Rutledge Street Shop Top Housing Proposal

DESIRED FUTURE CHARACTER REPORT

Contents

Introduction

The proposal at 6-12 Rutledge St, Queanbeyan (Lot 2 DP117998 and Lot 31 DP771673) is for a 10 storey shop top housing development above a single storey commercial ground floor. It consists of 2000m² of commercial GFA and 178 residential apartments.

The project site is located at Lot 2 DP117998, Lot 31 DP771673, along Rutledge Street, Queanbeyan NSW which is defined as a B3 zoning under the Queanbeyan Palerang Regional Local Environment Plan 2022 at the time of lodgement of the application. The site is currently surrounded by existing and under construction multi-storey developments, single storey residential dwellings and community facilities.

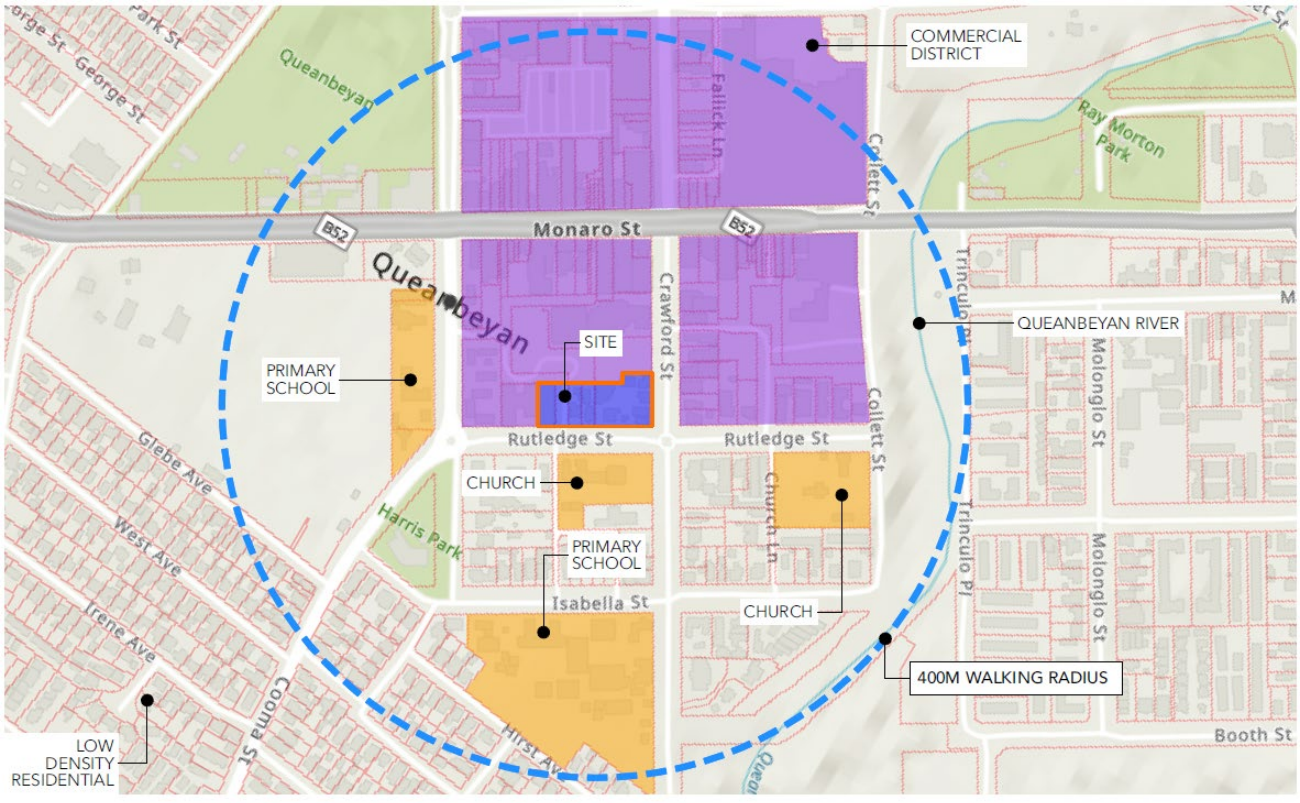
The proposed development includes a consolidation of blocks along Rutledge St and a new development

which includes:

• Two levels of basement parking;

• Ground level commercial and public space and landscaping; and

• Two residential towers – with communal open space located on the eight floor of both buildings.



LOCAL CONTEXT PLAN

Defining Desired Future Character

Determining the "desired future character" of an area can be a difficult task, especially as Council has not defined this term in the QPRLEP22. The Department has produced a circular "Planning and designing for better places: respecting and enhancing local character" (PS21-026) which provides guidance for local councils and other relevant planning authorities, state agencies and communities about the tools available to them to incorporate consideration of local character into strategic planning and detailed planning for places. However, Queanbeyan Palerang Regional Council has not undertaken any strategic work to define the desired future character of areas within the Queanbeyan CBD.

There is recent case law from the Land and Environment Court which does provide guidance in how to properly assess the 'desired future character' of an area.

The recent case of *Big Property Pty Ltd v Randwick City Council* [2021] (***Big Property***), followed *by HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**), provide guidance and flexibility in terms of how to properly assess the 'desired future character' of an area. Maintaining such 'character' is frequently referenced as an objective of development standards in LEPs, and is often cited by councils as a reason to refuse any clause 4.6 variation request. However the Big Property decision demonstrates that exceedances of development standards such as height and FSR are expressly permissible under clause 4.6, and that the desired future character of an area is subject to this – buildings can and will exceed planning controls, and so the 'desired future character' of an area is not as simple as pointing to development controls as being the maximum envisaged for the entire future shape and form of an area.

In considering the question of character in the **Big Property** case, Acting Commissioner Clay focused on the question of "what is the desired future character and is the proposal consistent/compatible with that desired future character?"

Importantly, the Acting Commissioner made the distinction that the adjoining developments were not a scenario in which an adjacent development had been approved and constructed many years ago, sitting as an anomaly in the street, but rather these developments reflect the recently expressed attitude of the Council to such development. They were approved by Council under effectively the same controls as present, notwithstanding the fact that they exceed the height and floor space ratio controls.

So, with the character being dictated by the adjacent developments to the east, the proposal (being of the approximate same height and form) was found to be consistent with that character, although significantly in breach of the applicable development standards.

This recent case law shows that the desired future character of an area is determined by a range of factors including the LEP and the approved buildings neighbouring a development. The fact that a development exceeds height and FSR standards cannot be used as a carte blanche for claiming that a development is inconsistent with the desired future character of the neighbourhood.

It should also be noted that recent changes to the *SEPP Housing 2021* allows for an increase in Height and FSR by up to 30% based on the percentage of affordable housing being offered within the development. The SEPP is an environmental planning instrument and therefore this needs to be a consideration when considering the emerging future character of an area.

Discussion on the Proposed Development and how it addresses the desired future character of the area

The proposed development is consistent with the desired future character of the area in terms of its land use, built form, bulk and scale, density and aesthetics. The proposed development is also compatible with the existing character of the area by providing appropriate setbacks, a well-articulated built form, and high quality landscape to protect the amenity of surrounding sites. It is noted the most prominent building in the area is the recently completed new Council Administration Centre at 257 Crawford St, Queanbeyan, which adjoins the site and is 32.97m in height. This together with the recently consented shop top housing development at 202-214 Crawford Street Queanbeyan has set the direction for high density development in the area.

