

# **Attachment D**

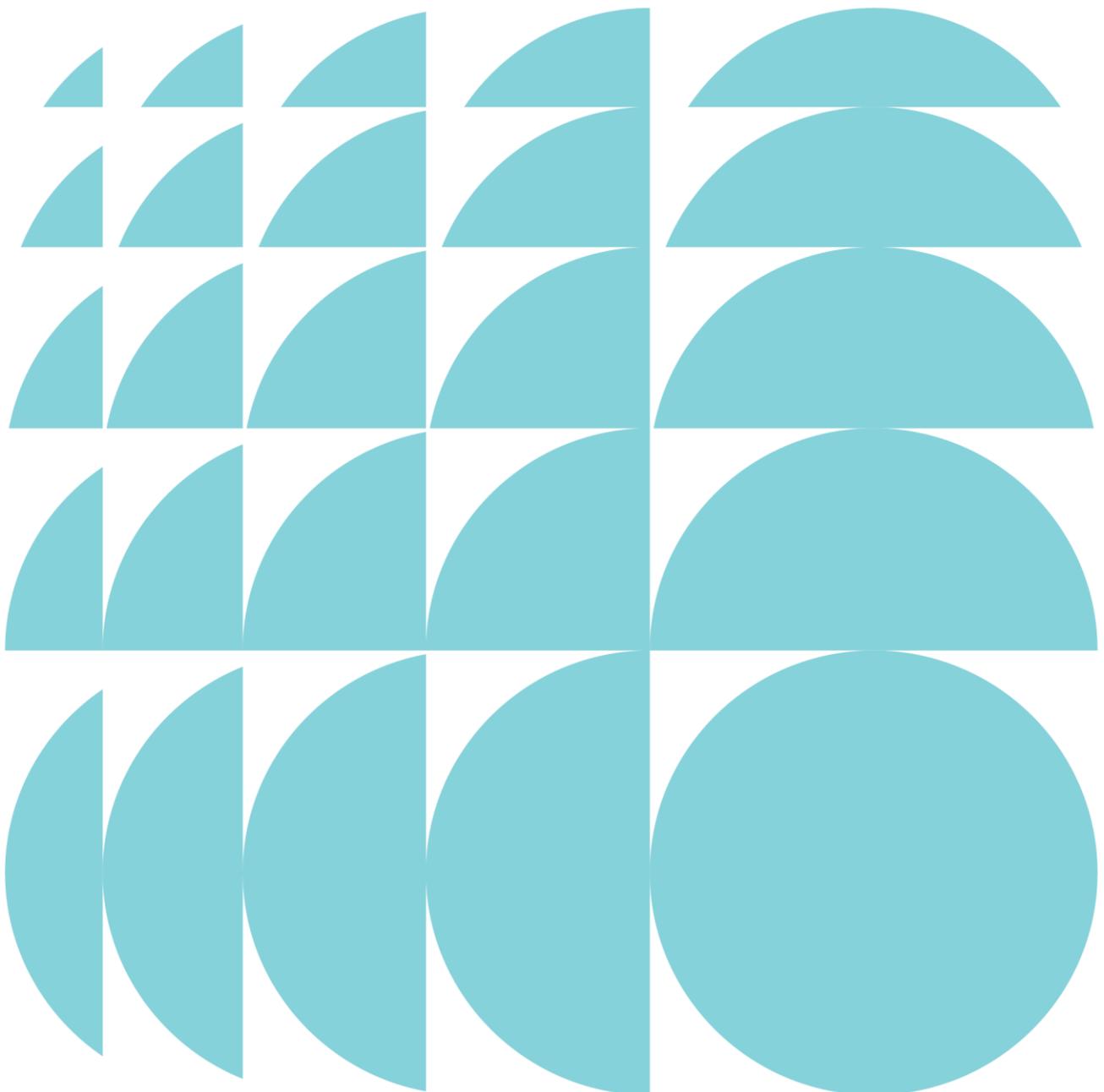
**Revised clause 4.6 statement**

**Clause 4.6 Variation - Building Height  
Variation**

44-48 O'Dea Avenue, Waterloo  
Stage 2 DA - Building C (Lot 12)

Submitted to City of Sydney  
On behalf of Crown W48 Pty Ltd

22 March 2019 | 17539





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## 1.0 Introduction

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (SLEP 2012) allows Council to grant consent for development even though the development seeks to depart from a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- 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.

Assistance on the approach to justifying a contravention to a development standard is taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118; and
4. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552.

