3:** Identification of the relevant environmental planning instrument and the relevant development standard, which is proposed to be varied, including the extent of the contravention.
- **Section 4:** Justification for the proposed variation including assessment of the variation in accordance with Clause 4.6 of the LEP.
- **Section 5:** Summary and conclusion.

1.1. PROJECT BACKGROUND

On 5 September 2023, a development application was lodged to Willoughby City Council for the demolition of all structures and construction of a 27-storey mixed-use development at 9-11 Nelson Street, Chatswood. On 8 December 2023, Willoughby City Council issued a request for information (**RFI**) regarding various elements of the development.

Point 4 of the RFI letter noted Council's lack of support for the Clause 4.6 variation statement. Following further refinement of the design, the project has reduced the proposed maximum building height. Accordingly, this clause 4.6 variation seeks only a minor variation in accordance with the revised design.

- Public domain and landscape works along all frontages.
- Delivery of a 3m wide publicly accessible easement along the eastern boundary of the site.

Figure 2 Development Render



Source: DKO Architects

3. PROPOSED VARIATION OF HEIGHT OF BUILDING STANDARD

3.1. ENVIRONMENTAL PLANNING INSTRUMENT

The request seeks a variation to the height of building development standard which applies to the site under Clause 4.3 of the Willoughby LEP 2012. The variation request is made pursuant to Clause 4.6 of the LEP.

3.2. SITE ZONING

The site is zoned MU1 Mixed Use (refer **Figure 3** below).

Figure 3 Land Zoning Map



Source: Urbis

3.3. DEVELOPMENT STANDARD

As shown in **Figure 3** below, the HOB map contained in the WLEP 2012 (as amended by PP 2020/22) identifies a maximum HOB of 90m for the entirety of the site, along with land to the north, and west.

The Dictionary of the WLEP 2012 defined building height as:

- (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 4 HOB Map



Source: Urbis 2023

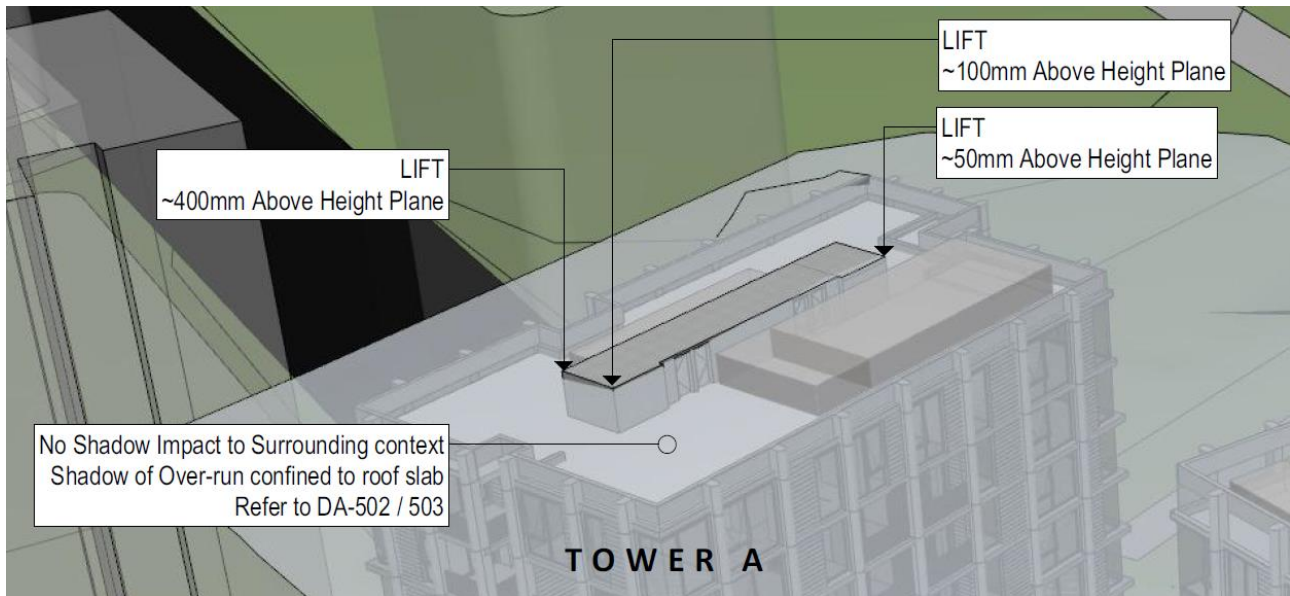
3.4. EXTENT OF VARIATION TO HEIGHT OF BUILDING

The proposed development seeks approval for a minor exceedance to the 90m height plane for the northern tower only, as follows

- **Northern Tower:**
 - A maximum height exceedance of 400mm or 0.36% for a centralised lift overrun.
- **Southern Tower:**
 - No exceedance of HOB control proposed.

