

# GYDE

# Clause 4.6

# Variation Request

Height of buildings (CI 4.3)

184B-190 Kurraba Road, Kurraba Point

submitted to North Sydney Council  
on behalf of PB & Co

## Clause 4.6 Variation Request

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### This report was prepared by:

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**Project:** Clause 4.6 Variation request  
**Report Version:** Final - Amended post lodgement

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## 1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.3 Height of Buildings of the North Sydney Local Environmental Plan 2013 (NSLEP) that is proposed in a Development Application (DA) for residential flat buildings (RFB) and dual occupancies at 184B-190 Kurraba Road, Kurraba Point (the site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

Clause 4.3 of the NSLEP prescribes two maximum building heights to the site being 8.5m (R2 zoned land) and 12m (R4 zoned land). The proposed development has maximum building heights as follows:

- 8.55m - 9.2m in the R2 zone where the 8.5m maximum building height applies. This equates to a maximum 0.72m (8.4%) variation of the 8.5m development standard.
- 12.2m in the R4 zone where the 12m maximum building height applies. This equates to a maximum 0.2m (1.6%) variation of the 12m development standard.

The majority of the bulk and scale of the development is located under the height of building development standard and the extent of the variations proposed relate to minor parts of the roof slab and awnings.

In brief terms, the requirement to comply with the HoB development standard is unreasonable and unnecessary in the circumstances because:

- The proposal satisfies the objectives of the HoB development standard.
- The built form has been designed to step down across the site responding to the steep topography of the land.
- The variation is primarily due to the steep topography of the site.
- The proposal is in harmony with adjoining developments and the character of the wider street.
- The proposal facilitates the orderly and economic development of the site and in particular in the R4 zoned part of the site which currently contains two x dual occupancies.
- The proposed variation is limited to minor parts of the roof level structures and roof slab and does not contribute to any habitable floor space.
- The proposed development is compatible with adjoining residential development, is articulated and features a mix of materials, colours and landscaping which make it visually sympathetic to neighbouring buildings. Importantly, the variation to the height of building development standard does not result in any unreasonable impacts to residential amenity, solar access, views or privacy, particularly with the reductions made to the heights.

This request has been prepared under clause 4.6 of the NSLEP and demonstrates that compliance with the HoB development standard is unreasonable and unnecessary in the circumstances of this case, and there are sufficient environmental planning grounds to justify the variations. Further, the proposal is consistent with the objectives of the zone for the site and the development standard, and is therefore, in the public interest. This request also addresses the requirement for the concurrence of the Secretary.

## 2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP) to justify a variation to the Height of Building development standard proposed in a DA submitted to North Sydney Council for residential flat buildings and dual occupancies at 184B-190 Kurraba Road, Kurraba Point.

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

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

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

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

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b)

### 3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of Building development standard which is set out in Clause 4.3 of the North Sydney Environmental Plan 2013 (NSLEP) as follows:

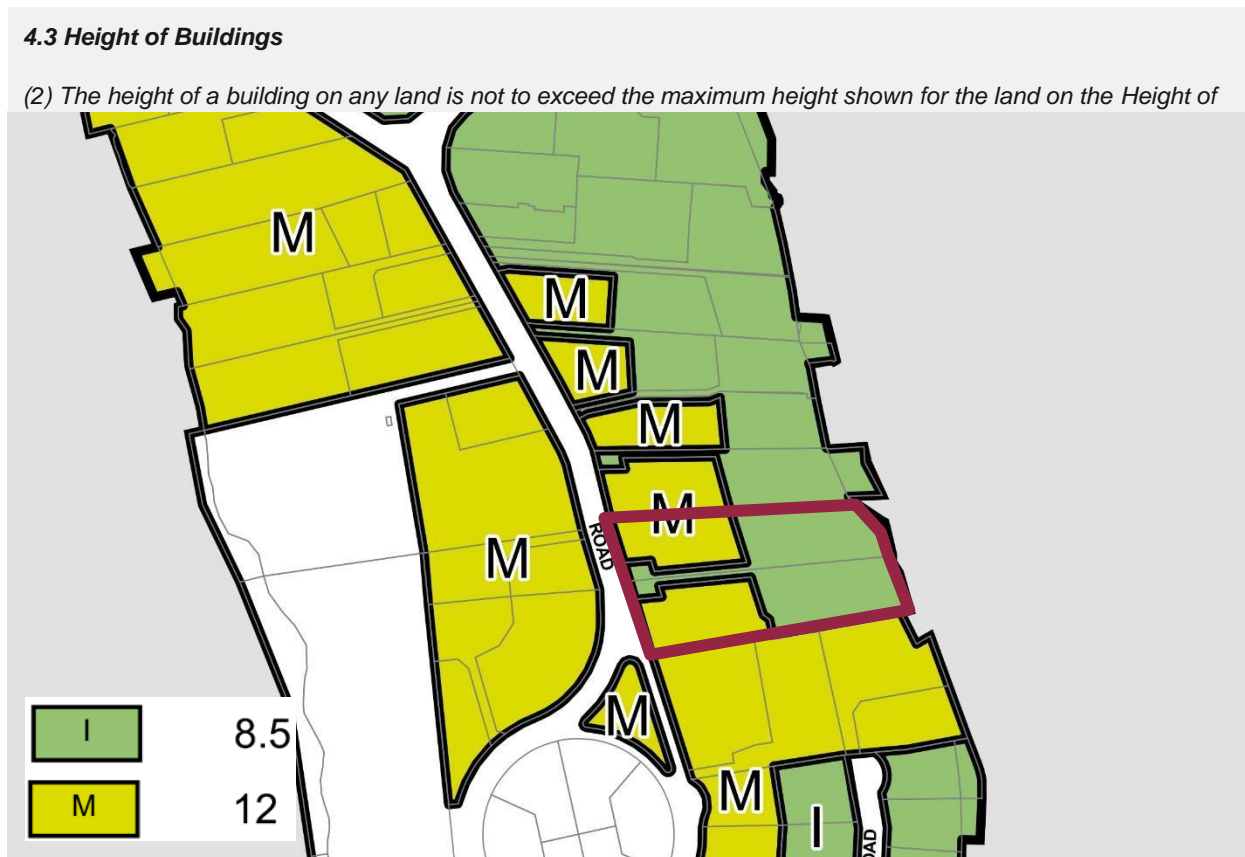


Figure 1: NSLEP Height of Buildings Map, location of the site outlined in red (Source: NSW Legislation)

The numerical values of the development standard applicable in this instance are 8.5m (R2 zoned land) and 12m (R4 zoned land).

