

**ITEM 6. SECTION 96 MODIFICATION APPLICATION: 111-139  
DARLINGHURST ROAD AND 224-226 VICTORIA STREET POTTS  
POINT - FORMER CREST HOTEL**

**FILE NO: D/2013/1747/A**

**DEVELOPMENT APPLICATION NO: D/2013/1747/A**

**SUMMARY**

**Date of Submission:** 13 March 2015

**Applicant:** Iris Capital

**Architect:** Durback Block Jagers

**Developer:** Iris Capital

**Owner:** Iris Capital

**Cost of Works:** N/A

**Proposal Summary:** Modification of the approved Stage 1 building envelope so as to accord with the competition winning design now lodged concurrently as a Stage 2 Development Application.

The changes to the approved envelope mainly involve the shape of the tower fluctuating beyond the approved envelope at the north western corner of the tower. There is also a reduction in the height of the tower, so that the proposed changes are still well within the 55m height limit.

The proposed changes to the envelope will not create any additional adverse impacts relative to the existing approved envelope in terms of view loss or overshadowing. The slight reduction in overall height will actually result in a slight reduction in view loss.

It is also proposed to delete Condition (10) which requires a detailed site contamination report to be submitted with the Stage 2 Development Application. Given that no excavation or substantial demolition is proposed, the removal of this condition is acceptable.

The modification application has attracted seven submissions. The concerns raised include: density of the development; views; overshadowing; parking and traffic; and whether the proposal is 'substantially the same'. These concerns are discussed within the report.

**Summary Recommendation:** The modification application is recommended for approval, with Condition (1) and Condition (10) proposed to be amended to reflect the new plans and deletion of the contamination condition.

**Development Controls:**

- (i) Sydney Local Environmental Plan 2012
- (ii) Sydney Development Control Plan 2012

**Attachments:**

- A - Proposed Drawings
- B - Approved Stage 1 Drawings
- C - Shadow Diagrams

**RECOMMENDATION**

It is resolved that consent be granted to Section 96 Modification Application No. D/2013/1747/A, subject to the amendment of Condition (1) Approved Development and Condition (10) Contamination Investigation, with modifications shown in ***bold italics*** (additions) and ***bold italics strikethrough*** (deletions), as follows:

**SCHEDULE 1A****Approved Development/Design Modifications/Covenants and Contributions/Use and Operation**

**Note:** Some conditions in Schedule 1A are to be satisfied prior to issue of a Construction Certificate and some are to be satisfied prior to issue of Occupation Certificate, where indicated.

**(1) APPROVED DEVELOPMENT**

- (a) Development must be in accordance with Development Application No. D/2013/1747, dated 12 November 2013, and the following drawings:

Drawing Number	Architect	Date
<del>A-2911 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<del>A-2921 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<del>A-2913 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<del>A-501 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<del>A-502 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<del>A-503 Rev 03</del>	<del>SJB Architects</del>	<del>24/06/14</del>
<b>1667.ENV.25</b>	<b>Durbach Block Jagers</b>	<b>March 2015</b>
<b>1667.ENV.26</b>	<b>Durbach Block Jagers</b>	<b>March 2015</b>
<b>1667.ENV.27</b>	<b>Durbach Block Jagers</b>	<b>March 2015</b>
<b>1667.ENV.28</b>	<b>Durbach Block Jagers</b>	<b>March 2015</b>

and as amended by the conditions of this consent.

- (b) In the event of any inconsistency between the approved plans and supplementary documentation, the plans will prevail.

**(Amended 10 September 2015)**

**(2) NOT APPROVED**

Consent is not granted for the following:

- (a) Any physical works demolition, refurbishment and / or excavation.
- (b) That layout and number of residential units, commercial spaces and car parking spaces.
- (c) The design of the building exteriors including facades and roofs.
- (d) Public domain and landscape design.
- (e) An additional 10% bonus height or floor space.
- (f) Any wind breaks or signage at roof level.
- (g) Any proposed works on Council's land at the southern tip of the site.

**(3) BUILDING HEIGHT**

The height of the building must not at any point exceed 55 metres as defined by Sydney Local Environmental Plan 2012, including any roof top plant or wind breaks.

**(4) FLOOR SPACE RATIO - ALL OTHER AREAS**

No approval is granted by this consent for a quantum of floor space. The final floor space must comply with the provisions of *Sydney Local Environmental Plan 2012*.

**(5) AMENDMENT TO BUILDING ENVELOPE**

Prior to the endorsement of any competition brief relating to the site, the building envelope must be amended so that no part of the envelope exceeds the 55m height limit, and provided to competition participants.

**(6) STAGE 2 DEVELOPMENT**

- (a) Any Stage 2 development application must be contained wholly within the approved building envelope.
- (b) Any Stage 2 development application must include measures for the ongoing protection of the memorial planting located adjacent to the southern corner of the site.

**(7) SEPP 65 AND RESIDENTIAL FLAT DESIGN CODE**

Any Stage 2 Development Application must comply with all aspects of *State Environmental Planning Policy 65 – Design Quality of Residential Flat Development* (SEPP 65) and the Residential Flat Design Code (RFDC). A detailed table of compliance is to be submitted with any Stage 2 Development Application.

**(8) STAGE 2 DESIGN MODIFICATIONS**

Any Stage 2 development application must incorporate the following design modifications:

- (a) The wrap-around awning extending across the southern elevation is not supported. Any future competition brief or Stage 2 development application must not include any awning to the southern elevation.
- (b) The continuous awning to Victoria Street is not supported. Any future competition brief or Stage 2 development application should include entry awnings to the western elevation at an appropriate height and scale.
- (c) The garden bed on Council land at the southern tip of the site is to be excluded.

**(9) COMPETITIVE PROCESS**

- (a) A competitive process must be held in accordance with Clause 6.21 of *Sydney Local Environmental Plan 2012* and Clause 3.3 of *Sydney DCP 2012*. The competition must be held before the lodgement of any Stage 2 development application for the site.
- (b) The Stage 2 development application and competition brief must address the following:
  - (i) Modulation to break up the apparent building length and appropriate articulation of all facades.
  - (ii) The scale and rhythm of the podium facade should relate to the vertical proportions and grain established along Darlinghurst Road.
  - (iii) Design and location of appropriate passive shading devices to exposed facades.
  - (iv) A significant proportion of residential units with double height spaces and dual aspects should be provided in order to provide adequate cross ventilation and compensate for low floor to ceiling heights.
  - (v) Residential uses on the first floor of the podium is not supported. Consideration must be given to appropriate types and distribution of commercial and residential uses within the lower levels of the building, particularly with regard to residential amenity.
  - (vi) The distribution of height and bulk should minimise potential view impacts on surrounding development. In particular, careful consideration must be given in determining the appropriate location of any bonus floor space or height that may be awarded.

- (vii) The provision of quality private and communal landscaped open space, having regard to site conditions. It should be noted that winter gardens may be appropriate in this location, however these would be included in floor space calculations.
  - (viii) An appropriate mix of residential units must be provided in accordance with Sydney Development Control Plan 2012.
  - (ix) Opportunities for increased activation on Victoria Street.
  - (x) Opportunities to incorporate public art, in accordance with the City of Sydney Public Art Policy.
  - (xi) Opportunities to incorporate high quality communal green roof and communal landscaping within the site.
  - (xii) Requirements of RailCorp contained in condition 11.
  - (xiii) The ability of the proposed development to comply with the relevant provisions of Council's *Policy for Waste Minimisation in New Developments 2005* which requires facilities to minimise and manage waste and recycling generated by the proposal.
- (c) The competition brief must include as an attachment the planning assessment report prepared for the Stage 1 development application, including attachments, but excluding attachment B.
  - (d) The competition brief must not include indicative floor plans prepared by SJB Architects as part of the submission for the Stage 1 development application.