This Clause 4.6 request demonstrates that:

- a) The height variation relates to the redistribution of massing from the western aspect of the tower to the northern aspect of the tower, and the stepped form of the building podium;
- b) The objectives of the height control are achieved notwithstanding the variation in that:
  - The site has been identified as an appropriate location for a landmark building under the SLEP 2012 and SDCP 2012 and the proposal is consistent with the intention of these controls;
  - There are no impacts on height transitions to any heritage items, conservation areas or special character areas;
  - Important view corridors, primarily views to the Sydney CBD, are unaffected by the proposal and appropriate building separation has been maintained to ensure sharing of views is promoted;
  - The stepped form of the building results in an appropriate height transition to surrounding areas;
  - Amenity of the public domain is retained as the primary tower form maintains its position within the southern portion of the site; and
  - The southern tower form emphasises the O'Dea Avenue frontage and provides a gateway to the Lachlan Precinct, while the stepped podium form responds to the more sensitive street frontages within the precinct.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, namely:
  - Acceptable solar access to surrounding buildings is retained in a manner that is generally consistent with the LEP envelopes;
  - The proposed variation to the lower levels allows for a more gradual visual impact and height transition to surrounding lower areas by allowing an improved stepped podium form;
  - Benefits resulting from the redistribution of tower massing from the western aspect to the northern aspect including:
    - A more slender east-west presentation of the tower form;

- Increased setback from the western boundary; and
  - Appropriate east-west apartment depths.
  - Allowing the core design principles of the competition winning scheme to be expressed and contributing to the achievement of design excellence; and
  - Demonstrated consistencies with the objects of the EP&A Act.
- d) The proposal is consistent with the objectives of the height of buildings development standard;
- e) The proposal is consistent with the objectives of the B4 Mixed Use zone; and
- f) The proposal is consistent with bonus Gross Floor Area awarded as per the competitive design process.

As per the above, the consent authority can be satisfied that compliance with the height of buildings development standard is unreasonable and unnecessary since the objectives of the control are achieved notwithstanding the non-compliance. Further, the consent authority can also be satisfied that the proposal is in the public interest because it is consistent with the objectives of the height control and is consistent with the objectives of the B4 Mixed Use zone, also described above.

The concurrence of the Secretary of the Department of Planning and Environment (DPE) is also required before the consent authority can grant development consent (cl 4.6(4)(b)). The matters the Secretary is required to consider before providing concurrence have been provided at **Section 4.5**.

This report should be read in conjunction with the supporting material prepared by Koichi Takada Architects dated 15 March 2019.

## 2.0 Development Standard to be Varied

### 2.1 Is the Planning Control in Question a Development Standard

The height of building control in Clause 4.3 of the SLEP 2012 is a development standard.

### 2.2 Relevant Development Standard

The development standard that is sought to be varied as part of this application is clause 4.3 of the SLEP 2012, relating to the maximum building height. It should be noted that the Stage 1 DA (D/2016/1450) was approved with a building envelope and accompanying maximum heights up to RL 91 (m AHD). A separate Section 4.55 application has been submitted to Council to vary the approved building envelope and the proposed exceedance to maximum building height and to ensure consistency between the Stage 1 consent and the Stage 2 detailed proposal.

Clause 4.3 of the SLEP 2012 is reproduced below in its entirety and an extract of the relevant Height of Buildings Map, to which that clause applies, is reproduced in **Figure 1**. The site is subject to three separate maximum heights. A height of RL 40.15m applies to the northern part the site fronting Hatbox Place, while a maximum height of RL 46.35m applies to the central portion of the site along the northern and western aspects. A maximum height of RL 91m is afforded to the south-eastern corner of the site fronting Reed Street and O'Dea Avenue.