The development standard to be varied is not excluded from the operation of clause 4.6 of the NSLEP.

## 4. EXTENT OF VARIATION

### 4.1. Measuring Ground Level (Existing)

The maximum building height is to be measured in accordance with the following NSLEP 2013 definition:

**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.*

We have considered the various court cases (Stamford Property Services Pty Ltd v City of Sydney & Anor [2015] NSWLEC 1189, Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582 and Bettar v Council of the City of Sydney [2014] NSWLEC 1070),

### 4.2. Proposed Height Exceedances

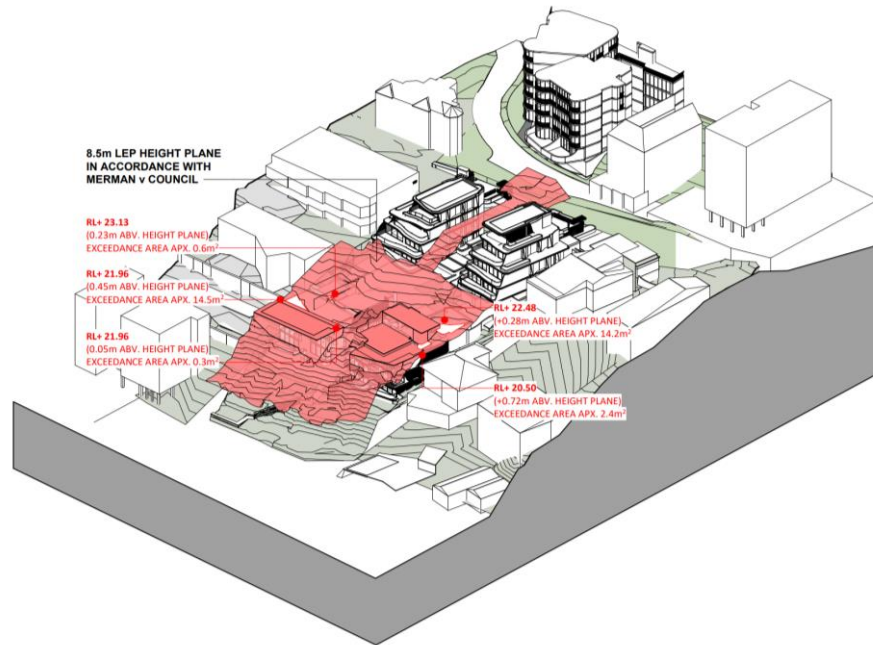
Clause 4.3 of the NSLEP prescribes a maximum height of building of 8.5m for the R2 zoned part of the site and 12m for the R4 zoned part of the site. The proposed development has maximum building heights as follows:

- 8.55m – 9.2m in the R2 zone where the 8.5m maximum building height applies. This equates to a maximum 0.72m (8.4%) variation of the 8.5m development standard.
- 12.2m in the R4 zone where the 12m maximum building height applies. This equates to a maximum 0.2m (1.6%) variation of the 12m development standard.

The majority of the bulk and scale of the development is located under the development standard and the extent of the variations proposed are shown in Figure 2 and Figure 3 and summarised below:

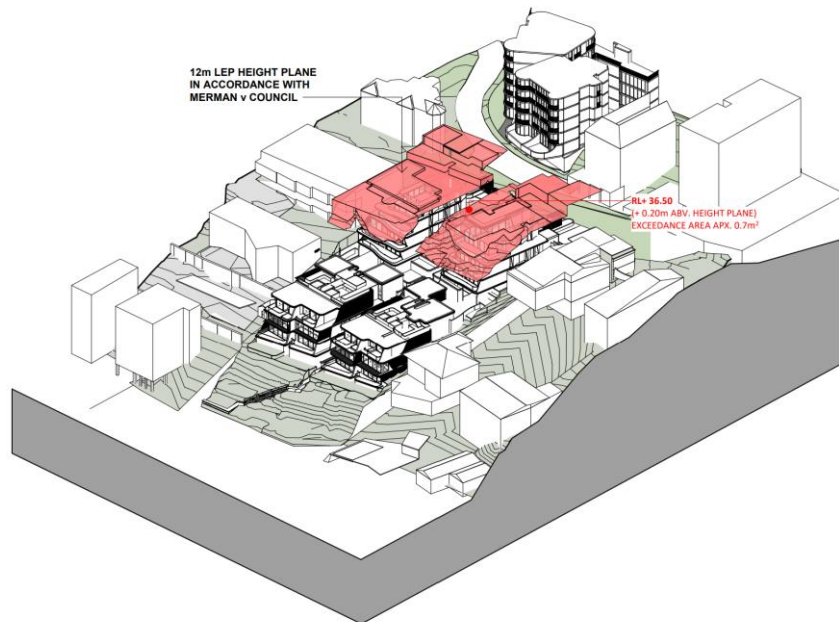
- In the R2 Zone (maximum 8.5m height standard) the following height variations are proposed:
  - 0.05m (area approximately 0.3sqm) relating to parts of the roof level structure for building D.
  - 0.23m (area approximately 0.6sqm) relating to parts of the roof level structure for building D.
  - 0.45m (area approximately 14.5sqm) relating to parts of the roof level structure for building D.
  - 0.28m (area approximately 14.2sqm) relating to parts of the roof level structure for building C.
  - 0.72m (area approximately 2.4sqm) relating to parts of the roof level structure for building C.
- In the R4 Zone (maximum 12m height standard) the following height variations are proposed:
  - 0.2m (area approximately 0.7sqm) relating to minor parts of the roof level structure of Building A.

Clause 4.6 Variation Request



R2 HEIGHT PLANE DIAGRAM - 8.5m ABOVE EXISTING GROUND LEVEL (VIEW 1)

Figure 2: Drawing A483(Rev 8) R2 8.5m Height Plane Diagram (Source: KTA)



R4 HEIGHT PLANE DIAGRAM - 12m ABOVE EXISTING GROUND LEVEL (VIEW 1)

Figure 3: Drawing A481(Rev8) R4 12m Height Plane Diagram (Source: KTA)



## 5. UNREASONABLE OR UNNECESSARY

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

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

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

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate.