#### **(10) CONTAMINATION INVESTIGATION**

~~Any Stage 2 development application must be accompanied by a detailed contamination investigation prepared by a suitably qualified consultant.~~

~~*(Deleted 10 September 2015)*~~

#### **(11) RAILCORP REQUIREMENTS**

Any future Stage 2 development application must satisfy the following requirements of RailCorp:

- (a) An accurate survey locating the development with respect to the rail boundary and rail infrastructure must be provided. The survey is to be prepared by a registered surveyor to the satisfaction of RailCorp.
- (b) A services search is to be conducted to establish the existence and location of any rail services. The services search is to be conducted using equipment that will not have any impact on rail services and signalling. Should rail services be identified, the applicant must contact RailCorp to determine whether these services should be relocated or incorporated within the development site.

- (c) A Geotechnical Engineering Report is to be submitted to RailCorp for review and must demonstrate that the development of the site will not impact on the rail corridor or on the structural integrity of rail infrastructure through loading and ground deformation. The report must include structural design details/ analysis and is required to address the potential impact of any demolition or excavation and vibration in rail facilities, and loadings imposed on RailCorp Facilities by the development.

## (12) ACOUSTIC REPORT

The building must provide high levels of acoustic attenuation for occupants when windows are closed. Any future Stage 2 development application must be accompanied by the following:

- (a) An acoustic report prepared by a suitably qualified acoustic consultant \* must be submitted as part of any Stage 2 development application. The acoustic report must include noise control measures to ensure that habitable rooms will not be affected by offensive noise from the occurrence of any structure and/or airborne noise resulting from operational activities conducted within neighbouring licensed premises, including operation of premises located within the site.
- (b) The internal noise criteria adopted for residential premises shall be in accordance with the City of Sydney noise criteria used for licensed premises below rather than Australian Standards:
  - (i) The  $LA_{10, 15 \text{ minute}}$  noise level emitted from the use must not exceed the background noise level ( $LA_{90, 15 \text{ minute}}$ ) in any Octave Band Centre Frequency (31.5 Hz to 8 kHz inclusive) by more than 5dB between the hours of 7.00am and 12.00 midnight when assessed at the boundary of any affected residence.
  - (ii) The  $LA_{10, 15 \text{ minute}}$  noise level emitted from the use must not exceed the background noise level ( $LA_{90, 15 \text{ minute}}$ ) in any Octave Band Centre Frequency (31.5 Hz to 8 kHz inclusive) between the hours of 12.00 midnight and 7.00am when assessed at the boundary of any affected residence.
  - (iii) Notwithstanding compliance with (a) and (b) above, the  $LA_{10, 15 \text{ minute}}$  noise level emitted from the use must not exceed the background noise level ( $LA_{90, 15 \text{ minute}}$ ) in any Octave Band Centre Frequency (31.5 Hz to 8 kHz inclusive) when assessed within a habitable room at any affected residential property between the hours of 7am and 12pm.
  - (iv) Notwithstanding compliance with (a), (b) and (c) above, the noise from the use must not be audible within any habitable room in any residential property between the hours of 12.00 midnight and 7.00am.
  - (v) The  $LA_{10, 15 \text{ minute}}$  noise level emitted from the use must not exceed the background noise level ( $LA_{90, 15 \text{ minute}}$ ) in any Octave Band Centre Frequency (31.5 Hz to 8 kHz inclusive) by more than 3dB when assessed indoors at any affected commercial premises.

*Note: The LA10, 15 minute noise level emitted from the use is as per the definition in the Australian Standard AS1055-1997 Acoustics – Description and measurement of environmental noise. The background noise level LA90, 15 minute is to be determined in the absence of noise emitted by the use and be representative of the noise sensitive receiver. It is to be determined from the assessment LA90 / rating L90 methodology to be in complete accordance with the process listed in Appendix B of the NSW EPA Industrial Noise Policy and relevant requirements of AS1055.1997.*

*\*Note: Suitably qualified Acoustic Consultant means a consultant who possesses the qualifications to render them eligible for membership of the Australian Acoustics.*

### **(13) FLOODING AND OVERLAND FLOW**

Any Stage 2 development application must include a flooding and overland flow report prepared by a suitably qualified engineer. The report must include, but not be limited to, the following information:

- (a) A review of the impact of overland flow and flooding in the area.
- (b) Set flood planning levels using the 100 year flood level for all entry points and lifts; and PMF flood level for all driveway accesses for the sites relevant frontages.

### **(14) PUBLIC DOMAIN PLAN**

Three copies of a detailed Public Domain Plan must be prepared by an architect, urban designer or landscape architect and must be lodged with Council's Public Domain Section as part of any Stage 2 Development Application.

The Public Domain Plan must be prepared in accordance with the City of Sydney's Public Domain Manual.

### **(15) LANDSCAPING OF THE SITE**

- (a) A detailed landscape plan, drawn to scale, by a qualified landscape architect or landscape designer, must be submitted as part of any Stage 2 Development Application. The plan must include:
  - (i) Location of existing and proposed structures on the site including existing trees (if applicable);
  - (ii) Details of earthworks including mounding and retaining walls and planter boxes (if applicable);
  - (iii) Location, numbers and type of plant species;
  - (iv) Details of planting procedure and maintenance;
  - (v) Details of drainage and watering systems; and
  - (vi) Details of green walls and green roof treatments.



**SCHEDULE 2****PRESCRIBED CONDITIONS**

**The prescribed conditions in accordance with Division 8A of the *Environmental Planning and Assessment Regulation 2000* apply:**

- Clause 98 Compliance with *Building Code of Australia* and insurance requirements under the *Home Building Act 1989*
- Clause 98A Erection of signs
- Clause 98B Notification of *Home Building Act 1989* requirements
- Clause 98C Conditions relating to entertainment venues
- Clause 98D Conditions relating to maximum capacity signage
- Clause 98E Conditions relating to shoring and adequacy of adjoining property

Refer to the NSW State legislation for full text of the clauses under Division 8A of the *Environmental Planning and Assessment Regulation 2000*. This can be accessed at: <http://www.legislation.nsw.gov.au>

## BACKGROUND

### The Site and Surrounding Development

1. The site is irregular in shape and occupies an area of approximately 1,629m<sup>2</sup>. It is located at the acute intersection of Darlinghurst Road, Victoria Street and Bayswater Road, Potts Point (refer to Figure 1).
2. The site contains a mixed use development known as the Crest Hotel, comprising 14 storey tower, above a 2 to 3 storey podium with 3 basement levels accommodating 227 hotel rooms.