Located at the southern end of the Queanbeyan Central Business District (CBD) within the emerging Civic and Cultural precinct, this site is situated in an area currently undergoing revitalization. Adjoining the site to the north, the recently completed Council Civic Building and the new Civic Square play crucial roles in connecting the civic function of the council building with The Queanbeyan Performing Arts Centre (The Q), serving as a significant community gathering space.

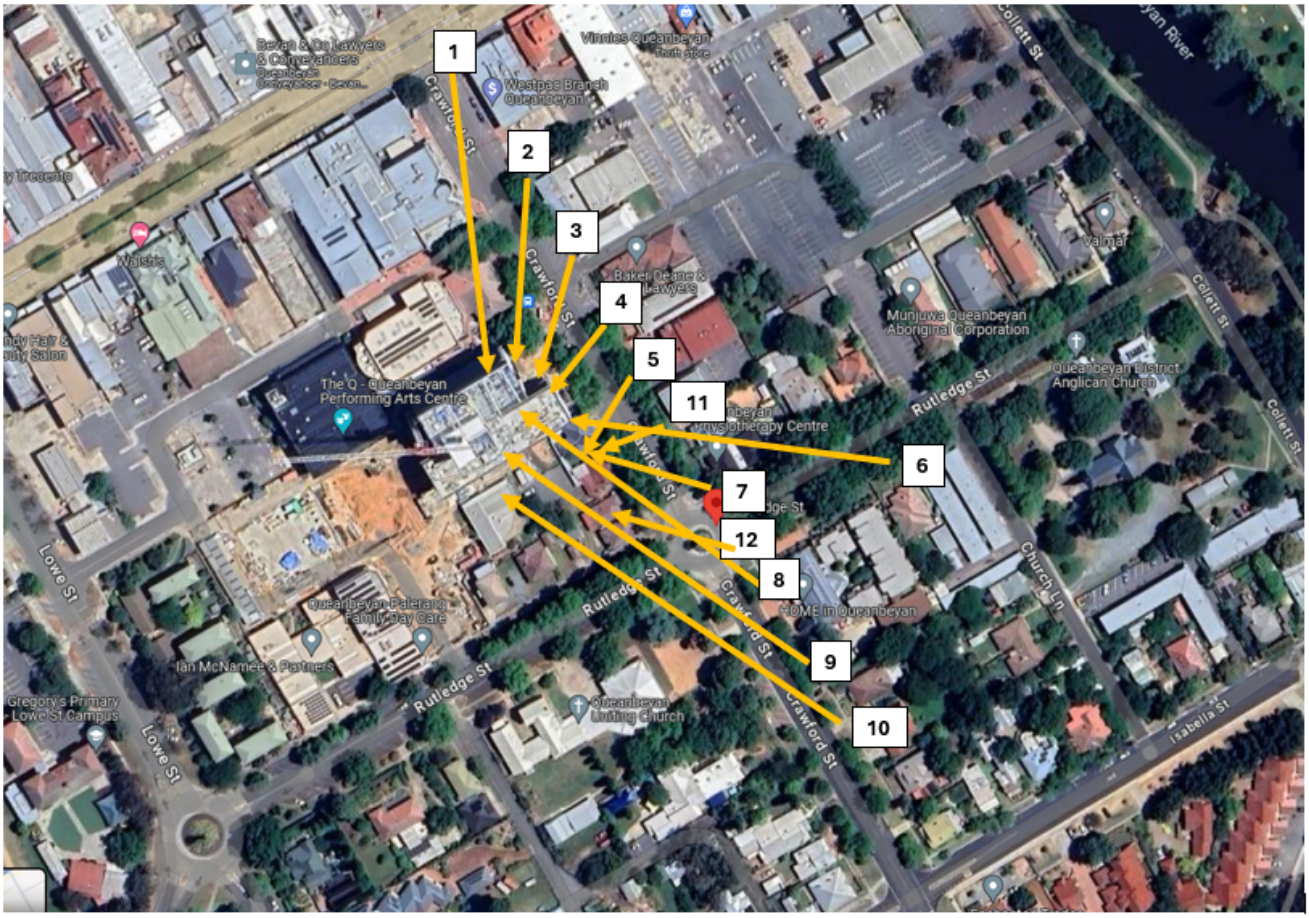
Bordered by Rutledge Street, featuring established street trees, and a heritage conservation area to the south, as well as Crawford Street to the east, the site is only 150 meters away from the major east-west connector, Monaro Street, in Queanbeyan. The proposed development seeks to replace seven 1-2 storey buildings, associated outbuildings, Queanbeyan Library, realign a north-south access road, and restore two heritage buildings on-site.

The design envisions two 10-storey shop-top housing buildings, with a north-south pedestrianised laneway linking Rutledge Street to the proposed Civic Square. The commercial ground level will complement the new Civic Square, enhancing the streetscape through commercial frontages facing Rutledge Street, Civic Square, the proposed laneway, and open space.

The architectural approach considers the evolving nature of the CBD and responds to the heritage values of the area through thoughtful material selection and built form. The proposed design aligns with the vision for the Queanbeyan CBD by offering commercial floorspace, a mix of housing options, well-designed density, and active uses, and includes 15% affordable housing component. Positioned as a significant component of the new Civic and Cultural precinct, it aims to establish a new standard for development throughout the CBD.

The streetscape frontage is articulated through a suitable rhythm of the façade, including the establishment of a "Heritage Corner" that pays homage to existing heritage buildings on Crawford St and draws attention to the street level. This potentially developable corner was sacrificed to a communal garden and open space that could be used by the residents and general public. The benefit of this approach was that the scale and bulk to Crawford Street is reduced. The bulk of the buildings step down from Crawford Street as well as Rutledge Street, which reduces the impact of the buildings on the public realm.

To follow are streetscape photos to demonstrate how non-visible the site is from a number of viewpoints due to the existing vegetation within the road reserve:



1. Photo taken from Cnr Crawford & Monaro St (Westpac)
2. Photo taken from 256 Crawford Street
3. Photo taken Crawford Street Car park entry
4. Photo taken from 260 Crawford Street
5. Photo taken from 266 Crawford Street
6. Photo taken from near church lane
7. Photo taken from Cnr Crawford St & Rutledge St
8. Photo taken from opposite Cnr Crawford & Rutledge St
9. Photo taken from 284 Crawford Street
10. Photo taken from 288/286 Crawford Street
11. Photo from 276 Crawford Street
12. Google image – from Roundabout Cnr Rutledge & Crawford St

    Additional Image – Photo from Queanbeyan Uniting Church

Photo 1 – Photo taken from Cnr Crawford and Monaro St (Westpac)