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

We have considered each of the ways as follows.

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

In Table 1 we consider whether the objectives of the development standard in Clause 4.3(1) of the NSLEP are achieved notwithstanding the proposed variation (Test 1 under *Wehbe*).

Table 1: Achievement of Objectives of Clause 4.3 of the North Sydney Local Environmental Plan 2013

<b>ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013</b>
<b>(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</b>
<p>The topography of the site is steep, starting from RL28.18 at the west (Kurraba Road) boundary and stepping down the site to the foreshore at RL 1.5. This represents a step down across the site by approximately 27.3m from the street level to the interface with the water.</p> <p>The proposed RFBs are 3 to 4 storeys above the existing ground level and the upper levels are setback from eastern building edge. This creates a step in the RFB building mass which then reduces to a 2 to 3 storey built form in the R2 zone where the dual occupancies are proposed.</p> <p>The proposal requires excavation however the design of buildings A, B, C &amp; D has been amended to significantly reduce the amount of excavation required. An entire level of basement excavation has been deleted under buildings A and B, with the car parking now limited to R2 level 2 / R4 lower ground. To accommodate this change, the R2 zone private garages have been raised and now sit approximately level with the car parking level of the R4 RFBs.</p> <p>The elements of the proposal that contravene the development standard are minor and relate to the roof level. The proposal, notwithstanding the height variations, reflects the natural landform by stepping down the site from Kurraba Road to the waterfront.</p>

<b>ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013</b>
<b>(b) to promote the retention and, if appropriate, sharing of existing views,</b>
<p>From the outset, it is important to note that the objective of the height standard requires the promotion of the retention and, if appropriate, sharing of existing views. The objective does not require the 'preservation' or minimisation of impact of existing views such that no impact to views can be had by the proposed development.</p> <p>In this regard, an assessment has been made of the potential effects on views from surrounding dwellings and the extent of view sharing utilising the guidance provided by Senior Commissioner Roseth of the Land Environment Court of NSW in the judgement in Tenacity Consulting v Warringah [2004] NSWLEC 140 – Principles of view sharing: the impact on neighbours. The impact on views has been of the area of non-compliance with height and have been updated to reflect the most recent changes.</p> <p>Tenacity is specific to view loss and provides a method of assessment, applying a four-step view sharing analysis. An assessment of the proposal on the potentially affected surrounding development utilising each of the four steps in Tenacity as summarised below.</p> <p><b>STEP 1 - Existing views to be affected, STEP 2 – from where the view is available, STEP 3 the extent of the impact and STEP 4 the reasonableness of impact</b></p> <p>The existing views which are to be affected, albeit minimally, are outlined below and modelled views have been prepared for each to show the extent of view loss.</p>

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

(b) to promote the retention and, if appropriate, sharing of existing views,

**Viewpoint 1: Unit 1, 192A Kurraba Road**



Figure 4: Unit 1, 192A Kurraba Road - existing and proposed views (Source: Urbis and KoichiTakada Architects) red highlights extent of height variation

The non complying parts of the R2 zoned development component is the south-east trailing edge of the roof. It blocks a minor amount of open water and land-water interface and shoreline vegetation from the living area of Unit 1, 192A Kurraba Road. Whilst these are part of the scenic and highly valued features of the view as defined in Tenacity, in quantitative and qualitative terms the view loss is minor and Unit 1, 192A Kurraba Road will still enjoy existing views of land and water, shoreline and extensive views. In terms of step 4, the reasonableness of impact, the minor view impact for the whole dwelling, when considering all views available is minor or less and reasonable, equitable and supported.

**Viewpoint 2: Unit 3, 192 Kurraba Road**

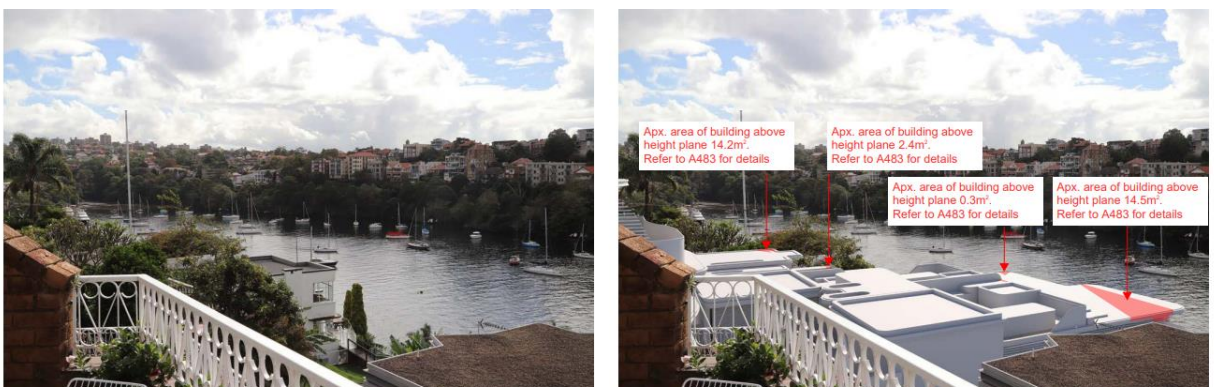


Figure 5: Unit 3, 192 Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects) red highlights extent of height variation

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(b) to promote the retention and, if appropriate, sharing of existing views,**

The non complying roof form in Figure 5 above blocks a minor extent of open water in Shell Cove from the east balcony of Unit 3, 192 Kurraba Road but does not block features considered to be scenic and highly valued features as defined in *Tenacity*. In quantitative and qualitative terms the view loss is minor and Unit 3, 192 Kurraba Road will enjoy existing open water views of Shell Cove. The extent of view impacts is negligible as the views affected are highly oblique, across a side boundary and occupy only a minor part of all views available from the dwelling. The negligible view impact for the whole dwelling is reasonable, equitable and supported.