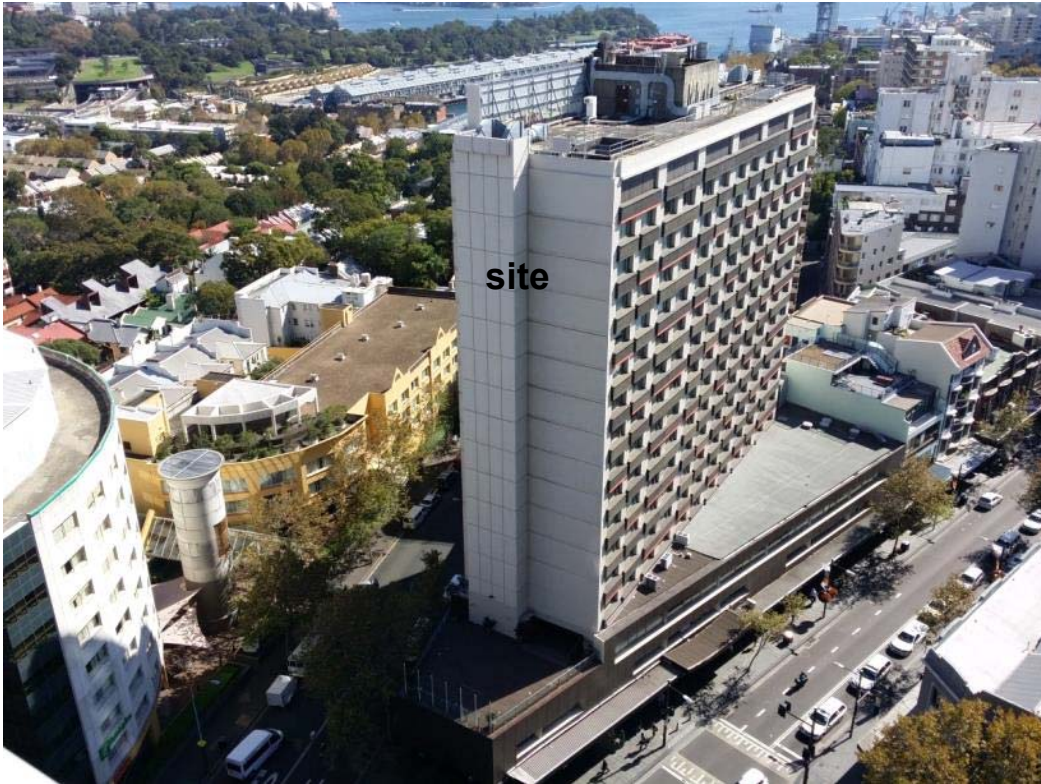
**Figure 1:** Aerial photo of the subject site, highlighted

3. The podium contains a nightclub known as Goldfish, a sports bar, gaming lounge, TAB and bottle shop at the ground floor. These premises are all accessed from Darlinghurst Road. A secondary entrance to the gaming lounge and a fire exit are also provided from Victoria Street.
4. The first floor of the podium is currently vacant and the second floor contains the hotel reception area, function rooms and kitchen.
5. Vehicle access to the site is from Victoria Street. Parking is located on Basement levels 2 and 3, while a substation, loading bay, hotel laundry and back of house service areas are located on Basement level 1.
6. The existing development has a maximum height of 54m to the top of the lift overrun from Victoria Street, and approximately 50 to 52 metres to the roof of the building.

7. The existing development has a gross floor of area of 11,704m<sup>2</sup>, resulting in a floor space ratio of 7.1:1.
8. Located on the southern edge of the site is a landscaped garden bed set behind an iron fence and low masonry wall containing a memorial planting known as Jacaranda for Jasper (refer to Figures 7 and 8).
9. Surrounding land uses are characterised by mixed commercial and residential uses, including retail, licensed food and drink premises and tourist and visitor accommodation.
10. Surrounding development along Darlinghurst Road is predominantly between 3 and 5 storeys. On the western side of Victoria Street development in the immediate vicinity of the site ranges between 4 and 9 storeys, while on the eastern side of Victoria Street are a number of taller buildings up to 14 storeys.
11. Directly adjacent to the southern corner of the site is a 33 storey mixed use development, containing a residential tower known as the Zenith building (82-94 Darlinghurst Road).
12. The site is located within the Potts Point/ Elizabeth Bay heritage conservation area (C51) and is identified as a detracting item. The nearest heritage items are located at 72-80 Darlinghurst Road (Minton House, refer to Figure 10) and 248 William Street (the Kings Cross Hotel, refer to Figure 9).
13. Photos of the site and surrounds are provided below:



**Figure 2:** View of the site looking north-east from Victoria Street



**Figure 3:** View of the site from adjacent residential tower located to the south, showing the plant room and associated services located on the roof



**Figure 4:** View of the site, looking west from Bayswater Road



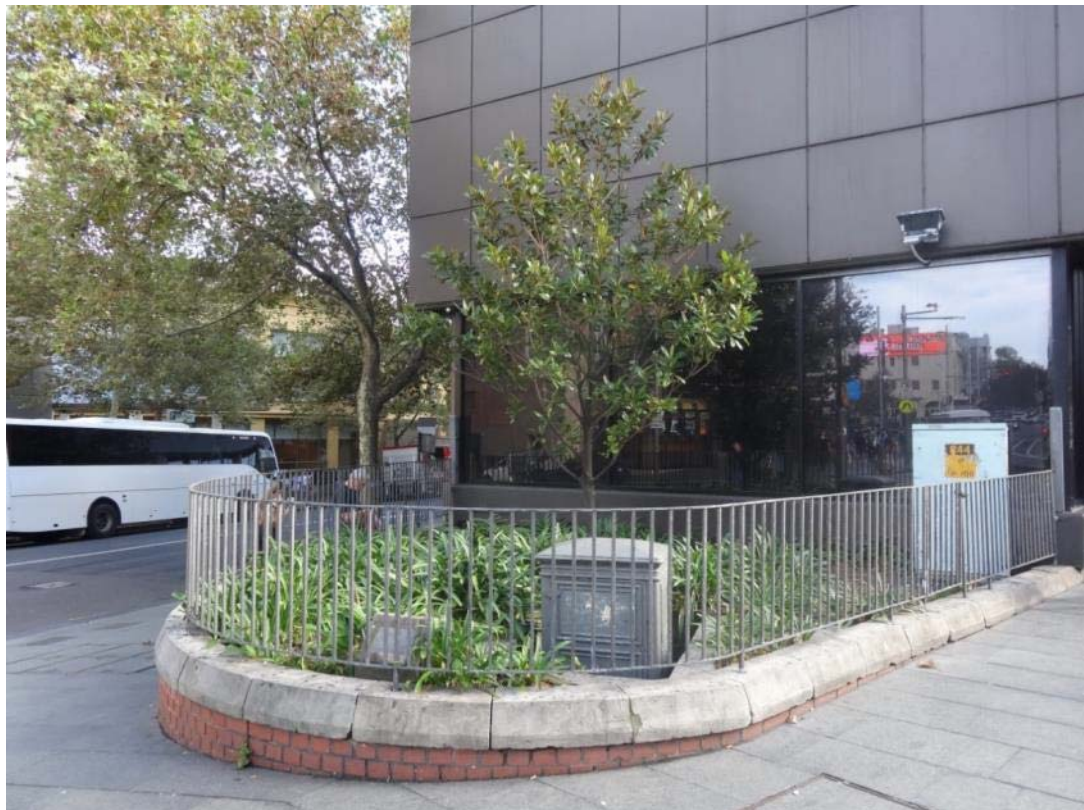
Figure 5: View of the site looking south west along Darlinghurst Road



Figure 6: View of Victoria Street west facade showing 3 storey podium with entries



**Figure 7:** View of the southern corner of the site, from the intersection of Victoria Street and Darlinghurst Road



**Figure 8:** A garden bed containing a memorial planting known as 'Jacaranda for Jasper' is located adjacent to the southern corner of the site



**Figure 9:** View of the Kings Cross Hotel, a local heritage item located to the south west of the site



**Figure 10:** View towards the Zenith building at 82-94 Darlinghurst Road, located to the south east of the site, and a partial view of Minton House (left) directly opposite the subject site