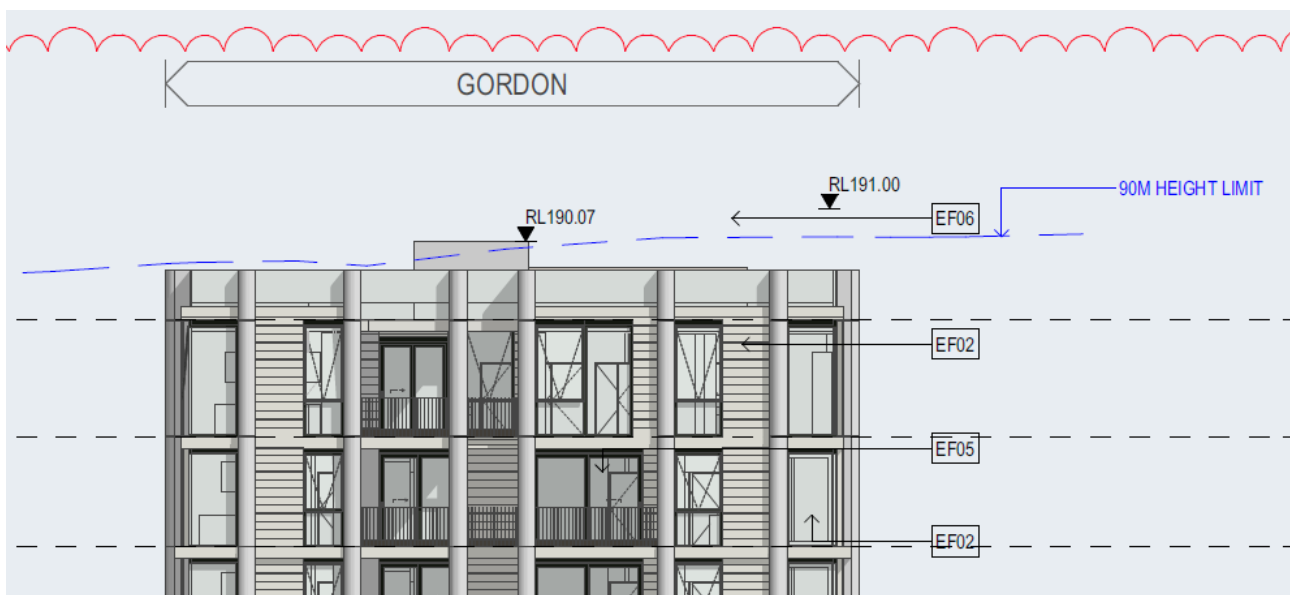
The figures below demonstrate the areas of the proposed development that exceed the 90m height plane.

Figure 5 Height Plane Diagram



Source: DKO

Figure 6 Northern Tower Section



Source: DKO

4. JUSTIFICATION FOR THE PROPOSED VARIATION

The following section provides detailed responses to the key questions required to be addressed within the above considerations and Clause 4.6. This request is informed by an assessment of the proposal on:

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

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

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

The height of buildings control prescribed under clause 4.3 of the WLEP is a numeric development standard capable of being varied under clause 4.6 of the WLEP.

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 the WLEP.

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

The specific objectives of clause 4.3 of the WLEP 2012 are detailed in **Table 1** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 1 Assessment of Consistency with Clause 4.3 Objectives