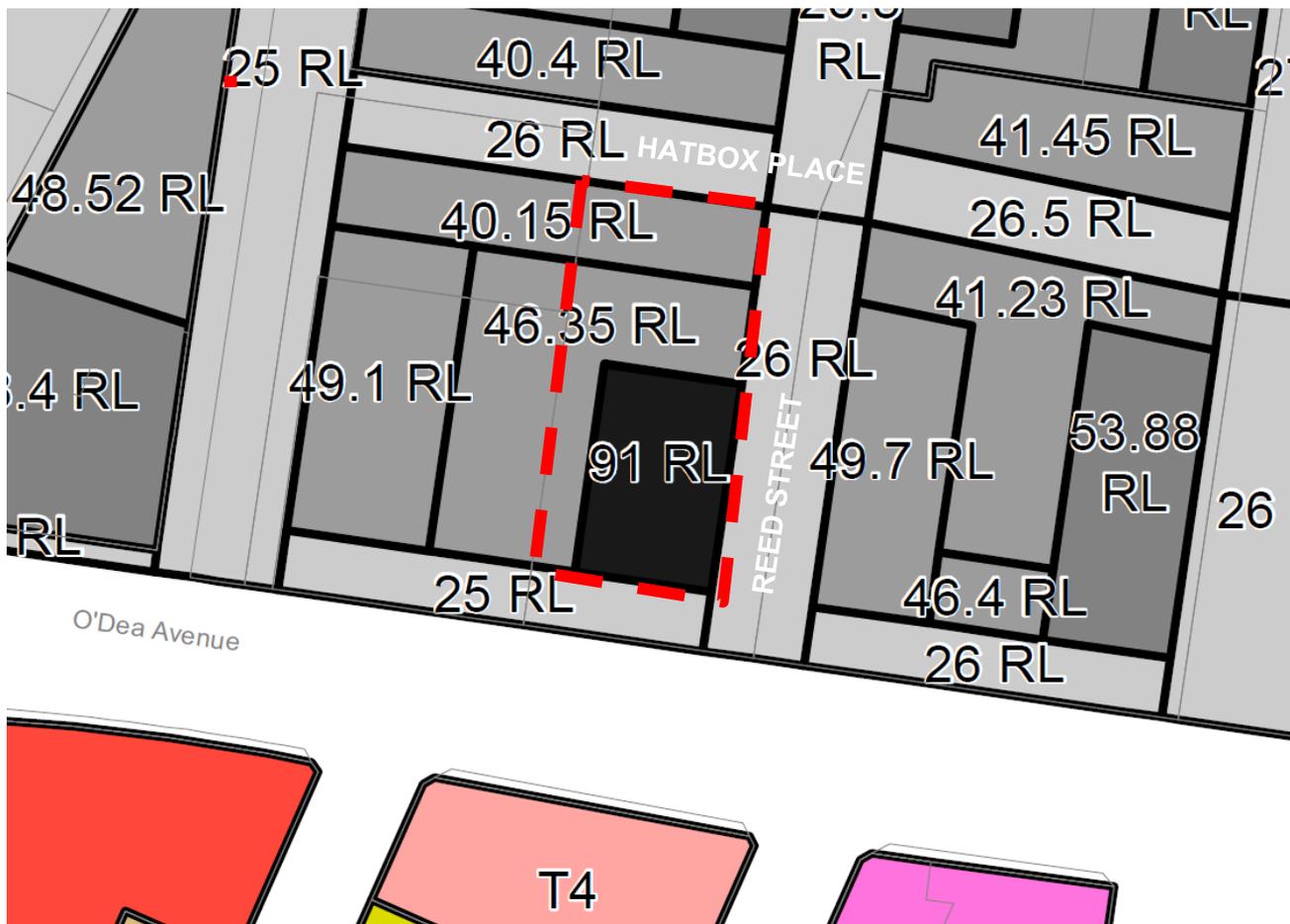
Maximum building heights surrounding the site range between RL 25.0m and RL 49.7m.

*“Clause 4.3 Height of buildings*

*(1) The objectives of this clause are as follows:*

- (a) to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) to promote the sharing of views,*
- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) in respect of Green Square:*
  - (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
  - (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.*

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”*



**Figure 1** Extract of the LEP maximum building height (site indicated red)  
 Source: SLEP 2012

### 2.3 Variation Sought

As illustrated in **Figure 1** above, the site is afforded three different maximum height controls being RL 40.15m, RL 46.35m and RL 91m. This allows for a somewhat terraced building form stepping upwards to a tower at the south-eastern corner of the site.

The proposed scheme provides a building that largely complies with the site's maximum height controls. The variation sought relates to small portions of the building floor plates, generally associated with outdoor terraces between Levels 4 and the Roof Level along the northern aspects of the façade. **Figure 2** on the following page divides the building into three components: C1A, C1B, and C1C. The remainder of this report refers to these components of the building for clarity.