**Figure 11:** View of the Elan building at 1 Kings Cross Road, located to the south east of the site



**Figure 12:** View of the Hampton building at 13-15 Bayswater Road, east of the site

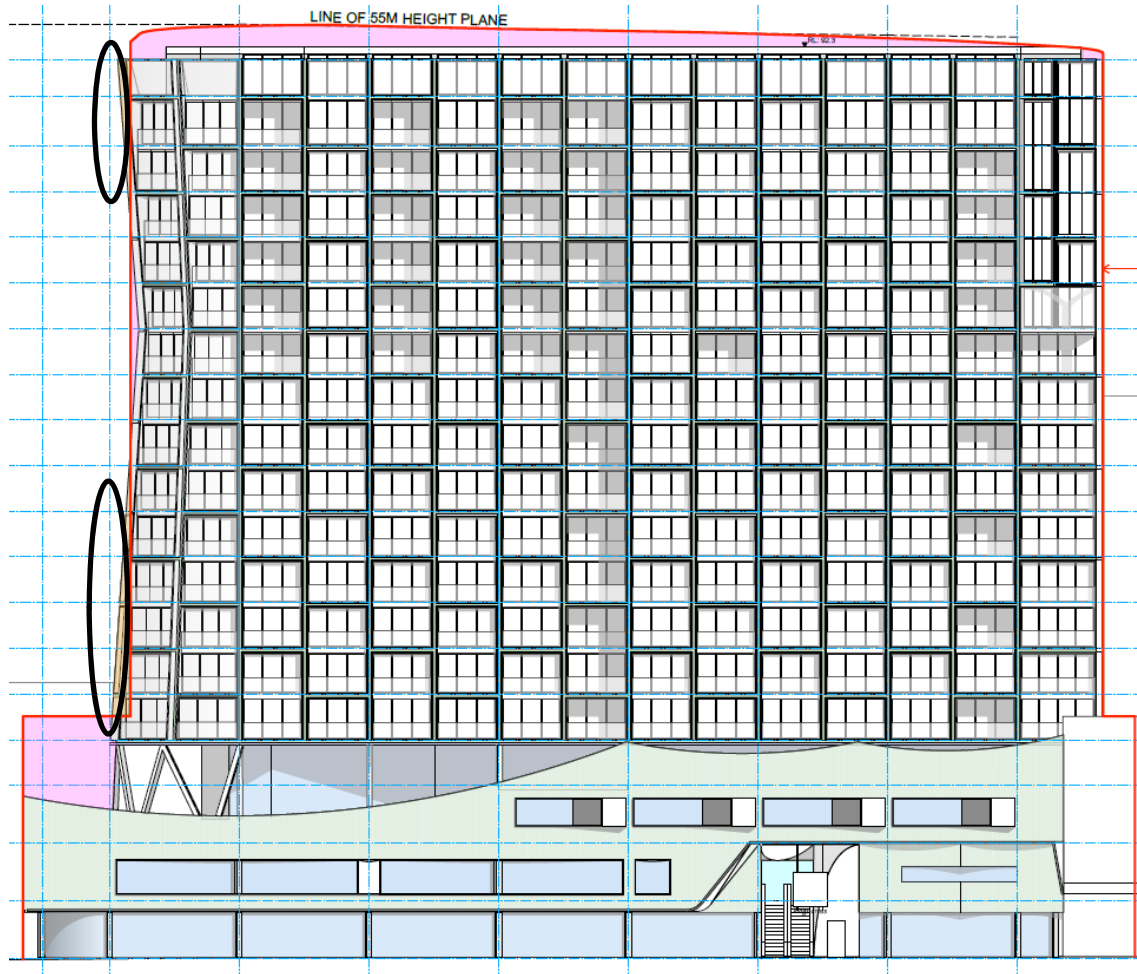




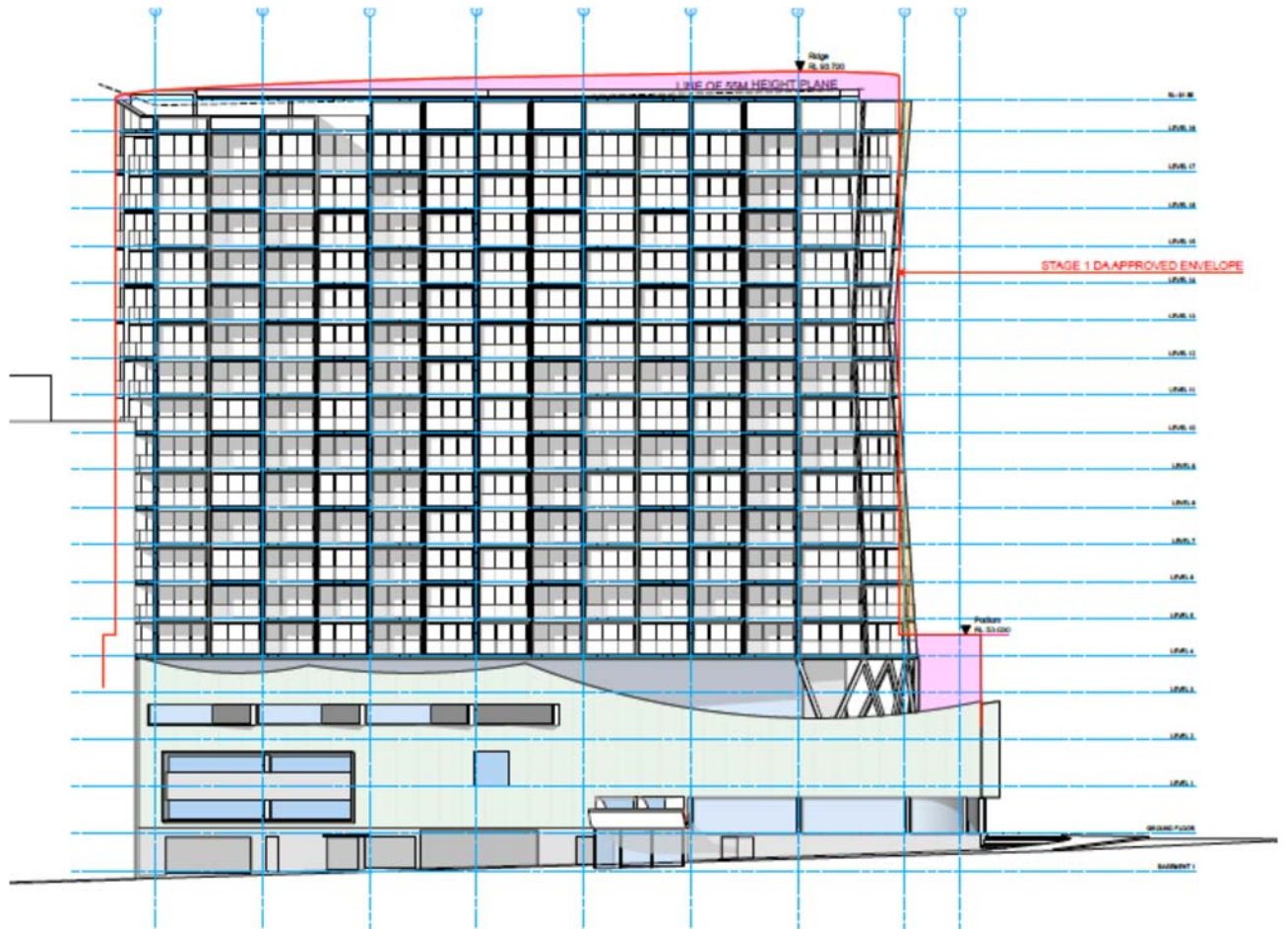
**Figure 13:** View of the Darlinghurst Fire Station, south of the subject site