**Viewpoint 3: Unit 1, 192 Kurraba Road**



*Figure 6: Unit 1, 192 Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects) red highlights extent of height variation*

The area of variation creates minor view blocking, including the minor non compliances from the east balcony of Unit 1, 192 Kurraba Road which do not create any significant view loss. The four storey massing is visible immediately north of this end unit, where it blocks background residential development. In this regard the extent of the view loss as shown in this view, is contemplated by those combined controls and could be generated by any complying R4 development. The composition to be lost by the compliant R4 proposal is not predominantly characterised by scenic and highly valued features as defined in *Tenacity*. Therefore, in quantitative and qualitative terms the view loss is minor. Unit 1, 192 Kurraba Road will continue to have open sky and open water views. In terms of steps 3 and 4, the view impact is considered minor for the whole dwelling and as only a short section and minor amount of view would be lost. It is therefore reasonable, equitable and supported.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

(b) to promote the retention and, if appropriate, sharing of existing views,

**Viewpoint 4: Unit 2, 192A Kurraba Rd**



Figure 7: Unit 2, 192A Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects ) red highlights extent of height variation

The built form in Figure 7 will block areas of open water and sections of a ‘whole view’ formed by the combination of land-water interface, shoreline vegetation and open water from the existing view north from the central door to balcony of Unit 2, 192A Kurraba Road which together are considered to be scenic and highly valued features as defined in Tenacity. In quantitative and qualitative terms however, the view loss from the height variation is minor and reasonable. This is because the substantive view loss occurs from the complying part of the built form. The height non compliance only affects a small part of that view from the existing view north on balcony Unit 2. The retention of some existing open water views, open sky and land-water interface views will remain from Unit 2, 192A Kurraba Road. The view impact is considered minor as the majority of the view loss includes areas of open water which is considered of less value in Tenacity terms. It is therefore considered reasonable.

**Viewpoint 7: (Survey point 9A) Unit 2, 184A Kurraba Road**

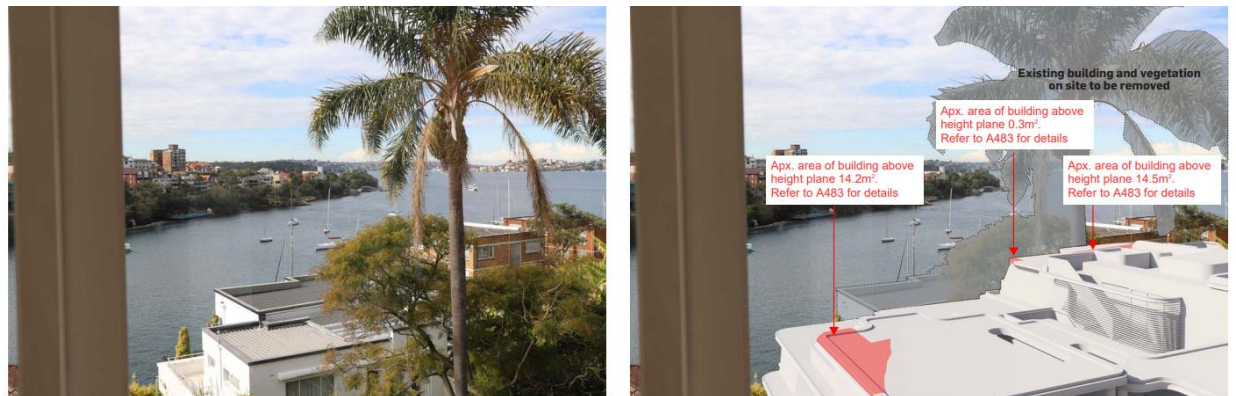


Figure 8: Survey point 9A, 184A Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects) red highlights extent of height variation

The height variation in quantitative and qualitative terms is minor and will not affect existing views southeast of the dining area of Unit 2, 184A Kurraba Road. In relation to step 3, the view impact is deemed as minor – negligible and in terms of step 4, the minor section of non compliant development blocks neighbouring residential development and

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

(b) to promote the retention and, if appropriate, sharing of existing views,

does not block scenic or highly valued features as defined by Tenacity. The view impact is therefore considered as reasonable, equitable and is supported.

**Viewpoint 8: (Survey point 9B – 184A Kurraba Road**



Figure 9: Survey point 9B, 184A Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects ) red highlights extent of height variation.

The height variation when viewed from the living room of Unit 2, 184A Kurraba Road will not affect the extent of existing views available. The view impact is considered minor – negligible as the views affected are across a side boundary. The majority of the view loss is not characterised by scenic and highly valued features as defined in Tenacity with only a minor extent of open water blocked. The minor-negligible view impact for the whole dwelling is reasonable, equitable and supported.

**Viewpoint 9: (Survey point 10) – 184A Kurraba Road (downstairs unit)**



Figure 10: Survey point 10, 184A Kurraba Rd - existing and proposed views (Source: Urbis and KoichiTakada Architects ) red highlights extent of height variation.

The height variation when viewed from the existing view southeast from the outdoor area of 184B Kurraba Road will not affect the retention of views as shown in Figure 10. The removal of the existing building and vegetation will help

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(b) to promote the retention and, if appropriate, sharing of existing views,**

retain existing views at 184B Kurraba Road. In terms of Tenacity step 3, the view impact is minor as the section of non compliant development currently blocks a minor extent of Sydney Harbour, land-water interface and open sky and largely replaces existing built form with new built form. The removal of buildings and vegetation on site reveals a section of Shell Cove and land-water interface at Cremorne Place that was previously blocked from view. The view impact is therefore reasonable and supported in relation to step 4.

**Viewpoint 11: (Survey point 14) – Sub-Penthouse Level 4, 147 Kurraba Road**



Figure 11: (Survey point 14) – Sub-Penthouse Level 4, 147 Kurraba Road - existing and proposed views (Source: Urbis and KoichiTakada Architects) red highlights extent of height variation

A minor section of the roof form is 0.2m above the height plane across an area of approximately 0.7sqm. From the master bedroom of sub penthouse, the non compliant section is on an oblique angle which blocks a section of Cremorne Point tree canopy and residential development, neither of which are defined as scenic or highly valued features by Tenacity. In quantitative and qualitative terms the view loss is minor-negligible for the whole dwelling at Level 4, 147 Kurraba Road. In terms of step 4 reasonableness, the minor view impact for the whole dwelling is reasonable, equitable and supported.