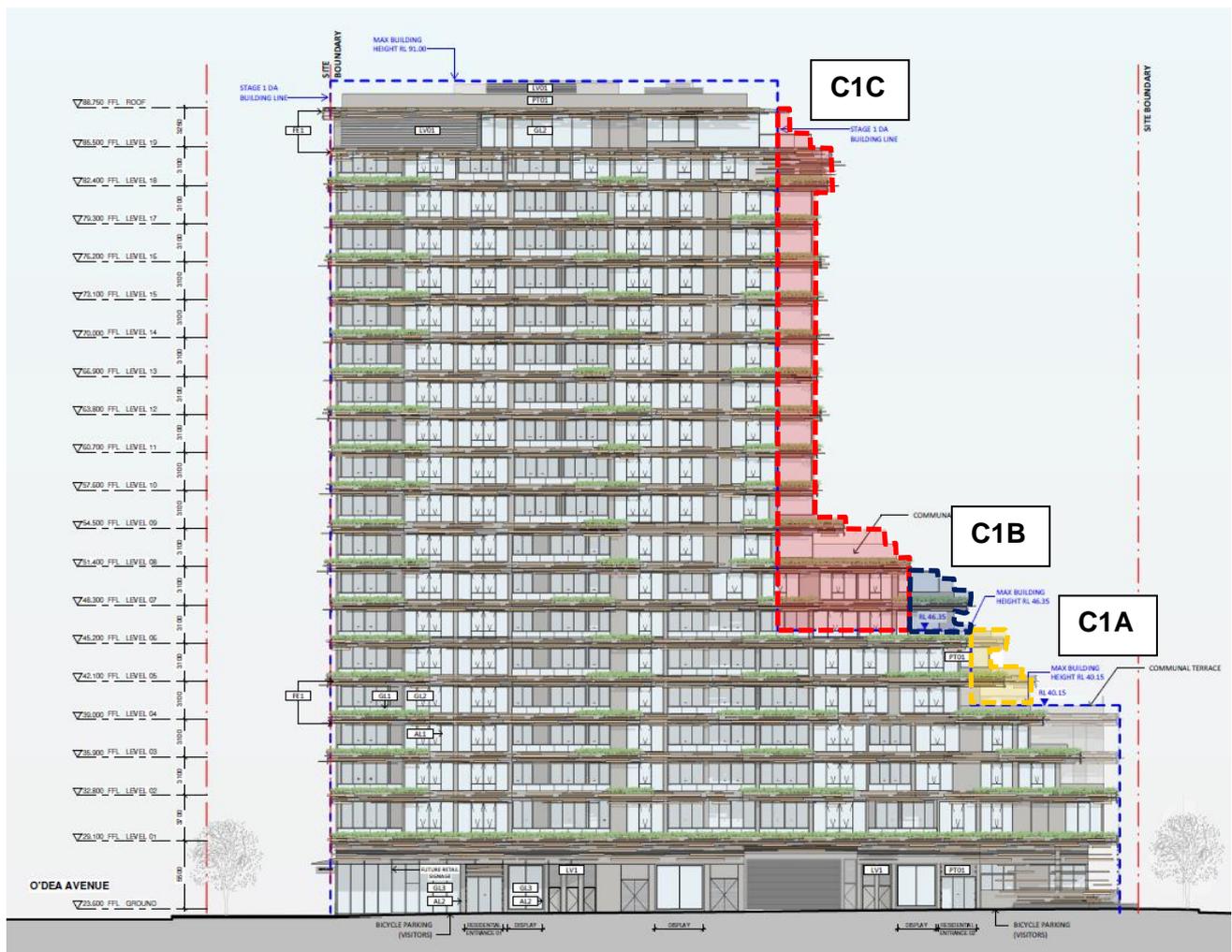


**Figure 2 Eastern elevation of Building C and its three components of differing height**

Source/Notes: KKAA and KTA

**Figure 3** on the following page illustrates the extent of the building that exceeds the maximum height control.

It is noteworthy that the building does not at any instance exceed the tallest height control afforded to the site of RL 91m. The variation sought under this application is the result of minor sections of the building components exceeding the building height controls of RL 40.15m and RL 46.35m along the northern aspect of the building. These exceedances are discussed in more detail within the following pages.