## PROPOSAL

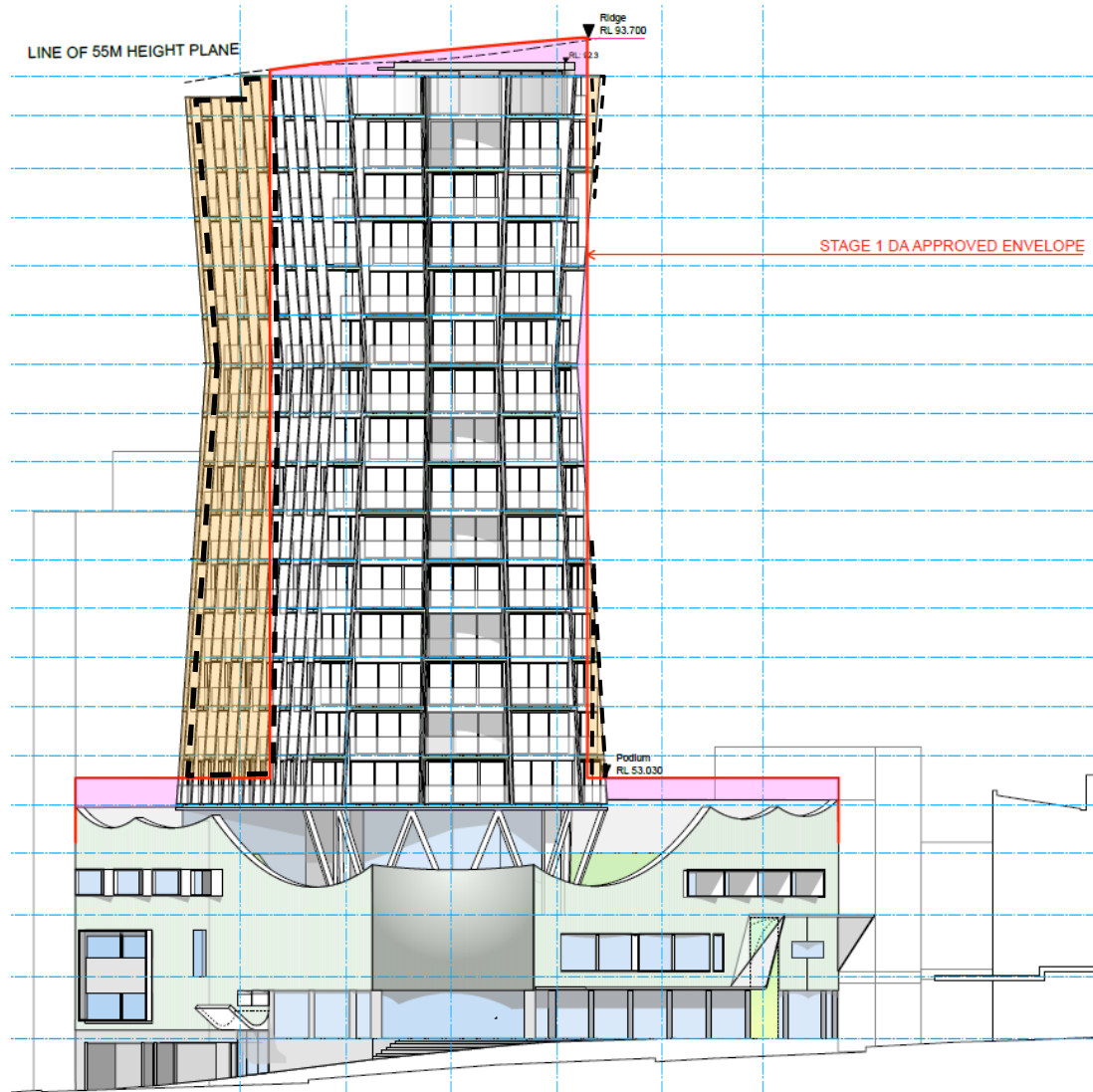
14. Consent is sought to modify the approved Stage 1 envelope, by increasing the building footprint mainly in the north-west corner of the tower. This is best represented by the 4 images below. The approved Stage 1 envelope is shown outlined in red, with the proposed projections outlined in black and shown with orange shading.
15. While there are some projections beyond the approved envelope, there are also some reductions in the envelope. The reductions can be seen mainly at the top of the tower and are shown in pink shading. The amended envelope will still comply with the 55 metre height limit.
16. The proposal also seeks to delete condition (10) which relates to site contamination investigations to be submitted with the Stage 2 Development Application.



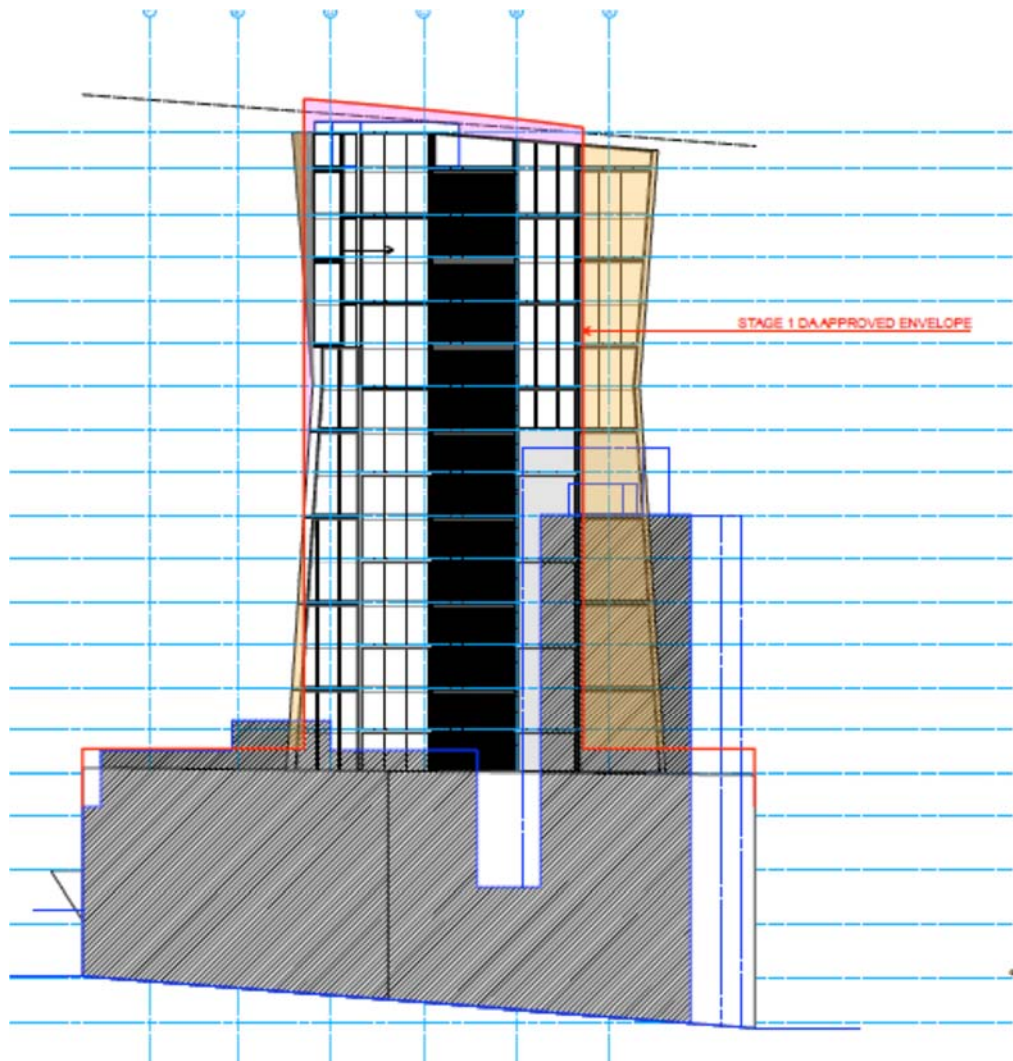
**Figure 14:** Amended envelope to Darlinghurst Road (east elevation). Approved Stage 1 envelope outlined in red. Proposed projections circled in black and shaded orange. Reduction to envelope shown at top of building and podium shaded pink.