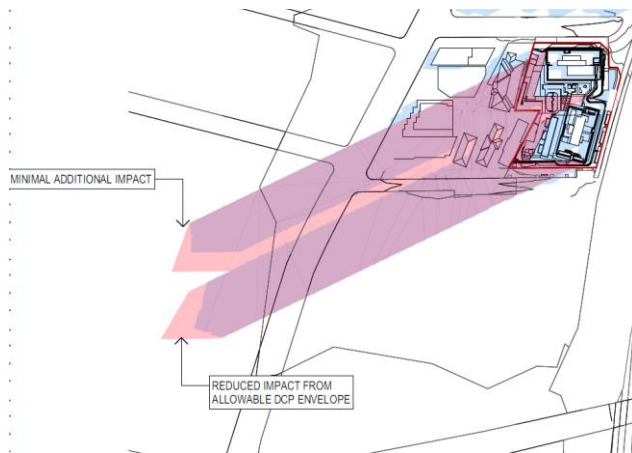
Objectives	Assessment
(a) <i>to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape.</i>	The proposed development is consistent with the current emerging high-density character of the surrounding locality of the southern Chatswood CBD in terms of bulk and scale. Importantly, the proposal remains consistent with the envisaged use of the land as outlined in Council's CBD Planning and Urban Design Strategy 2036. Given the scale of urban transformation to 90m high towers on-site and immediately surrounding the magnitude of change proposed will not detract from maintaining a harmonious relationship with surrounding buildings.
(b) <i>to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion.</i>	The proposal has been designed to align with the requirements of the site-specific DCP, which includes a general building envelope plan established by podium and tower setbacks. The proposal does not maximise the envelope established by the site specific DCP, rather seeks to increase setbacks, such as the southern and western façade of the southern tower. This has resulted in towers that are slender and rectangular, while also creating greater separations between the towers on the site and with adjoining future development to the west. This separation aids in reducing overshadowing impact, solar access into the future dwellings, outlook and views, and overall apartment amenity.

Objectives	Assessment
	<p>The following key environmental impacts have been considered in the assessment of this variation request:</p> <p>Overshadowing: DKO have prepared a revised overshadowing analysis contained within their architectural plan set and provided below. The analysis compares the impact from the envelope of a scheme compliant with the site specific DCP and HOB control, versus that of the proposed scheme. The assessment demonstrates that if the proposal were to maximise the building envelope established by the site specific DCP and HOB control of 90m, the proposal would result in a greater overshadowing impact than that which results from the proposal. Due to the centralised location of the proposed exceedance on the northern tower, no additional shadow is proposed above that which would be created by a wholly compliant building envelope.</p> <p>Amenity and Privacy: The proposed variation does not result in additional habitable floor space, or GFA. Rather, the exceedance facilitates access to rooftop services and utilities. Due to significant setbacks of the northern towers from future development in all directions, the addition lift overruns would be imperceptible and difficult to view even from future high-density dwellings.</p> <p>Disruption of Views: The proposed exceedance, being centrally located on the northern tower only, is unlikely to result in the disruption of views from adjacent development towards locations of objects that contain visual importance. Future surrounding building will be of similar scale and equal opportunity for the middle and upper floors to have expansive district views. The minor intrusion for the centralised lift core of the northern tower above the 90m height will have an immaterial view impact from neighbouring development.</p>
<p><i>(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores.</i></p>	<p>The proposed development has been subject to an architectural design competition as required by Clause 6.23 of the WLEP. The project was awarded design excellence by the jury, subject to design refinements prior to the lodgement of the DA. The final design of the proposal remains consistent with the scheme for which design excellence was awarded despite the minor exceedance of the HOB control and is therefore considered to represent a high visual quality when viewed from any neighbouring site.</p>
<p><i>(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development.</i></p>	<p>The current building envelope established by the site specific DCP and HOB control were informed by an approved view sharing analysis submitted with the site-specific planning proposal for the site. While it is acknowledged that the original view sharing analysis did not consider an exceedance to the HOB control, it does identify that the fact that no short, medium and long-distance views exist at a height that would be impacted by the additional height proposed.</p>