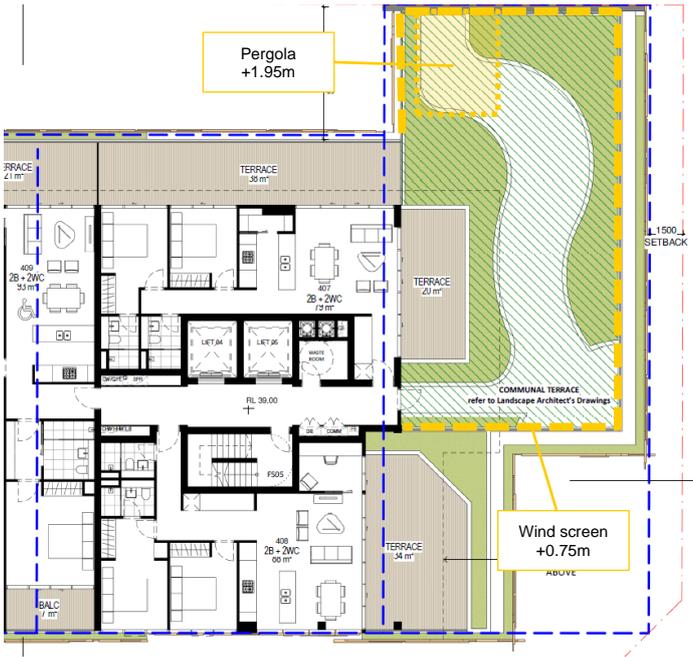


**Figure 3** Indicative extent of building that exceeds the height controls (as shown in red, blue and yellow)

Source: KKAA and KTA

### Building component C1A

The maximum allowable height for component C1A is RL 40.15m. At Level 4, the finished floor level (FFL) and parapet are within this maximum height limit. However, a pergola is proposed above a portion of the western edge of the communal terrace to a height of RL 42.10m, in line with the FFL of Level 5 above. This represents a variation of 1.95m (4.9%) over the maximum building height. **Figure 4** over the page shows the extent of this exceedance.

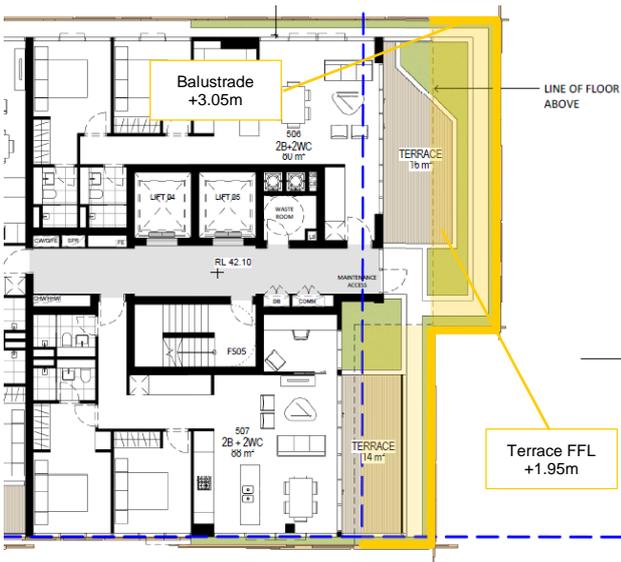


**Figure 4 Level 4 - extent of height exceedances**

Source: Adapted from KKAA and KTA

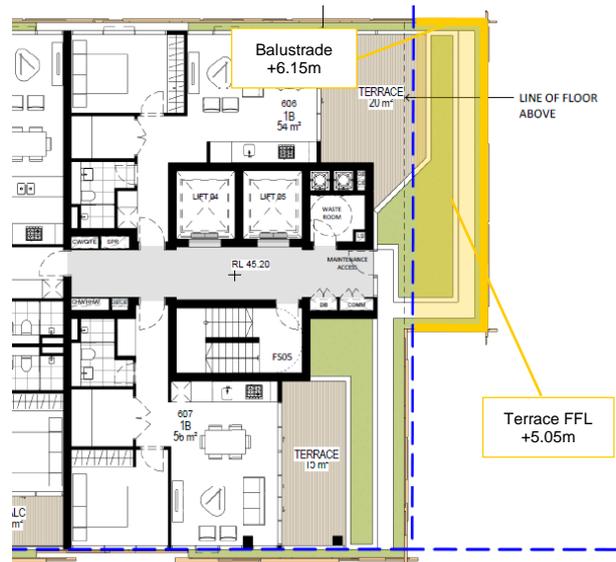
At Level 5, the FFL of the outdoor terrace is RL 42.10m, with balustrades to a height of 43.20m. This represents exceedances of 1.95m (4.9%) and 3.05m (7.6%) above the RL 40.15m height limit, respectively. Along the western half of the northern aspect, there is also a minor protrusion of the building form at RL 45.20m, resulting in an exceedance of 5.05m (12.6%) above the height limit of RL 40.15m. **Figure 5** below shows the extent of these exceedances.

Similarly, at Level 6 the outdoor terrace FFL is RL 45.2m, with a maximum balustrade height of RL 46.30m. These heights represent exceedances of 5.05m (12.6%) and 6.15m (15.3%) respectively. It is noted that these exceedances occur for a small portion of the building floorplate and are associated with landscaped terraces, as demonstrated in **Figure 6** below which shows the extent of these exceedances.