**Figure 15:** Amended envelope to Victoria Street Road (west elevation). Approved Stage 1 envelope outlined in red. Proposed projections on the right and shaded orange. Reduction to envelope shown at top of building and podium shaded pink



**Figure 16:** Amended envelope (south elevation to acute corner) Approved Stage 1 envelope outlined in red. Proposed projections on the right and left outlined in black hatched line and shaded orange. Reduction to envelope shown at top of building and podium shaded pink

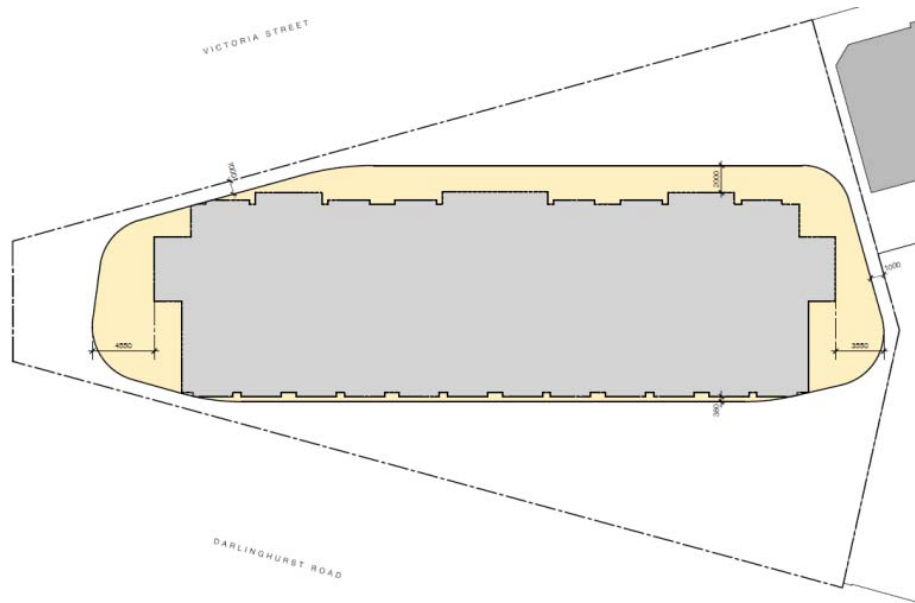


**Figure 17:** Amended envelope (north elevation) Approved Stage 1 envelope outlined in red. Proposed projections on the right and left shaded orange. Reduction to envelope shown at top of building shaded pink

## HISTORY RELEVANT TO THE DEVELOPMENT APPLICATION

### D/2013/1747 – STAGE 1 DEVELOPMENT APPLICATION

17. A Stage 1 Development Application (D/2013/1747) was approved on 21 August 2014 which established an indicative building envelope for the future redevelopment of the site. The approved Stage 1 drawings are at Attachment B.
18. The Stage 1 application anticipated the retention of the floor slabs and columns of the existing building with extensive alterations and additions to enable conversion from hotel accommodation to residential apartments.
19. The approved Stage 1 building envelope provides for an enlarged building footprint, including an additional two (2) to three (3) storeys to create a four (4) to five (5) storey podium and additions to the tower up to a maximum height of 55 metres.



**Figure 18:** Diagram showing the increased tower footprint approved under the Stage 1 development consent (D/2013/1747)



**Figure 19:** Approved Stage 1 building envelope, east elevation (Darlinghurst Road)

20. In accordance with the requirements of Clause 6.21(5) of Sydney LEP 2012 which requires a competitive design process for buildings exceeding 25m located outside Central Sydney, the Stage 1 approval required a competitive design process be undertaken prior to the lodgement of a Stage 2 Development Application.

21. A competitive design process was subsequently undertaken in accordance with the City of Sydney Competitive Design Policy 2012. The winning scheme by Durbach Block Jagers forms the basis of the current Stage 2 Development Application, to be considered concurrently by the consent authority.

#### **D/2015/331 – Stage 2 Development Application**

22. On 13 March 2015 a Stage 2 Development Application was lodged for redevelopment of the site including a change of use from hotel accommodation (Crest Hotel) to residential development, a new supermarket and two retail tenancies and the retention of existing licensed premises. The proposal seeks to retain the existing structure and provides for 139 apartments and parking for 56 vehicles.
23. The application is generally consistent with the approved Stage 1 envelope, with the exception of some projections which correspond with the tapered tower form of the winning design competition.

#### **THRESHOLD TEST**

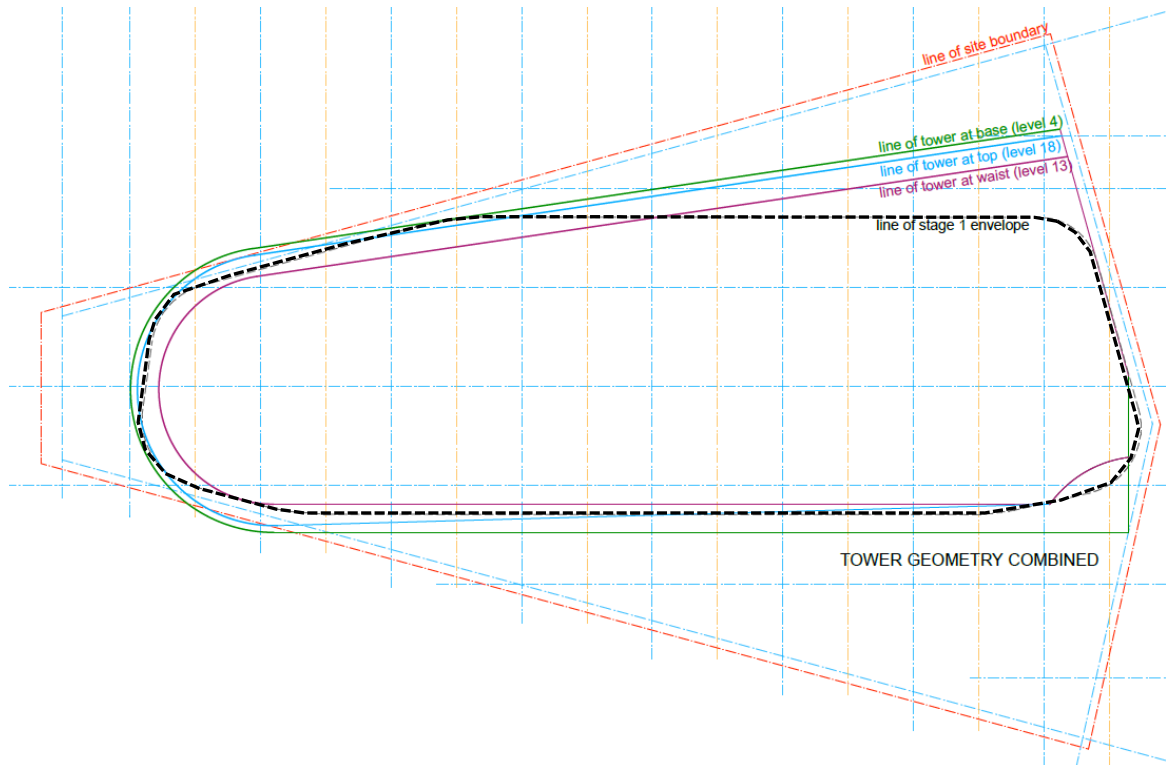
24. The development as proposed to be modified is considered to be substantially the same as that originally approved, and can therefore be considered pursuant to Section 96 of the Environmental Planning and Assessment Act, 1979.