Objectives	Assessment
	That is, no one would have a view to anything noted as being visually prominent being blocked or interrupted by the additional height proposed. Therefore, the additional height proposal will not create any unreasonable distribution to existing views from adjacent development.
<i>(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping.</i>	The magnitude of change proposed is extremely minor in the context of the project, with a maximum of 0.36% observed for the southern tower lift overrun. In the context of a centre planned for significant transformation to high-density with equally scaled towers surrounding, the magnitude of departure would not be discernible from the public domain in close or wider proximity. The building will still maintain a scale and character which could be reasonably expected. If compliance were required with the 90m HOB control, the proposal would be unable to meet the redevelopment potential of the site envisaged under the site specific VPA, while also providing compliance with the NCC and ADG regarding floor-to-floor heights. The proposed height breach does not result in additional habitable floor space or GFA.
<i>(f) to use maximum height limits to assist in responding to the current and desired future character of the locality.</i>	The emerging in character of the immediate surrounds has been informed by the Council's Chatswood CBD Planning and Urban Design Strategy 2036. Land to the north and west of the site share the same HOB control as that of the site, being 90m. Due to the minor nature (0.36%) height exceedance proposed, the proposal is unlikely to detract from the desired future character of the site and surrounds.
<i>(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood.</i>	The proposal reinforces the primary and emerging character of the Chatswood CBD through delivering a mixed-use development consistent with Council's Chatswood CBD Planning and Urban Design Strategy 2036.
<i>(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.</i>	Transitions in building heights are currently established under Council's HOB controls applying to land in both a north and south direction from the site. While land to the north of the site contains a HOB control of 90m, land to the south currently controls a HOB control of 53m. A site located adjacent lower HOB control should not be expected to deliver a lesser building height. The proposed 0.36% increase in building height in isolation is unlikely to negate the ability for a transition in height to be delivered.

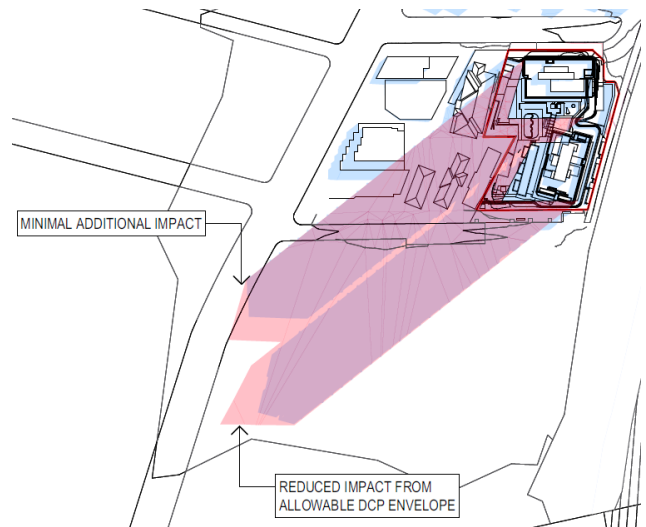
The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation request. Due to the extremely minor nature of the proposed variation, it is unable to be visually articulate on the diagrams following. Accordingly the assessment demonstrates that the proposal results in less overshadow impact than that of a wholly compliant building envelope.

Figure 7 Shadow Diagrams (DCP Envelope Blue, Compliant Purple)