**Figure 5 Level 5 - extent of height exceedances**

Source: Adapted from KKAA and KTA



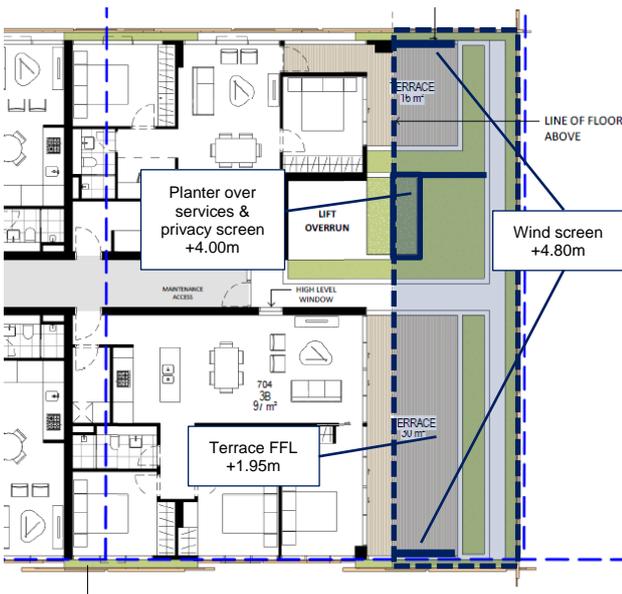
**Figure 6 Level 6 - extent of height exceedances**

Source: Adapted from KKAA and KTA

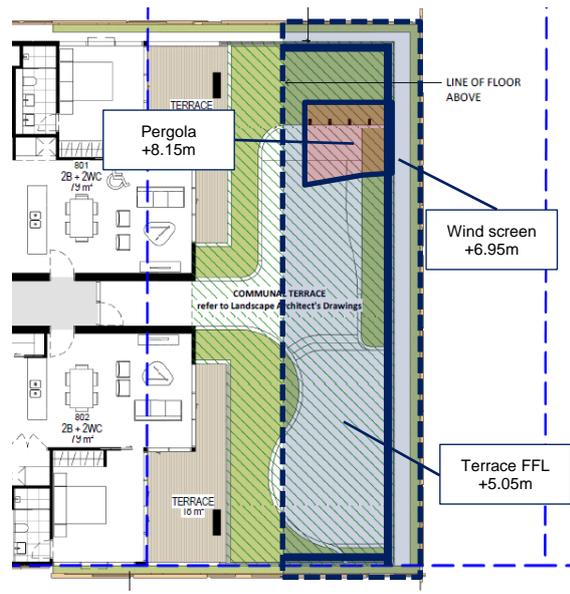
**Building component C1B**

The maximum allowable building height for component C1B is RL 46.35m. At Level 7, the outdoor landscaped terrace protrudes beyond the allowable building envelope. The FFL of the outdoor terrace is RL 48.30m, with a proposed planter over a services room to a height of RL 50.35m and wind screens to a height of RL 51.15m. This represents variations to the maximum height limit of 1.95m (4.2%) and 4.80m (10.4%) respectively. **Figure 7** below shows the extent of these exceedances in plan.

At Level 8, the communal terrace protrudes beyond the building envelope with an FFL of RL 51.40m. A pergola is proposed over the western edge of the terrace, with a maximum height of RL 54.50m. Wind screens around the perimeter extent up to RL 53.30m. This results in a variation to the maximum height limit by 8.15m (17.6%), respectively. The areas for which these exceedances are proposed are shown in **Figure 8** below.



**Figure 7 Level 7 – extent of height exceedances**  
 Source: Adapted from KKAA and KTA



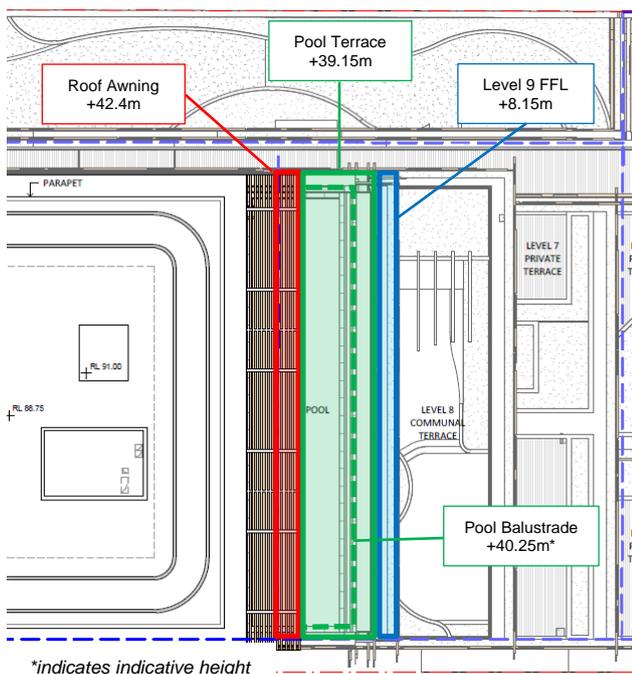
**Figure 8 Level 8 – extent of height exceedances**  
 Source: Adapted from KKAA and KTA