Photo 2 – Photo taken from 256 Crawford Street

Photo 3 – Photo taken Crawford Street Car park entry

Photo 4 – Photo taken from 260 Crawford Street

Photo 5 – Photo taken from 266 Crawford Street

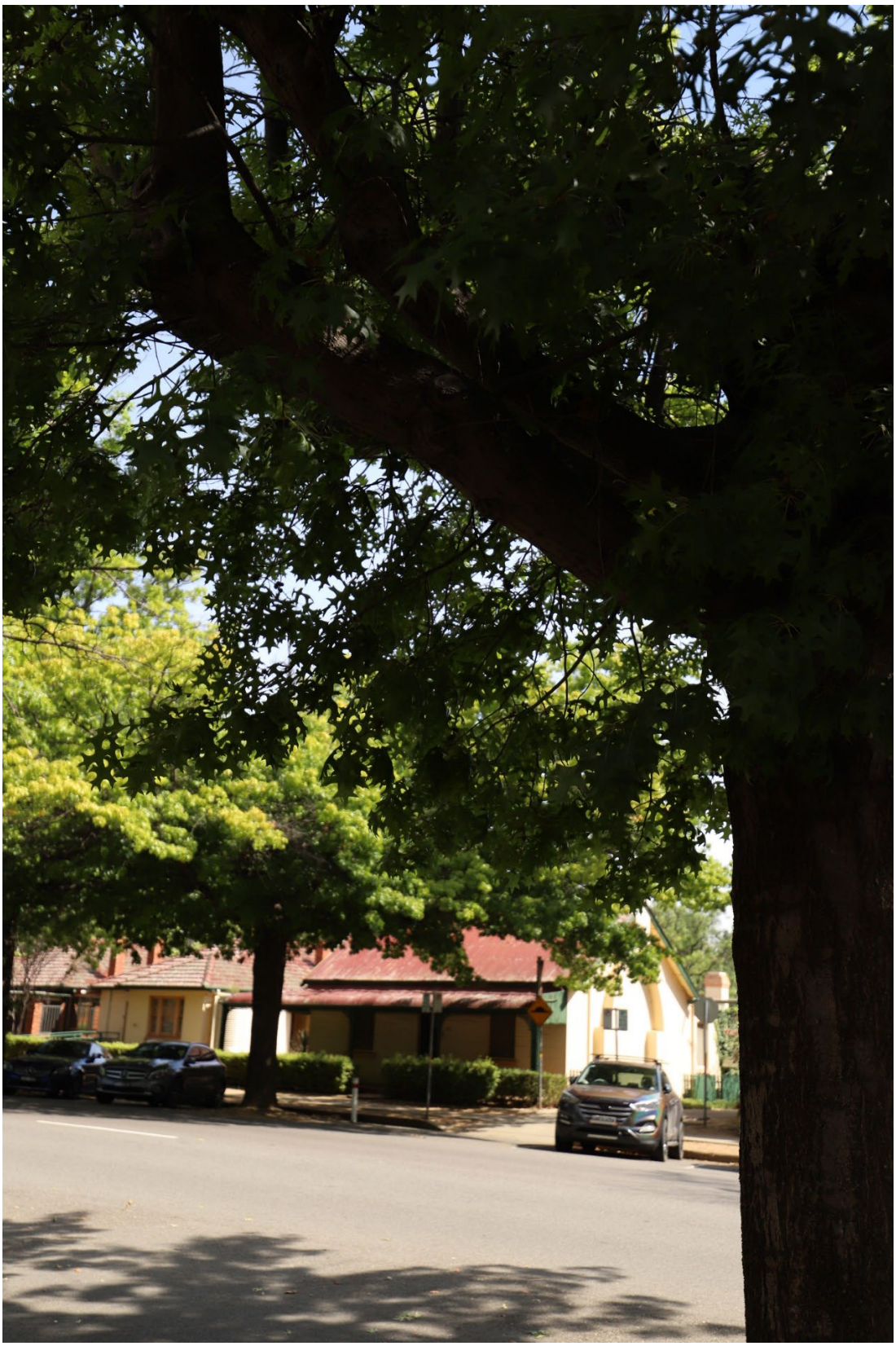


Photo 6 – Photo taken from near Church Lane

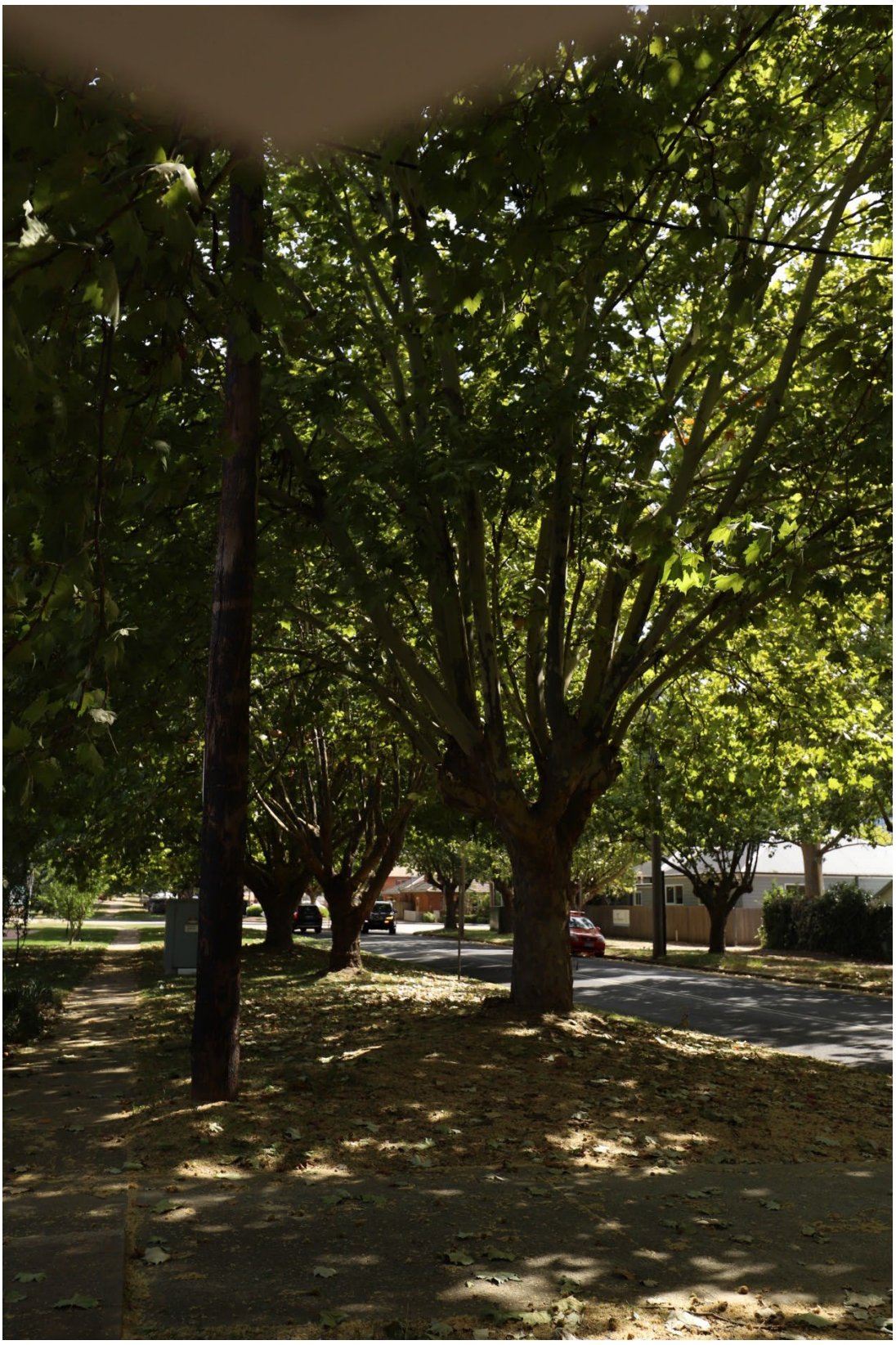


Photo 7 – Photo taken from Cnr Crawford and Rutledge St

Photo 8 – Photo taken from opposite Cnr Crawford and Rutledge St

Photo 9 – Photo taken from 284 Crawford St

Photo 10 – Photo taken from 288/286 Crawford St

Photo 11 – Photo from 276 Crawford St

Google Image (12) – from Roundabout Cnr Rutlege & Crawford St

Additional photo taken from Rutledge Street opposite subject site

Photo from Queanbeyan Uniting Church

Recently Approved Development within the Vicinity of the Site that contribute to the emerging character of the area.

As per the recent case law discussed in this report, development within the vicinity of the site is part of the consideration of what the future desired character of an area is, when Council has not defined or mapped the characteristics and desired future character of an area.

Below are three examples of recently approved/lodged applications that are of similar height and bulk as to what is proposed in the current application. All of these examples have been approved/lodged in the last two years and are governed by the same Development Control Plan and the same LEP (albeit the Council building was considered under the draft LEP).