Urbis concludes the following in relation to view sharing as a result of the proposal:

- The extent of view loss for the majority of dwellings inspected ranges from negligible to minor and in one case for the adjoining neighbour at 184, 184A Kurraba Point, to minor-moderate. All view impacts ratings relate to impacts of views from the whole dwelling not solely on the isolated view used for analysis.
- The non compliant parts of the R2 massing are either not visible in north-easterly views or easterly views from upper level apartments at 145 Kurraba Road, or do not cause view loss in relation to scenic or highly valued features as defined in Tenacity
- The minor non-compliances as modelled, in relation to the R2 side setback and LEP height control do not cause viewloss of scenic and highly valued features as defined in Tenacity.
- The majority of view loss shown in photomontages is caused by fully complying built form and as such the quantum of visual change created by the proposed R4 and R2 massing envelopes, is anticipated by the LEP and DCP.
- The composition of views to be lost predominantly includes limited areas of open water, background residential development and vegetation. In five views (unit 1/192a and unit 1/192 Kurraba Road, Unit 2. 192A Kurraba Road, Unit 1. 184a Kurraba Road & Level 4 Sub-Penthouse at 147 Kurraba Road) a short

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(b) to promote the retention and, if appropriate, sharing of existing views,**

section of land-water interface is affected). For Unit 2/192a a wider section of land-water interface will be blocked all of which is caused by fully complying parts of the proposed development.

- Overall, all dwellings assessed will be affected by a limited extent of potential view loss, in one direction over a side boundary where all other scenic and highly valued features as defined in Tenacity views in all other directions including those that are arguable more scenic whole views of Sydney Harbour will remain unaffected.
- This extent of view loss is low using the Tenacity scale and other factors reduce the overall view impacts for eachwhole dwelling, to an extent that view sharing is reasonable and acceptable.
- The proposed development can be supported on view impacts grounds.

Further to the above, the proposed height variations do not restrict the proposed view corridor through the site from Kurraba Road to the water which will create views from the public domain.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development**

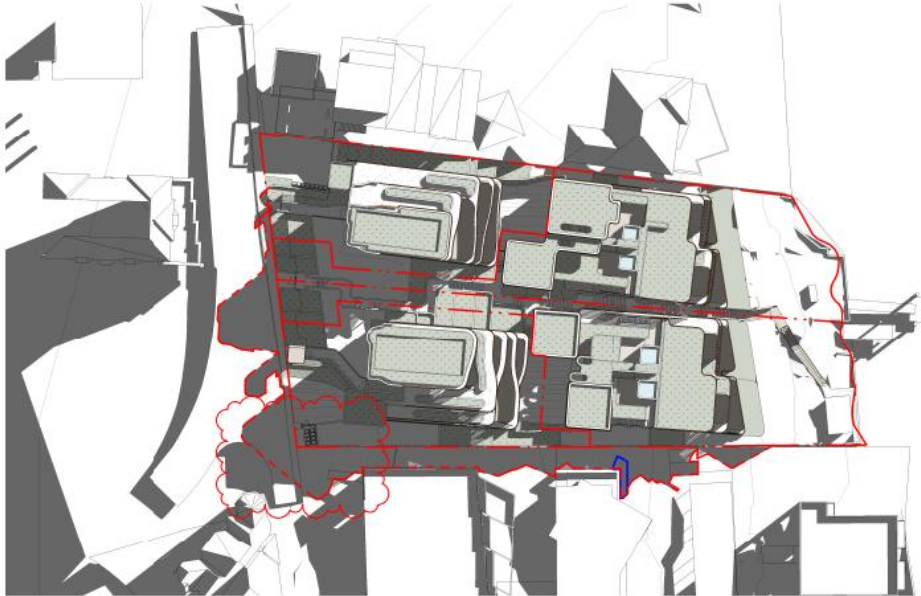
The portions of the development which contravene the development standard do not cause any unacceptable solar accessimpacts to adjoining dwellings, public reserves or streets.

**Maintaining Solar Access to Existing Dwellings**

Part B Section 1.3.7 of the DCP requires a minimum 3 hours solar access be provided to adjoining residential properties between 9am and 3pm mid-winter. The proposed departure to the standard is illustrated by the blue outline on the shadowdiagrams. The shadow cast as a result of the height variation falls on the building at 192A Kurraba Road at 9am. From 10am to 11am the shadow falls partly on ground level open space but then moves to the hardstand car park area from midday to 2pm mid-winter. The proposed departure to the standard, causes negligible additional shadowing to surroundingexisting dwellings.

Considering the shadow impact as a result of the whole development, the main balconies at 192 Kurraba Road will receive a minimum 3 hours solar access in the morning mid-winter. The same applies to 192A Kurraba Road. However, in the afternoon the buildings to the south will be overshadowed by the proposed building which is unavoidable. The level of solaraccess provided to neighbours in the morning mid-winter is considered reasonable given their location immediately to the south of the subject site. Further, both buildings at 192 and 192A will overshadow themselves in the afternoon in mid-winter as the sun moves to the west on the opposite side of Kurraba Point.





JUNE 21 9AM WINTER SOLSTICE

Figure 12: Drawing A452 – June 21 9am Shadow Winter Solstice (Source: KTA)



JUNE 21 12PM WINTER SOLSTICE

Figure 13: Drawing A452 – June 21 12pm Shadow Winter Solstice (Source: KTA)

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development



JUNE 21 3PM WINTER SOLSTICE

Figure 14: Drawing A453 – June 21 3pm Shadow Winter Solstice (Source: KTA)

**Maintaining Solar Access to Public Reserves**

Not applicable - the site is not located in close proximity to any public reserves and therefore will not cause any additional overshadowing of any.

**Maintaining Solar Access to Streets**

The proposed development casts shadows on Kurraba Road at 9am and partly shadows the road at 10am and 11am. However, by midday mid-winter the proposal does not cast any shadows on Kurraba Road allowing the road to maintain areas of solar access from 9am to 2pm mid-winter.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings**

The proposed development seeks to maximise visual privacy within the site and externally to neighbouring developments. This has been achieved through the provision of setbacks and building separation distances that generally comply with theDCP. Tapered, solid masonry walls are strategically placed to create privacy between residences where needed. The side elevations show that window openings have been minimised where possible to avoid direct overlooking of neighbouring properties. Screening is also proposed on the internal elevations.