#### **ECONOMIC/SOCIAL/ENVIRONMENTAL IMPACTS**

25. Besides the matters discussed in this report, the assessment against the provisions of Section 79C of the Environmental Planning and Assessment Act, 1979 contained in the report to the Central Sydney Planning Committee at its meeting on 21 August 2014 are still relevant.

#### **Changes to Envelope**

26. The proposal seeks to modify the approved building envelope and, as such, amended plans are necessary to reflect the desired changes.
27. The amended envelope is the result of a design competition undertaken in accordance with Clause 6.21(5) of Sydney LEP 2012 and the Stage 1 development consent.
28. The amended envelope does not result in any additional height. The maximum height of the amended envelope remains at 55m, which complies with the maximum building height permissible under Sydney LEP 2012, and in accordance with the Stage 1 development approval.
29. The amended envelope contains some projections beyond the approved envelope, which vary according to the level of the building, as shown in Figure 20 below. This corresponds with the tapered hourglass design of the winning competition entry by Durbach Block Jagers.



**Figure 20:** Diagram showing the geometry of the Stage 2 proposal at various levels (shown in green, blue and pink outline) compared to the approved Stage 1 building envelope (shown in a black hatched line)



**Figure 21:** Photomontage of the winning scheme by Durbach Block Jagers viewed from the south (acute corner)



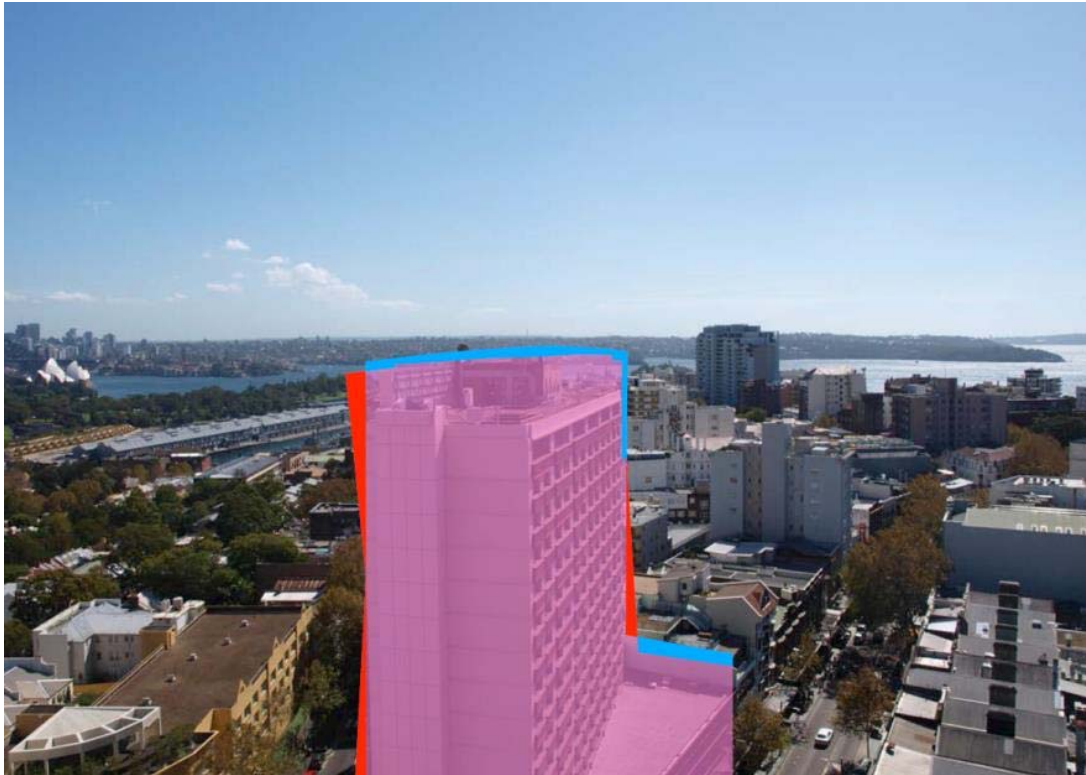
30. In terms of design, the proposed projections are acceptable. They vary at different levels, thereby retaining the tapered and hourglass form of the building. Therefore, the main consideration as to whether the changes are appropriate relate to considering any additional view loss and overshadowing.

### View Loss

31. As part of the Stage 1 Development Application, a detailed view impact assessment was undertaken from surrounding properties at 1 Kings Cross Road (the Elan), 3 Kings Cross Road (Altair Apartments) and 82-94 Darlinghurst Road (Zenith). The assessment was conducted in response to submissions received and was based on the planning principles established by Senior Commissioner Roseth in the Land and Environment Court decision of *Tenacity Consulting v Warringah [2004] NSWLEC140*.
32. Of the 15 properties that were inspected, the Stage 1 building envelope was considered likely to result in a moderate impact on views from living rooms of 4 properties.
33. A view impact analysis was submitted with the current Stage 2 application, following the approach adopted for the Stage 1 view impact assessment.
34. Because the geometry of the Stage 2 tower differs from the approved Stage 1 envelope, the proposal actually results in a reduction in the extent of view loss from surrounding properties.



**Figure 22:** View impact analysis from an apartment at 3 Kings Cross Road showing that the proposal will generally result in a reduction in the loss of views when compared to the approved Stage 1 building envelope



**Figure 23:** View impact analysis from an apartment at 82-94 Darlinghurst Road showing that the proposal will not impact on views when compared to the approved Stage 1 building envelope

35. In response to the notification period, a submission was received from a property owner at 13-15 Bayswater Road raising concern about loss of views of the city and St Mary's Cathedral as a result of the proposal. This property was not included in the view impact assessment conducted for the Stage 1 Development Application as no submissions were received from this property during the assessment of that application.
36. A Council Officer has now attended the property in question to assess existing views and the potential impact arising from the proposal. Existing views from living room windows and a balcony are primarily in a northerly direction with partial views of the city and St Mary's Cathedral to the west.
37. The proposal is considered likely to result in negligible impacts on views from the property at 13-15 Bayswater Road.