All three examples demonstrate that the emerging character of the Queanbeyan CBD is that of 7-10 storey buildings, with limited front setbacks and modern in their design.

DA.2020.1022 – 257 Crawford St Queanbeyan

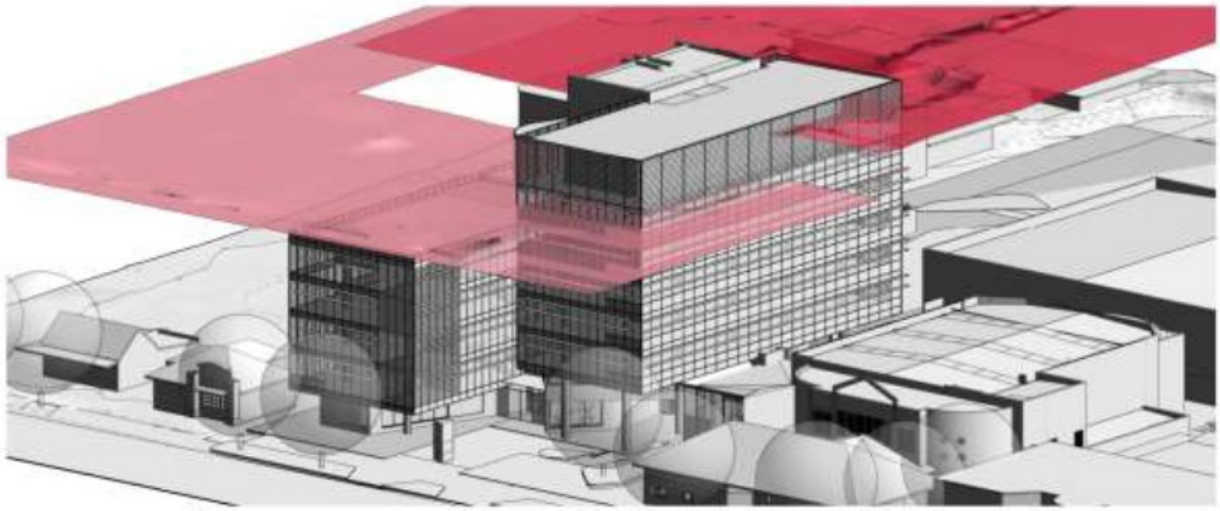
DA.2020.1022 is the recently completed new Council Administration Centre at 257 Crawford St, Queanbeyan, which adjoins the site subject to this development application.

This development sought a Clause 4.6 request to the maximum building height, with similar height limits across the site as to that which applies to this site. The development was approved by the Regional Planning Panel with a maximum height of 32.97m which resulted in a maximum non-compliance of approximately 7.97m or 32% over the 25m height limit portion of the site and a 2.97m or 10% maximum non-compliance over the 30m portion of the site.

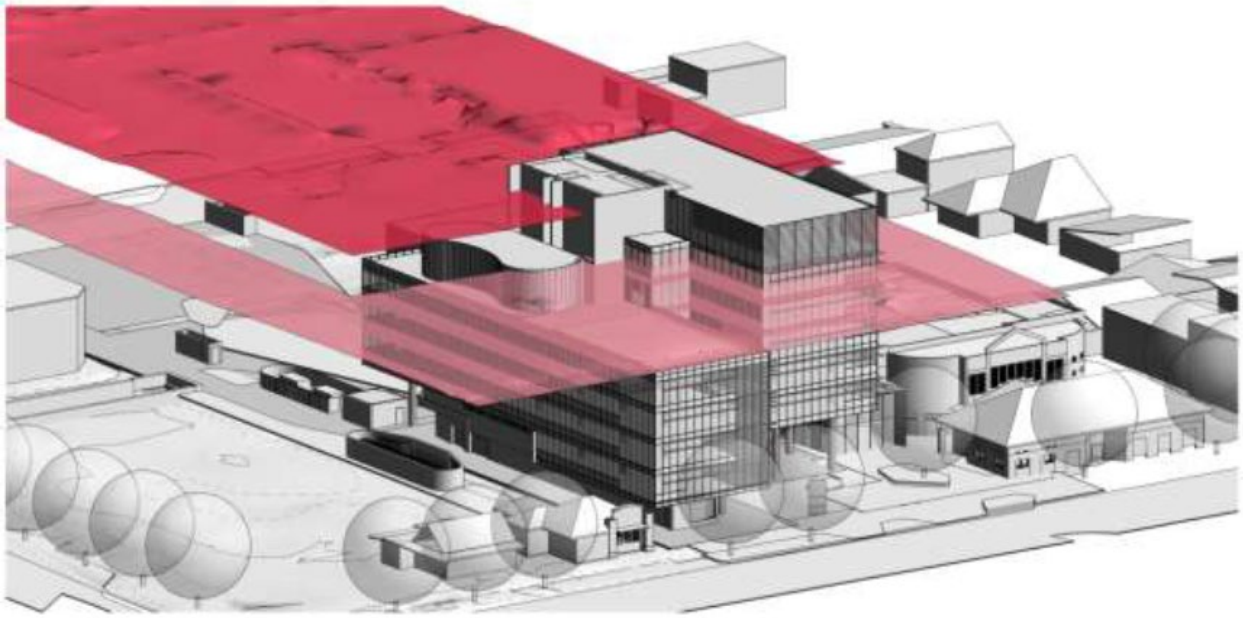
The assessment also considered and approved seven variations to the Queanbeyan Development Control Plan including a substantial reduction in the front setback to Crawford St where the setback of 4.97m does not comply with the DCP which requires a 20m setback for buildings over two storeys in height.