The portions of the proposed development which contravene the HoB development standard primarily relate to non-trafficable roof areas which do not cause any unacceptable privacy impacts to residents of existing dwellings or potential future development. Figure 15 below illustrates the setback and landscaping around the D1 and D2 roof terraces.



Figure 15: Landscape Plan – D1 and D2 terraces (Source: DBS Landscape Plan)

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(e) to ensure compatibility between development, particularly at zone boundaries,**

The site is zoned part R2 Low Density Residential and part R4 High Density Residential and adjoins R2 and R4 zoned land. Also located in close proximity to the site is R3 Medium Density Residential and RE1 Public Recreation zoned land(refer to 22).

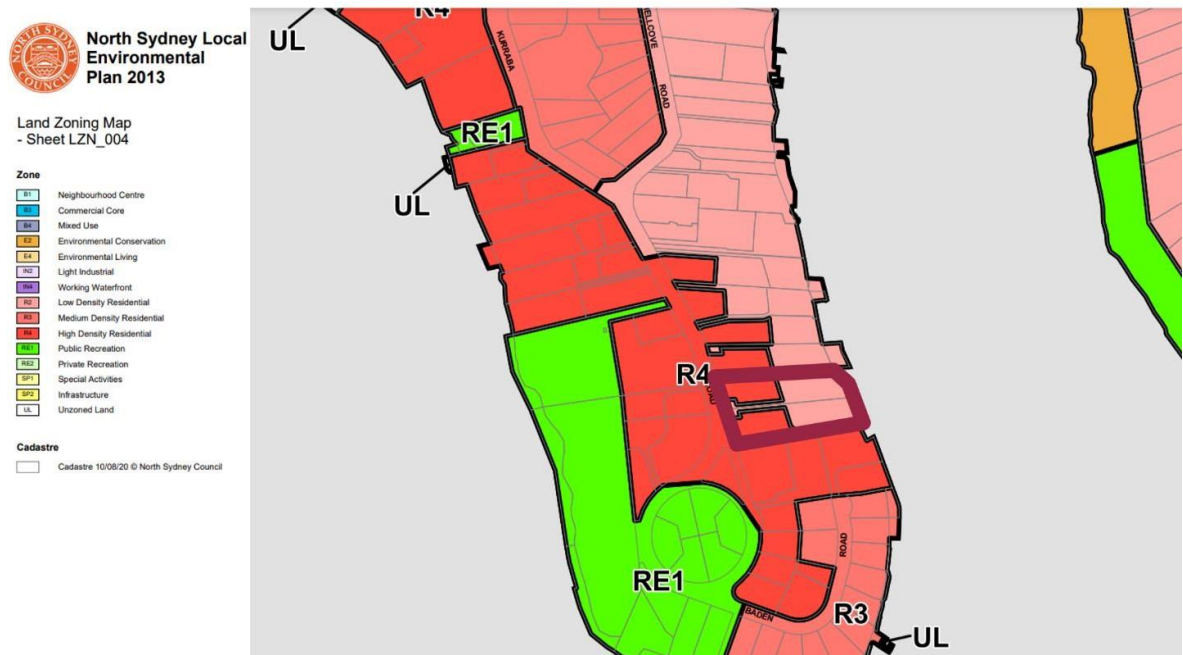


Figure 16: Land Zoning Map, site outlined in red (Source: NSLEP 2013)

When considering compatibility, reference is made to *Project Venture Developments Pty Ltd v Pittwater Council [2005]NSWLEC 191* which determines that “compatible” does not require “sameness”. “Buildings do not have to be the same height to be compatible. Where there are significant differences in height, it is easier to achieve compatibility when the change is gradual rather than abrupt. The extent to which height differences are acceptable depends also on the consistency of height in the existing streetscape”. Further, where compatibility between a building and its surroundings is desirable, its two major aspects are physical impact and visual impact. In order to test whether a proposal is compatible with its context, two questions should be asked.

*Are the proposal’s physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.*

*Is the proposal’s appearance in harmony with the buildings around it and the character of the street?*

In response to the first question, the proposal’s physical impacts on surrounding development (including overshadowing, privacy and views) are acceptable as discussed in detail in this Section of the Clause 4.6 Variation Request.

Consideration is given below to whether the proposal’s appearance is in harmony with the buildings around it and the character of the street.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(e) to ensure compatibility between development, particularly at zone boundaries,**

The development that is immediately surrounding the site is limited to residential development of various types and scales. Immediately north of the site at 184A Kurraba Road is a three-storey dual occupancy with garage and car port, while also immediately north of the site at 184 Kurraba Road is a two and three storey dwelling house. Further north at 182 Kurraba Road a dual occupancy is being converted to a part 4 and part 5 storey residential flat building (DA 333/19).

Immediately south of the site fronting the street at 192 Kurraba Road is a two-storey multi dwelling housing development. Also located immediately south of the site at 192A Kurraba Road is a three-storey dwelling house. Fronting the water immediately south of the site at 23 Braden Road is a six-storey residential flat building. Further south of the site towards Kurraba point is a mix of dwelling houses, dual occupancies and residential flat buildings ranging from three to five storeys.

To the west of the site at 143 and 145 Kurraba Road is a nine-storey and four-storey residential flat building, respectively. Also, immediately west of the site at 147-153 Kurraba Road is an under construction 'Kurraba Residences', which comprises a six-storey residential flat building.

When viewed from Kurraba Road the proposal presents as two x two/three storey buildings setback behind the proposed car lifts. As discussed above, the existing residential development along Kurraba Road varies significantly from one to twostorey dwellings up to nine storey residential flat buildings. The three storey presentation to Kurraba Road will create an appropriate transition from the four to nine storey residential flat buildings on the west site of Kurraba Road then stepping down the site towards the water. Similarly, along the eastern side of Kurraba Road, the proposal creates an appropriate step in height between the adjoining sites as shown in Figure 17. A further height transition is created through the upper level setback which steps down to the side boundaries.