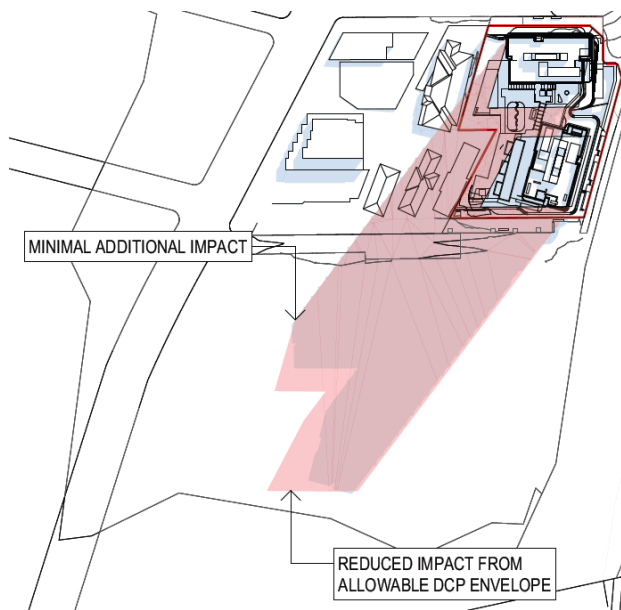
Picture 1 9am 21 June

Source: DKO



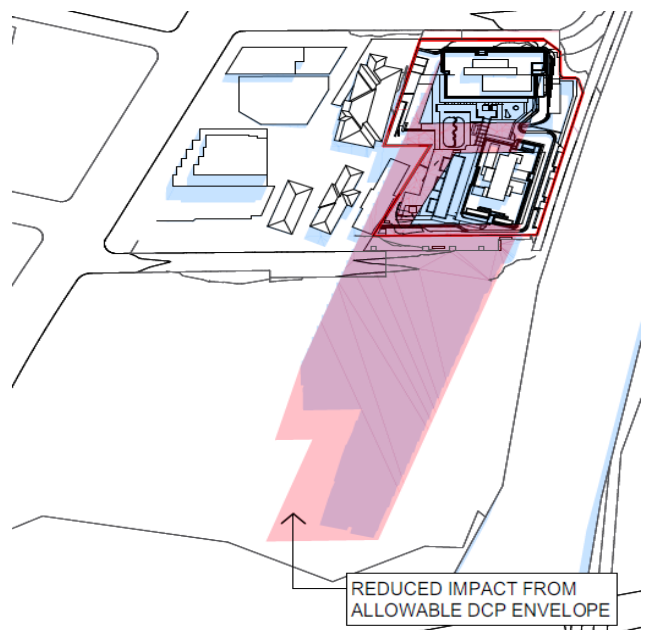
Picture 2 10am 21 June

Source: DKO



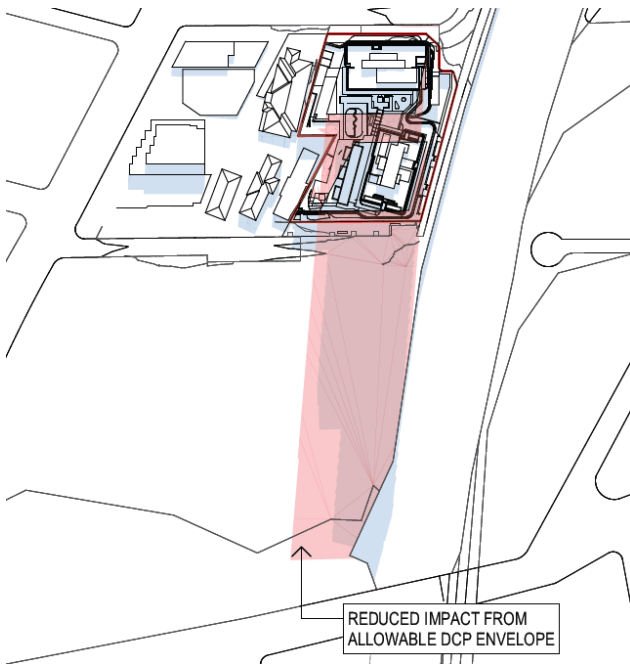
Picture 3 11am 21 June

Source: DKO



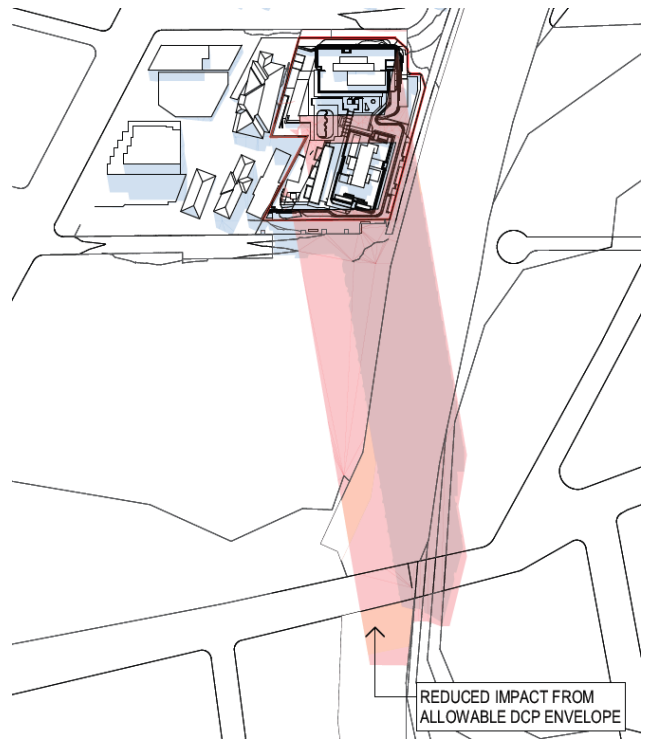
Picture 4 12pm 21 June

Source: DKO






Picture 5 1pm 21 June

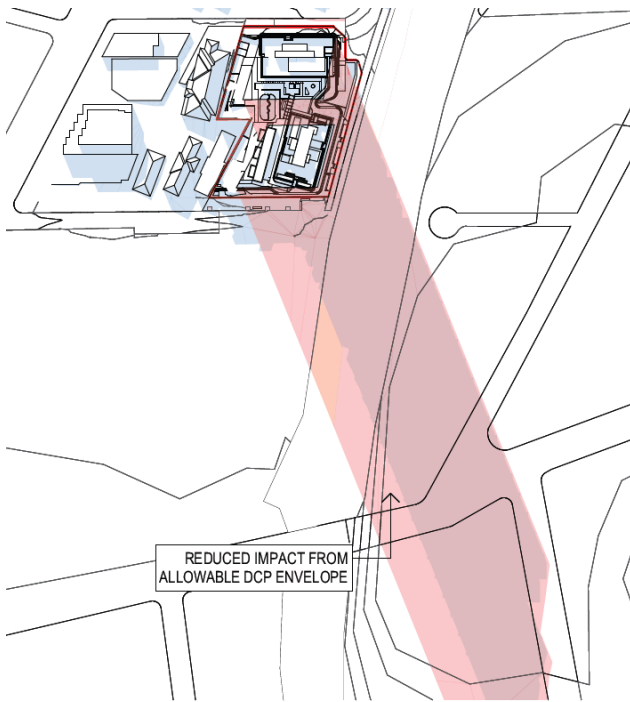
Source: DKO



Picture 6 2pm 21 June

Source: DKO

-  SHADOW OF PROPOSED BUILDING AND EXISTING CONTEXT
-  SHADOW OF 90M DCP MASSING
-  PROPOSED/ 90M DCP MASSING OVERLAY



Picture 7 3pm June 21

Source: DKO

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

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

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

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

There are sufficient environmental planning grounds owing to the absence of environmental harm from the contravention of the development standard and positive planning benefits arising from the proposed development as outlined below.

- **Overshadowing:** The proposed breach of 0.36% on the northern tower lift core does not result in any additional overshadowing to that of a wholly compliant scheme. This is due to the centralised nature of the exceedance. Additionally, the proposal as a whole results in a lesser impact than that of a scheme which maximises the full DCP envelope.
- **Visual and Privacy:** The proposed variation does not result in additional habitable floor space or GFA that would create the opportunity for overlooking from the proposal. Rather, the exceedance facilitates access to services and plant on the rooftop of the northern building, likely to be accessed very infrequently.
- **Disruption of Views:** The proposed exceedance being extremely minimal in nature and wholly centralised on the northern tower only, it would not result in any distinguishable disruption of views from adjacent development towards locations of objects that contain visual importance.
- **Tower Slenderness:** The client’s design concept from the outset is to create two towers with small floor plates. Smaller floor plates result in better performing buildings, both environmentally, but from a bulk and scale perspective also. By siting the towers appropriately and implementing the smallest floor plates possible; our proposal provides maximum amenity to the surrounding neighbours and reduces the overall bulk and scale of the project.