The following sketches of the Council Building show the additional height approved for the building.

Figure 2: Height Plane Showing Portions of the Development Exceeding the building height controls



View South West



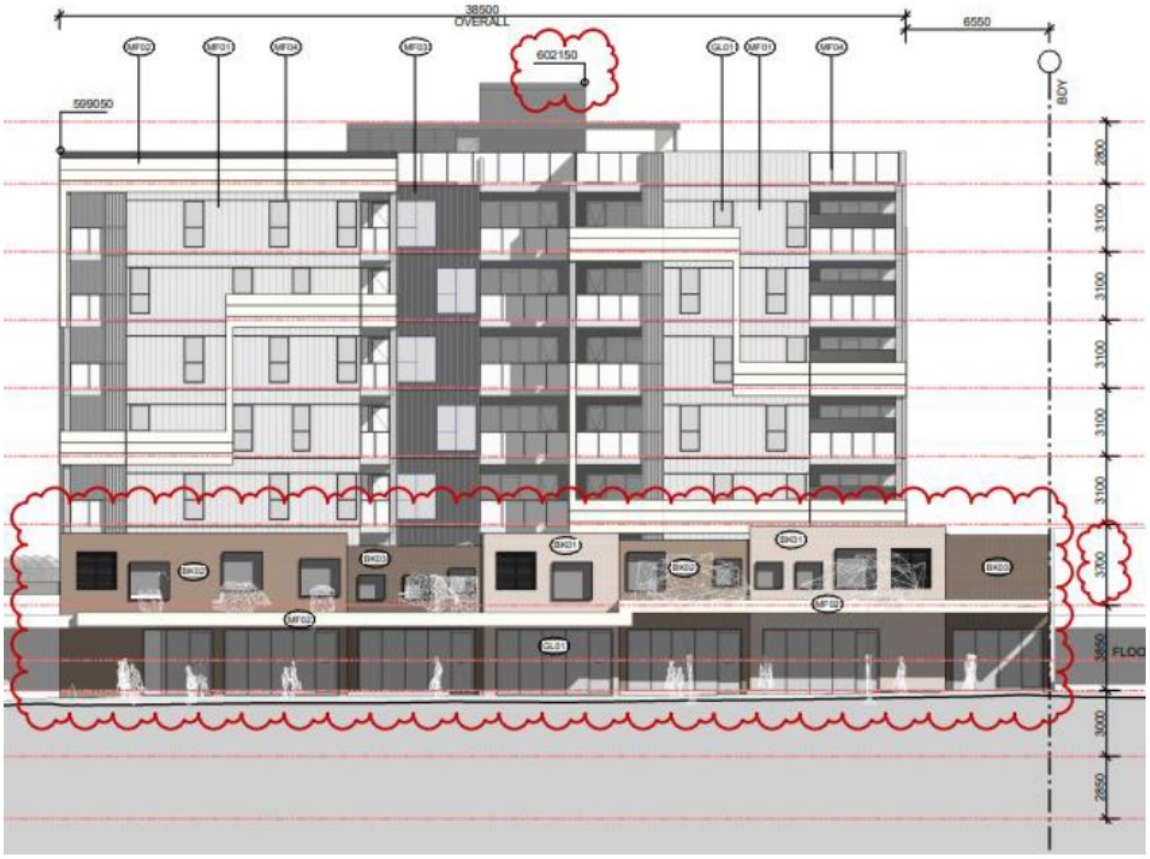
View North West

DA.2022.1002 – 202-214 Crawford St

DA.2022.1002 for the Demolition, ground level commercial premises tenancies and construction of a seven storey shop top housing development (58 units) is located at 202-214 Crawford St Queanbeyan. The site is subject to a 25m height of buildings development standard.

The proposal required a Clause 4.6 Request to vary the maximum height of building standard to 27.4m which is approximately a 10% variation. The development also sought a variation to the DCP front setback of 20m to 6m only for 3 stories and above.

This development was approved by Council at the 14 June 2023 meeting. Below is a sketch of the approved development showing the areas of non-compliance.



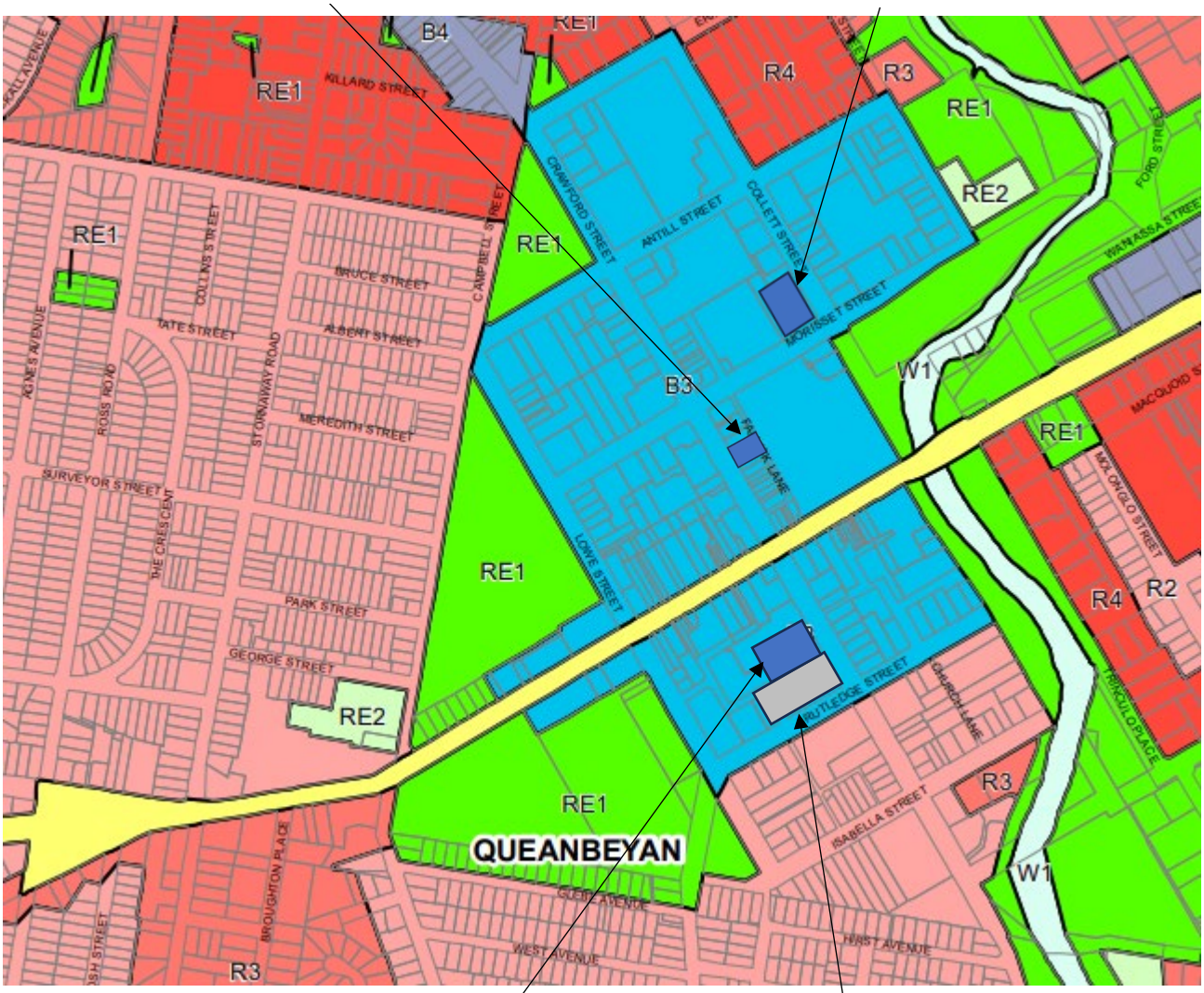
DA.2023.0602 – Morisset St, Queanbeyan

Whilst not yet determined, there has also been a development application lodged for a nine storey shop top housing development at 50 Morisset St Queanbeyan (DA.2023.0602). The proposed height of this development is approximately 28m.