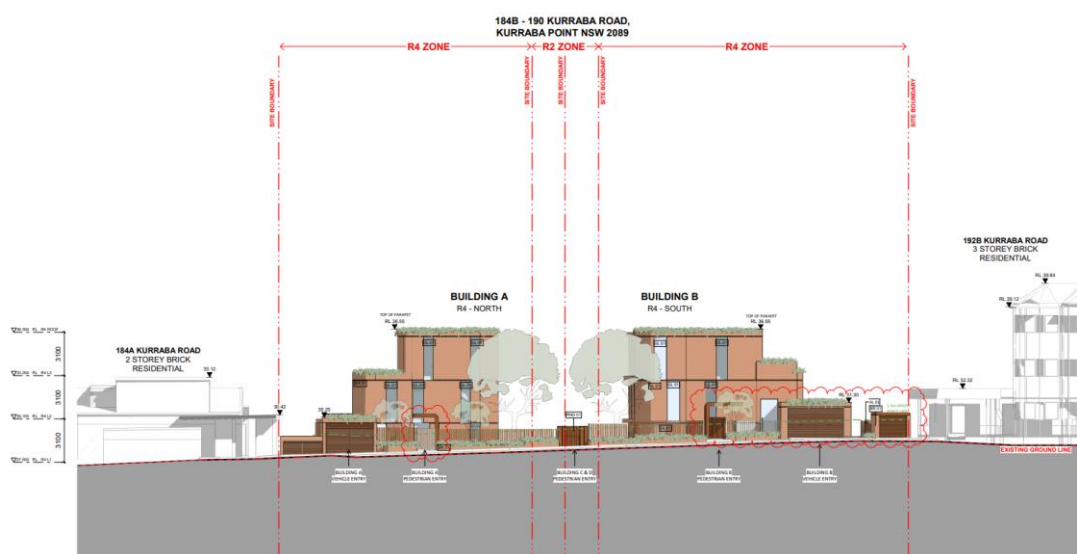


Figure 17: Drawing A204 - West Elevation (Source: KTA)

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(e) to ensure compatibility between development, particularly at zone boundaries,**

The proposed height variation in the R4 Zone is located away from the street frontage and will not be discernible when viewed from the public domain. In this regard, the proposed height variation in this part of the site does not impact on the proposal's overall appearance being in harmony with the buildings around it.

Consideration has also been given to the proposal's appearance with nearby buildings viewed from the water and Cremorne Point beyond. Figure 18 below is an extract of the east elevation which illustrates how the dual occupancies relate to the adjoining developments. The height of the dual occupancies is not dissimilar to development on surrounding sites including the two to three storey dwelling at 184 Kurraba Road and the six storey RFB at 23 Baden Road. Noting the RFB site lower and closer to the water compared to the proposed dual occupancies.

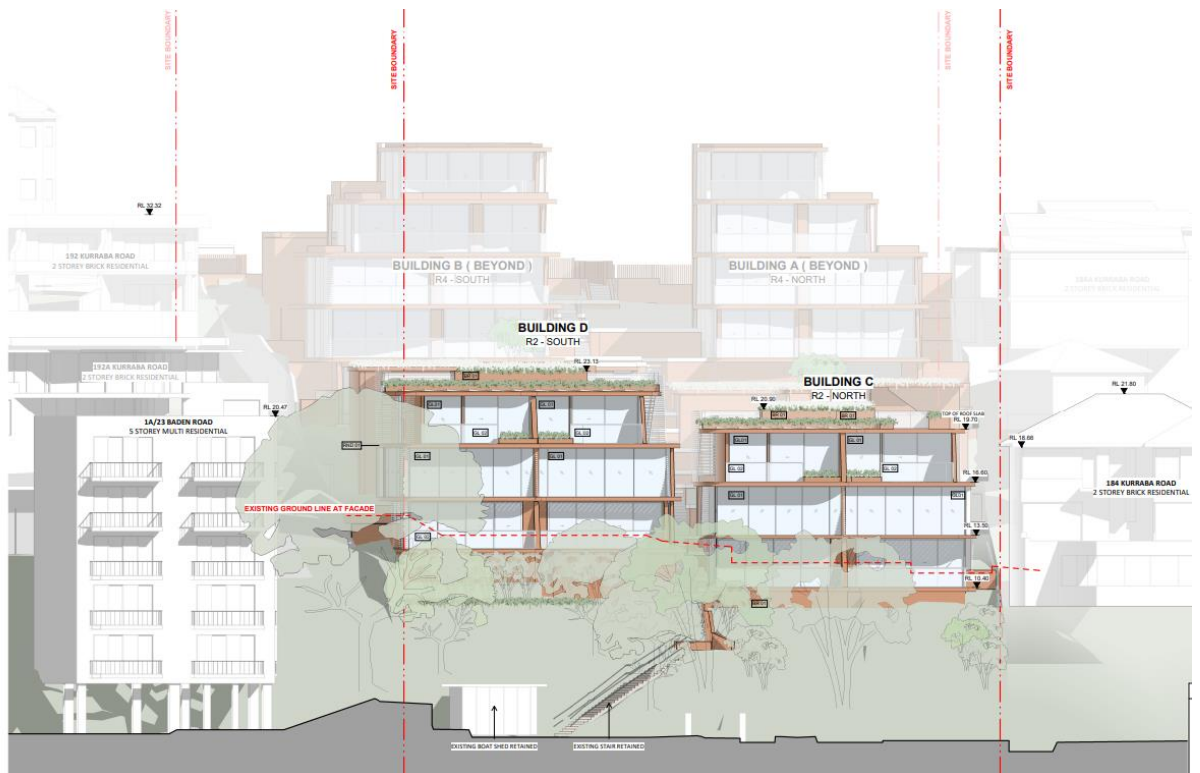


Figure 18: Drawing A201 - East Elevation (Source: KTA)

The proposed height variation in the R2 part of the site is restricted to minor parts of roof level structures. When looking at the east elevation of the site (from the water and beyond) the roof elements that exceed the height limit do not result in additional built form that impacts the harmony between the proposed building and adjoining development.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(e) to ensure compatibility between development, particularly at zone boundaries,**

This objective also requires consideration to be given to compatibility particularly at zone boundaries. Within the site is a boundary between the R4 and R2 Zones. In this regard, the proposal has been designed to create an appropriate transition between the two zones by creating two separate built forms between the RFBs and dual occupancies.