**Building component C1C**

Component C1C has two maximum building height limits: RL 46.35m for the northern portion and RL 91m for the remainder. No component of the proposed building exceeds the RL 91m height limit.

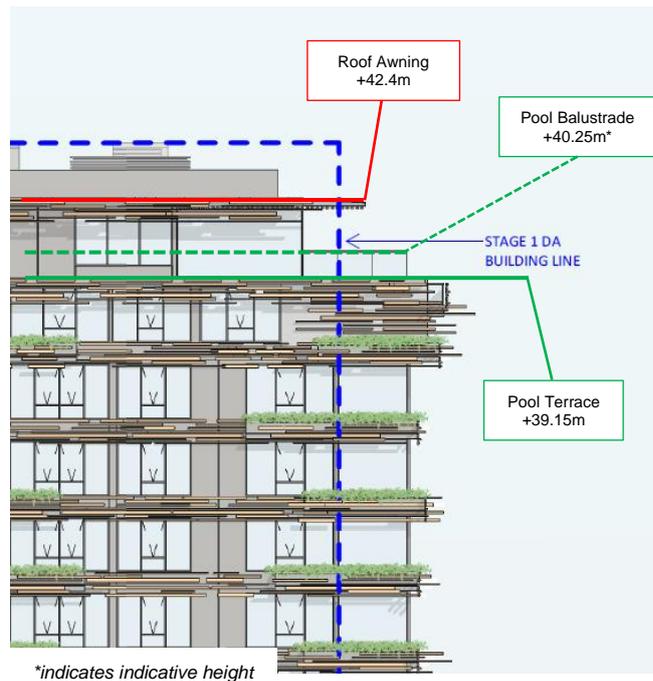
At Level 9, a small portion of the outdoor landscaped terrace protrudes beyond the building envelope with an FFL of RL 54.50m, representing a variation to the RL 46.35m height limit of 8.15m (17.6%). At Level 19, the cantilevered pool terrace also protrudes beyond the building envelope, with an FFL of RL 85.5m and balustrade height of RL 86.6m (indicative), which represents variations to the RL 46.35m height limit of 39.15m (84.5%) and 40.25m (indicative) (86.7%) respectively. Lastly, a very small area of the proposed awning over the pool terrace, which has a height of RL 88.75m, exceeds the RL 46.35m height limit by 42.4m (91.5%). The extent of these proposed exceedances is shown in **Figure 9** and **Figure 10** over the page.

While the magnitude of the abovementioned exceedances appear large, it should be noted that the tower form for the typical levels (Levels 10-17) is set back from the edge of Level 19, which cantilevers beyond the tower form towards the north, which was a design outcome supported during the design competition for the site.



**Figure 9 Building C1C Roof Plan – extent of height exceedances**

Source: Adapted from KKAA and KTA



**Figure 10 Building C1C East Elevation – indicative height exceedances**

Source: Adapted from KKAA and KTA

In summary, for the most part, Building C complies with the maximum SLEP 2012 building height control, with the exception of small parts of the building, predominantly associated with outdoor terraces and the cantilevered pool along the building’s northern façade.

The exceedance is limited to the northern facade has originated as a result of the need to maintain the design intent of the competition winning building by locating planter boxes and landscaped terraces on all building façades and creating a building form that terraces down to the north. Variations to the maximum building height limit for Building C1A and C1B ranges from 4.2% to 15.3%.

For Building C1C there is a technical maximum variation of 91.5%, which occurs on Level 19. This exceedance is primarily due to the fact that tower footprint has a marginally longer north-south axis (in the realms of 7%) compared to the footprint allowable under the LEP, which is very specific for the site. Accordingly, the maximum variation sought is for only a small portion of the site, when considered in totality.