Map showing location of other development sites within the CBD.

DA.2023.0602 –
7 storey shop top housing

DA.2022.1002 – 9 storey shop top housing



DA.2020.1002 Council Administration Building

Site subject to this development application

Conclusion

Strict compliance with the development standard Height of Buildings would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public, and in fact will result in a diminished urban design, amenity and public benefit outcome. In particular, strict compliance with the height control in this instance would eliminate the ability for the public benefits of affordable housing on the site and the more sensitive and appropriate urban design approach.

The visual impact of the development is not adversely affected by the exceedance of the height control and there is appropriate transition to the south which is in keeping with the existing and desired future character. There are no impacts arise on adjoining properties as a result of the non-compliance.

The proposed development is consistent with the emerging character of the area when compared to recently approved developments within the vicinity of the site. The design provides a transition of height to the adjoining properties through the use of a podium at street level. The height variation does not impact upon the desired future character of the area and the proposed built form, layout and design reference allows for a rhythm within the development to be established which is not repetitious and uninteresting in form.

The proposed development demonstrates a high quality outcome for the site which will result in the delivery of an integrated community of buildings, with the achievement of an integrated, cohesive and optimised urban design 'precinct' outcome for the subject and adjacent sites. The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

'to encourage:

i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
ii) the promotion and co-ordination of the orderly and economic use and development of land…'

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

• Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any significant additional benefits to the owners or occupants of the surrounding properties or the general public, and in fact would result in a diminished outcome for the community.

• Strict compliance would prevent the delivery of 15% affordable housing on the subject site.

• The proposed variation allows for the most efficient and economic use of the land.

As has been detailed in this report, the request to vary a development standard does not automatically mean that the proposed development is not consistent with the desired future character of the area. When comparing to recently approved developments within proximity to the site, the development can demonstrate that it meets the desired character of the area and the broader planning objectives of the zone are not undermined as the circumstances of the case are very particular to the subject site.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance and the proposal will be in keeping with the emerging character of the area as demonstrated by recent development approvals within the locality.

Attachment A:

Mills and Oakley reports on recent Land and Environment Court cases.

Important Court decision on ‘desired future character’, and its interplay with clause 4.6 variations

Menu

> Planning & Environment

By Anthony Whealy, Partner and Clare Collett, Special Counsel

The recent case of *Big Property Pty Ltd v Randwick City Council* [2021] (***Big Property***), followed swiftly *by HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (**HPG**), both provide welcome guidance and flexibility in terms of how to properly assess the 'desired future character' of an area. Maintaining such 'character' is frequently referenced as an objective of development standards in LEPs, and is often cited by councils as a reason to refuse any cluse 4.6 variation request (for example to breach height or FSR controls). However the Big Property decision (together with other recent decisions referenced in this article) is a strong reminder that exceedances of development standards such as height and FSR are often expressly permissible under clause 4.6, and that the desired future character of an area is subject to this – buildings can and will exceed planning controls, and so the 'desired future character' of an area is not as simple as slavishly pointing to development controls as being some absolute maximum envisaged for the entire future shape and form of an area.

The SJD Cases

The issue of desired future character and what this means for a development applications was considered in detail in the SJD cases by both Acting Commissioner Clay and Chief Justice Preston (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 and *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* (SJD). You can read our previous, detailed article on SJD **here.**

These cases involved an appeal against the refusal of development consent for the demolition of an existing building and construction of six-storey shoptop housing in Double Bay. The proposal exceeded the height and FSR controls by approximately 40% and clause 4.6 variation requests were submitted with the development application. An objective of both the height and FSR control was to ensure that

buildings were compatible with the future desired character of the area.

A key issue in the proceedings was whether the proposal was consistent with the 'desired future character' of the area, a term which as undefined in the LEP itself (as is often the case). The Applicant relied upon two recent approvals adjacent to the site which exceeded the current controls, to establish the desired future character of the part of Double Bay in which the Site sat. Council's position was that the approved adjacent developments did not reflect the desired future character. Acting Commissioner Clay accepted the Applicant's position and found that the **adjacent buildings which also exceeded the height controls should be considered when determining desired future character.** Importantly, the Commissioner found that it is possible to meet the objectives of the height and FSR controls even if there is a breach of those controls. Commissioner Clay also clearly supported the use of clause 4.6 requests and said as follows:

> *It should be noted cl4.6 of WLEP is as much a part of WLEP as the clauses with development standards.* ***Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome***.

Council appealed against Commissioner Clay's decision and Chief Justice Preston heard the appeal. Council claimed that Commissioner Clay had erred in his construction of desired future character by failing to have regard to the relevant provisions of the Development Control Plan (**DCP**), taking into account the allegedly irrelevant consideration of adjacent developments that had been approved, and misconstruing the desired future character provisions in the DCP.

Chief Justice Preston considered in even more detail what desired future character means. **His Honour held that if the term 'desired**

future character' was limited to being strictly defined by and limited to numerical development standards (and the objectives of these standards) then it would be near impossible to find that a development which contravened a development standard was consistent with desired future character. **Clause 4.6 variation requests would inevitably be doomed to failure**. **His Honour rejected such an approach.**

Chief Justice Preston explicitly found that, **in determining the desired future character, matters other than the development standard needed to be considered**. His Honour noted that **other provisions of the local environmental plan and other approved development that contravenes the development standard are both relevant to determining desired future character**. His Honour disagreed with all of Council's grounds of appeal in relation to desired future character. Importantly, His Honour noted that **Councils cannot define the future character that is referred to in a LEP by doing so in a DCP unless the LEP expressly refers to the DCP in the definition**. Therefore it is open to a developer to identify the desired future character in light of a range of factors, including other approved development, and the LEP provisions which of course allow variations to development standards, via clause 4.6.

The Big Property Case

The appropriate determination of desired future character was again in issue in the recent case of *Big Property,* a decision of Commissioner O'Neill which was handed down on 31 March 2021. The Big Property **case** was an appeal against the refusal of a development application for alterations and additions to an approved residential flat building, including the provision of additional affordable rental housing units and the construction of an additional storey.

The proposal exceeded the height and floor space ratio development standards, and Council contended that the clause 4.6 request was not well founded because the proposal was incompatible with the local character of the area, primarily due to its bulk and scale. In Big Property, the Applicant claimed that the height and FSR exceedances were a justified response to the provision of two additional affordable housing units.