The proposal's overall appearance is in harmony with the buildings around it and the character of the surrounding sites.

**ACHIEVEMENT OF OBJECTIVES OF CLAUSE 4.3 OF THE NSLEP 2013**

**(g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.**

The proposed dual occupancies in the R2 Zone are part 2 and part 3 storeys and step down towards the waterfront. Although the built form exceeds two storeys in part, as demonstrated above, the proposed built form in the R2 Zone is in harmony with the buildings around it, notwithstanding the proposed height variation. Further, the existing dwelling located on the R2 Zoned part of the site is a two to three storey dwelling and the proposed dual occupancies seek to adopt a similar height.

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

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

- 5.3. The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

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

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

The standard has not been abandoned by Council actions in this case and so this reason is not relied upon. Notwithstanding, it is noted that DA 333/19 for substantial alterations and additions to residential flat building at 182 Kurraba Road, Kurraba Point. DA 333/19 exceeded the 12m height limit by 0.6m (5%). The height variation related to parts of the roof and was approved by Council on 15 April 2020. 182 Kurraba Road is located two properties north of the subject site.

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

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

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

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

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

The environmental planning grounds to justify the variation of the HoB development standard are set out in the preceding sections in detail. As discussed in Section 5, the non-compliant portions of the development do not result in any meaningful additional adverse environmental impact and instead provide a built form that is compatible with the desired future character of the area and consistent with the objectives of clause 4.3.

Additionally, the proposed development, notwithstanding the non-compliance with the HoB development standard, better achieves important statutory goals (when compared with a compliant development and the existing development). The superior outcome, in terms of statutory planning goals, combined with the absence of meaningful additional adverse environmental impacts are environmental planning grounds that justify the variation.

The relevant environmental planning grounds are as follows:

- The steep topography of the site, in part, contributes to the proposed height variation. The site slopes approximately 26m from Kurraba Road down to the waterfront. The proposed excavation (which has been significantly reduced) seeks to generally maintain the step down across the site while also accommodating basement parking below the RFBs. The built form has been designed to step down across the site responding to the topography. The RFBs are proposed to be four storeys with the upper level setback from the side boundaries. The built form then transitions at the zone boundary within the step down to two to three storey dual occupancies in the R2 zoned part of the site.
- As discussed in detail in Section 5, the proposal is in harmony with adjoining developments and the character of the wider street.
- The proposal facilitates the orderly and economic development of the site and in particular in the R4 zoned part of the site. At present the R4 zone is occupied by two x dual occupancies which undermines the objectives of the R4 Zone. The redevelopment of the site will provide for the housing needs of the community within a high-density residential environment in accordance with the first objective of the R4 Zone and low density dual occupancies in the R2 Zone which are facilitated by the minor variation of the height of buildings standard. Accordingly, the variation promotes objective 1.3 (c) of the EP&A Act.
- The proposed variation is limited to minor parts of the roof level structures and roof slab.
- The proposed development is compatible with adjoining residential development, is articulated and features a mix of materials, colours and landscaping which make it visually sympathetic to neighboring buildings. Importantly, the variation to the height of building development standard does not result in any unreasonable impacts to residential amenity, solar access, views or privacy. Accordingly, the proposal achieves objective 1.3 (g) of the EP&A Act, “to promote good design and amenity in the built environment”.



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Finally, the size of the variation (maximum 8.4%) is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Having said this, the variation is relatively minor and will have no adverse impacts consequences.

## 7. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the objectives of the zones in which the development is proposed to be carried out. This is required by Clause 4.6(a)(ii) of the NSLEP.

Table 2 and Table 3 considers whether the proposal is also consistent with the objectives of the zones.

Table 2: Zone R2 Low Density Residential Objectives

OBJECTIVES OF THE R2 LOW DENSITY RESIDENTIAL ZONE	DISCUSSION
To provide for the housing needs of the community within a low density residential environment.	The proposal involves the redevelopment of the site to provide modern dual occupancies which are compatible with land uses in the locality and respond to a particular housing need.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal does not limit the provision of other land uses on other nearby sites.
To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.	The proposed development in the R2 Zone is for dual occupancies. As detailed in this Clause 4.6 Request, the proposal does not result in any unreasonable amenity impacts on the surrounding area including privacy, overshadowing and views.
To ensure that a high level of residential amenity is achieved and maintained.	As discussed above, the proposal does not result in any unreasonable amenity impacts on the surrounding area including privacy, overshadowing and views.

Table 3: Zone R4 High Density Residential Objectives

OBJECTIVES OF THE R4 HIGH DENSITY RESIDENTIAL ZONE	DISCUSSION
To provide for the housing needs of the community within a high density residential environment.	The proposal involves the redevelopment of the site to provide a modern residential flat building on the R4 Zoned part of the site which is compatible with land uses in the locality and responds to a particular housing need.
To provide a variety of housing types within a high density residential environment.	The locality comprises a mix of large-scale dwelling houses, and high density residential flat buildings. The proposal contributes to the variety of housing types in the area and improves the housing quality and stock.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal does not limit the provision of other land uses on other nearby sites.
To encourage the development of sites for high density housing if such development does not compromise the amenity of the surrounding area or	The proposal is for a residential flat building which is permitted with consent within the R4 High Density zone and does not compromise the amenity of the surrounding

#### Clause 4.6 Variation Request

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As demonstrated in Table 2 and Table 3, the proposal is consistent with the objectives of the zones and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(a)(ii), therefore, the proposal is in the public interest.

## 8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravening of the development standard raises any matter of significant for state or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone, noting the absence of objectives of the development standard, and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

## 9. CONCLUSION

This submission requests a variation, under clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), to the Height of Building development standard and demonstrates that:

1. Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development,
2. The development achieves the objectives of the development standard and is consistent with the objectives of R2 Low Density Residential and R4 High Density Residential zones,
3. There are sufficient environmental planning grounds to justify the contravention.

The consent authority can be satisfied with the above and that the development is in the public interest because it achieves the objectives of the development standard and is consistent with the objectives of R2 and R4 zone.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

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