- **Obstacle Limitation Surface:** The proposal, inclusive of the height breach, will not exceed the OLS for the site.

5. CONCLUSION

For the reasons set out in this written request, compliance with the maximum building height standard contained within clause 4.3 of the WLEP 2012 is unable to be achieved. It has been discussed that there are sufficient environmental planning grounds to justify a variation to the maximum building height and it is in the public interest to do so.

It is reasonable and appropriate to vary the height of 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 PP-2021-5704. The development is consistent with the desired built form and land use outcomes at the site and will integrate well into the southern area of the Chatswood CBD. The extremely minor variation to the building height is driven by the necessity to deliver minimum standards on apartment levels, while also achieving flexible, attractive and feasible non-residential tenancies within the podium.
- Strict compliance with the development standard is unreasonable and unnecessary as the objectives of clause 4.3 of the WLEP 2012 and the MU1 Mixed Use zone are achieved by the proposed development.
- Strict compliance with the development control does not promote any identifiable public benefit. Strict compliance with clause 4.3 of the WLEP 2012 would contradict the objective of all levels of government to aid in the facilitation of housing supply within accessible and well serviced locations, through not only reducing the number of dwellings proposed, but by directly increasing the commerciality of the remaining dwellings within the proposed development.
- There are sufficient environmental planning grounds to justify contravening the development standard for the maximum HOB, and there are no perceptible environmental impacts stemming from the contravention of development standard.

For the reasons outlined above, the clause 4.6 is well-founded. The development standard is 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.

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