In considering the clause 4.6 request and desired future character, **Commissioner O'Neill held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area.** Commissioner O'Neill held that development standards for building envelopes are frequently generic standards which do not account for existing and approved development, site amalgamations, SEPP allowances, heritage issues or the nuances of an individual site. The Commissioner expressly referenced SJD, and went on to hold that:

> *"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realisation of that masterplan will achieve the desired urban character. Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map. As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or*

other mechanisms that intensify development. All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality" [at44]

Commissioner O'Neill found that the exceedance of height/FSR standards due to the provision of affordable housing units was an environmental planning ground and thus the clause 4.6 request was a well-founded request. Commissioner O'Neill also expressly referenced the fact that some State Environmental Planning Instruments, such as that for Affordable Rental Housing, 'incentivise the provision by the private sector of in-fill affordable housing by providing additional GFA above the otherwise applicable development standards that determine the building envelope for a particular site'. This too must be factored into any consideration of what constitutes the 'desired future character' of an area.

The HPG decision

More recently, in May 2021, in the matter of *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021], judgement here.
Commissioner O'Neill was required to determine an appeal relating to the partial retention of an existing contributory building in a heritage conservation area in Mosman, and the construction of a new four-storey shop top housing development. The Proposal exceeded the height development standard essentially by one storey (in part), principally to achieve the allowable gross floor area while retaining the important heritage fabric of the existing building.

The Council in this case again claimed that the clause 4.6 variation request must fail on the basis that the proposal could not meet the express objective for the height of buildings development standard to "ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form and will produce a cohesive streetscape".

In upholding the appeal, Commissioner O'Neill held at [57]:

> "*The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built context of the site (Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60]).*

It was again also important that 'desired future character' was not defined in the LEP itself. Indeed, the Council sought to define the 'desired future character' by reference not even to a DCP, but to the 'Mosman Local Housing Strategy', a document which the Court noted 'postdates' the LEP, and could not therefore be relied upon to define terms used in the LEP.

What does this mean now?

Recent case law shows that 'desired future character' is determined by a range of factors including the LEP and the approved buildings neighbouring a development. The fact that a development exceeds height and FSR standards cannot be used as a carte blanche for claiming that a development is inconsistent with the desired future character of the neighbourhood. Applicants can clearly look at the surrounding site context to consider desired future character, and can assume that not all future development will comply with development standards.

What may change in the future?

The Department of Planning, Industry and Environment has developed a draft Local Character Clause which is proposed to be included in the Standard Instrument Local Environmental Plan. The clause will allow councils to adopt a map overlay which identifies the boundaries of a local character area and requires councils to consider local character statements when addressing development applications. The local character statement will address future desired character. This standard clause was on exhibition from late 2020 until January 2021 but is not yet in force. Furthermore, the preparation of a local character statement is optional and may not be a priority for some councils.

If a Council does adopt a local character statement, it is important this statement is considered when preparing a new development application as the proposed development will need to be consistent with the desired future character as outlined in that character statement. Until such time as local character statements are commonplace, developers will have to make their own assessment of desired future local character based on the LEP and other approved developments.

In the meanwhile, town planners in particular (and those who prepare development application documents and clause 4.6 variation requests) should be familiar with and make reference to these important recent Land and Environment Court decisions.

A (much-needed) breath of fresh air for developers and landowners as regards clause 4.6 variations: substantial height and floor space variations (>40%) in Double Bay Centre approved by the

Menu

Land and Environment Court

> Planning & Environment

By Anthony Whealy, Partner, Ashleigh Cowper, Senior Associate and Roisin McCann, Paralegal

In the last two years we have seen a number of judgments providing significant consideration on the proper construction of written clause 4.6 variation requests, which have emphasised the importance of well-drafted requests, but arguably resulted in a higher standard of satisfaction as to justified contraventions of development standards. Commensurately, most observers would agree that proposed variations have been subject to intense scrutiny and highly conservative decisions, for example refusing applications even where all parties considered that the design of a building was appropriate and that it caused no unreasonable adverse impacts whatsoever (see for just one example *Baron Corporation Pty Limited v Council of the City of Sydney* [2018] NSWLEC 1552.

On 12 March 2020, Acting Commissioner Philip Clay handed down his judgment in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (**SJD DB2**).

This appeal sought consent for the construction of a six-storey shop top housing development at 28-34 Cross Street Double Bay (**the DA**).

The Court approved the proposed development, having a height of 21.21m where the control was 14.7m – representing a maximum variation of approximately **44%** (or 6.51m) – and a floor space ratio (**FSR**) of 3.54:1 where the control was 2.5:1 – representing a variation of approximately **41%**. (View the design by Bates Smart here).

Background – recent court decisions on clause 4.6 variation requestsThese significant variations were approved by virtue of clause 4.6 of the *Woollahra Local Environmental Plan 2014* (**WLEP**), a standard clause which enables a consent authority to vary the applicable height and FSR controls, subject to satisfaction of certain prerequisites. In this case, the Court accepted that the clause 4.6 variations were well-justified, and ultimately better than a compliant (smaller) scheme on the subject site. An important factor contributing to this finding was the design excellence of the proposed building, which the Court referred to as "an excellent response to its context" and a "high quality architectural design" (at [74], [106].). The upshot was the approval of a building having six storeys rather than the four storeys that a strict application of the LEP controls would have allowed.

To provide some context on the significance of the *SJD DB2* decision, it is helpful to briefly set out the Court's recently endorsed approach to matters on the construction and interpretation of clause 4.6 variation requests. In other words, the correct legal approach to these matters.

In *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (**Baron**), the Court considered an appeal under under s 56A of the *Land and Environment Court Act 1979* to a judge of the Land and Environment Court relating to a development application for alterations and additions to an approved 7-storey residential flat building containing 27 apartments at 17-19 Dunning Avenue Rosebery, including to increase the number of units from 27 to 39 and increase the FSR of the development from 2:1 to 2.3:1.

This proposed increase in FSR resulted in the necessity of a request under cl 4.6(2) of the *Sydney Local Environmental Plan 2012*. At first instance, Commissioner Gray refused to grant development consent to the development application, finding that the Applicant's clause 4.6 variation request had not adequately addressed the matters required to be demonstrated by clause 4.6(3).

On appeal, the Applicant submitted that the Commissioner had misdirected herself by asking whether she was "directly and reasonably satisfied" with the reasons given in the clause 4.6 request, particularly in light of his Honour Chief Justice Preston's statement in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (at [25]) that:

"…the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b)."

The Court rejected the Applicant's submissions and held that a clause 4.6 request cannot be found to adequately address the matters required to be demonstrated unless it "in fact" demonstrates those matters.

This decision indicated that the approach taken by the Court in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 was the settled position in respect of the proper construction of clause 4.6 requests, despite otherwise contrary commentary provided in *Initial Action*, including as provided by the excerpt above.

Not long after the decision was handed down in *Baron*, the Court of Appeal considered matters concerning the proper construction of

clause 4.6 requests in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 (**RebelMH**) This appeal, also brought under s 56A of the *Land and Environment Court Act 1979*, involved a DA for the construction of a residential flat building at 14-16B Thrupp Street Neutral Bay, which contravened the height development standard provided in the *North Sydney Local Environmental Plan 2013* and accordingly required the submission of a clause 4.6 variation request.