**Figure 24:** The living room windows of an 8<sup>th</sup> storey apartment at 13-15 Bayswater Road, looking north. The subject site is only visible when standing immediately in front of window A, looking west, as shown in figure 25 below



**Figure 25:** View from living room window A from an 8<sup>th</sup> storey apartment at 13-15 Bayswater Road, looking west

**Overshadowing**

38. The amended building envelope would result in some minor additional overshadowing of the public domain between 9am and 12pm in mid-winter. This is not considered to significantly impact on the public domain.
39. The amended building envelope would result in some minor additional overshadowing of residential development at 13-15 Bayswater Road between 2pm and 3pm in mid-winter. The extent of overshadowing of this development is marginally reduced as a result of the current proposal when compared to the approved Stage 1 building envelope, and is not considered to detrimentally impact on residential amenity.
40. The amended building envelope would result in some minor additional overshadowing of the podium levels of the mixed use development at 82-94 Darlinghurst Road (including the Zenith tower) between 11am and 1pm in mid-winter. The podium levels of this development do not contain any residential development. The overall extent of overshadowing of this development is marginally reduced as a result of the current proposal when compared to the approved Stage 1 building envelope, and will not result in any detrimental impact on residential amenity.
41. The amended building envelope would result in some minor additional overshadowing of commercial development located at 200-225 Victoria Street at 9am and 72-80 Darlinghurst Road between 12pm and 2pm in mid-winter. The extent of additional overshadowing as a result of the current proposal when compared to the approved Stage 1 building envelope is marginal and will not result in material impacts on amenity.

**Contamination**

42. It is proposed to remove the condition that requires a detailed site contamination investigation to be submitted as part of any future Stage 2 application.
43. Given that the site is capped and no excavation is proposed to be undertaken as part of the Stage 2 development, a detailed site contamination investigation is not considered necessary.
44. Council's Environmental Health Unit have advised that given the historic land uses of the site and the scope of works proposed, a detailed contamination investigation is not required and as such Council can be satisfied that the site is suitable for the proposed use.

**Other Impacts of the Development**

45. The amendments will have no significant detrimental effect relating to environmental, social or economic impacts on the locality, subject to existing conditions of consent being maintained.

**Section 79C (1) (c) Suitability of the site for the development**

46. The amended consent will not alter the existing site suitability which have been considered in the Stage 1 approval, design competition and concurrent Stage 2 Development Application.

**Section 79C (1) (e) Public Interest**

47. The proposed development is generally consistent with the relevant controls. In this regard it is considered that the proposal will have no detrimental effect on the public interest, subject to appropriate conditions being maintained.

**POLICY IMPLICATIONS**

48. Not applicable to this report.

**FINANCIAL IMPLICATIONS - SECTION 94 CONTRIBUTIONS****Section 94 Contributions**

49. There are no financial implications as a result of the amended development. Section 94 contributions will be calculated as part of the Stage 2 Development Application.

**PUBLIC CONSULTATION****Section 79C(1)(d)****Advertising and notification**

50. The Section 96 application was notified for a 14 day period in accordance with the City's policy between 23 March and 7 April 2015. Seven (7) submissions were received, which are discussed below.

- (a) *Object to a revised Floor Space Ratio of 8.8:1 as the density is inappropriate for this site*

**Response:** The Sydney LEP 2012 provides a maximum Floor Space Ratio control for the site of 8:1. The design excellence provisions of the LEP then allow 10% additional floor space is a competitive process has been followed. The Stage 2 Development Application proposes a floor space ratio of 8.78:1, which complies with the LEP controls.

- (b) *Impact on existing view corridors*

**Response:** This has been discussed in this report and the report accompanying the Stage 2 development application.

- (c) *Insufficient parking for this type of development and increase in traffic*

**Response:** The City's parking controls are maximums and not minimums so no parking for residents would comply with the controls and support the City's sustainability goals. The amount of parking provided is appropriate. Any traffic generated by the development is acceptable for its location, keeping in mind the site's good position near the train station.

- (d) *Development should solve building access for pedestrians and vehicles*

**Response:** The Stage 1 approval and proposed modification relates only to building envelope. Issue relating to the sites access and activation of the street were considered in the design competition and Stage 2 Development Application.

(e) *Sustainability*

**Response:** The provision of less parking accords with the City's policy for sustainable development. Other conditions relating to sustainability such as the BASIX certification are conditions recommended on the Stage 2 development application.

(f) *Overshadowing*

**Response:** This issue has been discussed in the report above.

(g) *Loss of privacy*

**Response:** The building is bordered by streets on three sides (Darlinghurst Road, Victoria Street and the acute corner). Therefore the separation distances between the subject site, and residential properties opposite the site, varies from between approximately 20 metres and 33 metres. This is considered to be an adequate distance between properties, given that the Residential Flat Design Code only requires an 18m separation (up to a height or 8 stories) and a 24m separation from 9 stories and above. Most of the submissions about privacy come from the Zenith apartment building located at 82-94 Darlinghurst Road. This property is approximately 33 metres from the southern corner of the subject tower building, which is an adequate separation distance.

(h) *Possible removal of asbestos and hazardous material*

**Response:** A condition is recommended to be imposed on the Stage 2 Development Application that requires the proper and correct handling of hazardous materials and waste during the demolition process. Conditions relating to any possible asbestos removal are also proposed.

(i) *The proposal is not substantially the same development, substantially the same is defined by the Land and Environment Court and in this case there will be more overshadowing, more view loss, more floor space, different intensity of use, different bulk*

**Response:** For the proposal to be considered pursuant to Section 96(2) of the Environmental Planning and Assessment Act, 1979, the consent authority must be satisfied that the proposed development is substantially the same as the development for which consent was granted. Decisions of the Land and Environment Court refer to 'substantially the same' as meaning essentially or materially the same, without altering its essential nature or not radically transforming the originally approved development.

The purpose of Section 96 of the Act is to specifically allow modifications of the consent. This would allow for changes that could include reductions, as well as enlargements. The considerations are quantitative as well as qualitative. The fact that certain aspects are being enlarged or may increase impacts does not mean that you are forced to conclude that the proposal is not substantially the same.

Section 96(2) of the Act relates to “other modifications” which distinguishes it from Section 96 (1) and (1A), the former being for minor errors and the latter being for changes involving minimal environmental impact. A Section 96(2) modification could in fact have an impact, and it is that which forms part of the assessment.

Therefore, it is considered that the proposal is substantially the same, and can be considered pursuant to Section 96(2) of the Act.

The submission states that because of the following, the proposal is not a Section 96 modification: different and increased intensity; increased acoustic impacts; increased traffic; changes to overshadowing; adding to view loss; and a substantially different FSR, bulk and scale.

In response, the intensity of the use of the site remains unchanged. The Stage 1 approval only granted consent for a building envelope, no uses or floor space were approved. The proposed increase in the shape of the tower does not automatically mean that the intensity is also increase. The use of this additional space is proposed and assessed in the Stage 2 Development Application. The proposed changes are not considered to increase acoustic impacts and suitable acoustic conditions would be recommended on the Stage 2 development application. The proposed changes will not affect traffic above and beyond the approved Stage 1 envelope. Changes to overshadowing and view loss have been discussed in the report above. While the bulk and scale will be different, this aspect is what is being considered in the proposal, while FSR is not a consideration at Stage 1 and the Stage 1 approval does not grant consent for any floor space.

### **INTERNAL REFERRALS**

51. The application was discussed with Council’s Urban Designer, who raised no objections to the amended building envelope.

### **RELEVANT LEGISLATION**

52. The Environmental Planning and Assessment Act 1979.

### **CONCLUSION**

53. The proposed changes to the approved Stage 1 building envelope have arisen following the winning scheme at the design alternatives competitive process. The additional bulk will not result in any significant view loss or overshadowing. The tapered and hourglass form of the winning scheme is maintained in the proposed modifications and the overall height is being reduced and will maintain compliance with the 55m height limit. The proposed modifications will not create any additional significant adverse impacts in relation to overshadowing or view loss, and are recommended for approval.

### **GRAHAM JAHN, AM**

Director City Planning, Development and Transport

(Rebecca Thompson, Senior Planner)