The Applicant in this matter submitted that at first instance, Justice Moore had misconstrued clause 4.6 by finding that to '*adequately address'* the matters required to be demonstrated in clause 4.6(3), the request had to actually demonstrate those matters. The Court reaffirmed the decision in *Baron* (and Al Maha) in finding that "it is not sufficient for the request merely to seek to demonstrate the matters in subcl (3)… [it] must **in fact** demonstrate the matters in subcl (3)" (at [51]).

The findings of these two cases resulted in a higher standard to be met in satisfying the relevant tests, (at least compared to that set out in *Initial Action*,) in requiring that clause 4.6 requests must do more than simply cover the matters provided for under clause 4.6(3) and must instead demonstrate those outcomes have been met 'in fact'.

In light of these judgments, developers could be forgiven for being wary as to whether significant breaches in height and/or FSR might be achievable – even where clause 4.6 variation requests are carefully drafted and environmental planning grounds seemingly well established. However, this more recent judgment in *SJD DB2* provides some refreshing and helpful commentary on this area, and seems to reflect a much-needed return to an approach that embraces reasonableness and flexibility in a consent authority's exercise of their power to grant consent to a development that contravenes development standards.

Findings on the clause 4.6 variation requests

The main contentions maintained by the Council at the hearing in *SJD DB2* were as follows:

> that the objections made pursuant to cl 4.6 of WLEP did not adequately address the non-compliances;
> that the proposal was inconsistent with the desired future character of the area; and
> that the loss of commercial floor space was unacceptable.

The Court drew from the decisions in *Initial Action* and *RebelMH* in the *SJD DB2* judgment, and noted that although there are a number of ways to demonstrate that compliance with a development standard is unreasonable or unnecessary, it may be sufficient to establish only one way (at [35].) In considering the clause 4.6 variation requests submitted by the Applicant, the Court considered that they could be treated together, as the breaches they related to were fundamentally related, as where there is greater building form with additional height, so too is there greater floor area (at [63].)

The issues between the parties in respect of the clause 4.6 variation requests were refined by the Court as follows (at [65]):

1. *what is the desired future character?*
2. *is the proposal consistent/compatible with that desired future character?*
3. *has any visual intrusion been minimised?*
4. *have the controls been abandoned?*

The Applicant submitted that the clause 4.6 variation requests were well founded in light of the Council's recent approvals of two 6-storey

developments adjoining the subject site to the east at 20-26 Cross Street and 16-18 Cross Street because they:

> demonstrated the relevant desired future character of the area; and
> established Council's abandonment of the height and FSR controls as applicable to that particular area of the Double Bay Centre.

In respect of desired future character, the Court agreed with the Applicant in finding that the focus of its assessment should be primarily confined to the more immediate context of the subject site, as opposed to the broader area of the Double Bay Centre, which was considered to be of limited relevance. The portion of Cross Street subject of the proposed development was considered to be a "well-defined component of the Centre" with its own character that "forms part of the overall character of the Centre and is not an anathema to it" (at [68].)

Importantly, the Court considered that a construction of the desired future character "**must take into account** the form of the buildings to the east which the Council approved under effectively the same controls", and also substantially exceeded the height and FSR controls, and as a result, "**represent the recently expressed attitude of the Respondent to the controls and what is desired** in this part of Cross Street" (at [69]). These nearby approved developments were referred to as the 'driving force' for development in the immediate locality, and although the broader context was not to be excluded from consideration, it was this more defined context that the Court considered was "**determinative of the preferred form of development for the Site**" (at [70], [72].)

The issue of visual intrusion was determined as being both minor in nature and minimised by the proposed development (at [86]). In reaching this conclusion, the Court clarified that the existence of a 'visual intrusion' should be distinguished from a disruption to a 'view', and further defined as a **necessarily unwelcome** form that intrudes into an available outlook (at [78]-[79]). Due to the DA's proposed "attractive well-designed building with coherent form and scale", the impact of any visual intrusion was considered to be minimised, particularly because the affected outlooks did not contribute substantially to the amenity of impacted apartments (at [80], [87]).

Finally, although he noted it was not strictly necessary to do so, the Acting Commissioner turned his mind to whether the controls had been abandoned, especially in light of the recent nearby developments. As with construing the applicable 'desired future character' of the area, the Court considered that the immediate context of the section on Cross Street to which the DA related could be narrowed in on to illustrate that the concept of abandonment had been satisfied (at [92]-[93].) As a result, **the Council's abandonment of the height and FSR controls was found to be clearly and deliberately established**, albeit confined to this discreet section of Cross Street.

The Court's findings in *SJD DB2* reflect a common sense approach to the construction of 'desired future character' by reference to relevant contextual and factual circumstances, and carefully curtails the question of 'abandonment' of controls in this way to provide clarity as to how objectives of development standards might be adequately met despite numerical non-compliance.

The issue of commercial viability

On the issue regarding the loss of 1,000m^2 of commercial floor space, the parties engaged economic experts to provide evidence as to how

potential employment opportunities and the wider commercial viability of the Double Bay Centre might be impacted, and how significant those impacts were in an assessment of the DA as a whole. The Court agreed with the Applicant's submissions that the relevant provisions contained in the Woollahra Development Control Plan 2015 only encouraged, and did not require, that commercial use on first floors be retained.

The impact on employment opportunities was further assessed as being "so small as not to have a measureable impact on the viability" of the Centre (at [54].) The Court suggested that if such an objective were required to be achieved by every development in the area, rather than as a general Centre-wide outcome, there would necessarily result adverse planning and urban design outcomes, including discordant built form articulation and/or the provision of unnecessary floor-to-ceiling heights (at [58]-[59].)

Key takeaways

We expect that this decision will obviously be particularly significant for other recent and anticipated nearby development proposals in the Double Bay Centre, but should have a much broader application, reminding all consent authorities of the proper approach to clause 4.6 variations. In particular, **that there is no maximum number or percentage by which a development standard may be varied** – a common misconception within the industry whereby many councils suggest that if a variation is numerically large, that a planning proposal (LEP amendment) is instead required, rather than reliance on clause 4.6. That is fundamentally wrong. **No such numerical limitation on the size of a variation to a development standard such as height or FSR exists** under the Standard Instrument cluase 4.6 wording.

While it remains very much the case that clause 4.6 variation requests must be carefully drafted and well reasoned, developers should rest assured that flexibility in applying clause 4.6 to vary development standards can and should prevail in order to achieve better outcomes for a particular site and context in justifiable circumstances. Indeed, as Acting Commissioner Clay makes clear in his judgment, '**cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome**' (at [73]).

The approach taken by the Court in the *SJD DB2* judgment serves as a breath of fresh air, particularly following the recent trend of judgments that would appear to compound upon and constrain the set of tests applicable to clause 4.6 to such a degree that its underlying purpose of flexibility in varying development standards becomes obscured and even lost. We can hope to see a shift away from this direction within the Double Bay Centre in the near future, and perhaps even more broadly, as a result of the *SJD DB2* judgment.