**Section 4** below provides further discussion and justification of these exceedances.

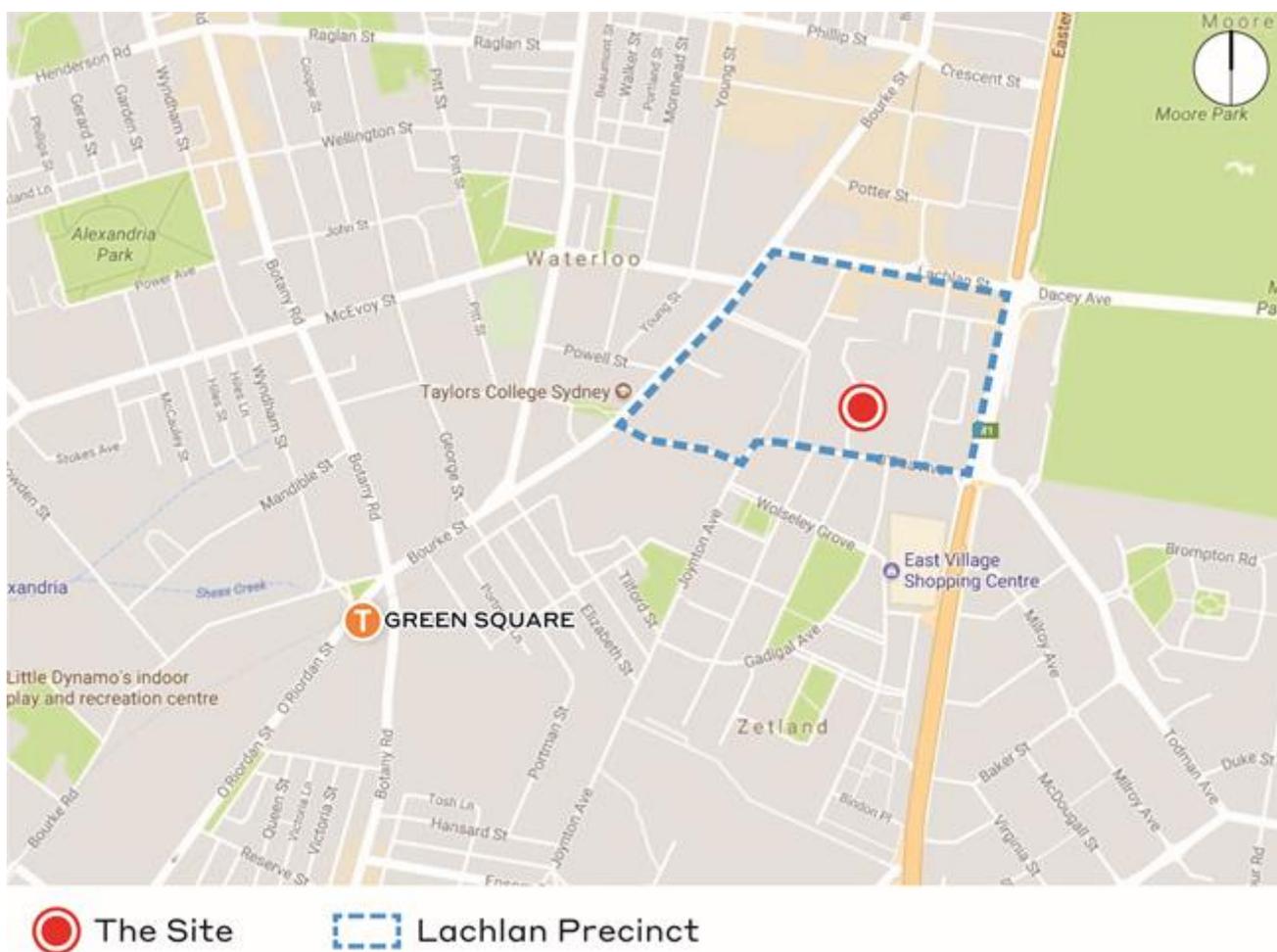
### 3.0 Background and Context to the Variation

#### 3.1 Surrounding Context

The site is situated within the north-eastern extent of the Green Square Renewal Precinct within the City of Sydney Local Government Area (LGA). More specifically, the site falls within Green Square’s Lachlan Precinct area located approximately 1km north-east of Green Square Railway Station and Green Square Town Centre. **Figure 11** below illustrates the context of the site within the wider locality.

The site is accessible from an array of public transport modes provided in proximity to the site, including Green Square Railway Station, the Route 302 and 303 buses along O’Dea Avenue and existing cycle infrastructure including the Green Square to CBD separate cycle route.

Given the location of the site within the broader Green Square Renewal precinct, the site is surrounded by parcels of land that are either undergoing redevelopment and construction or have just recently been completed.



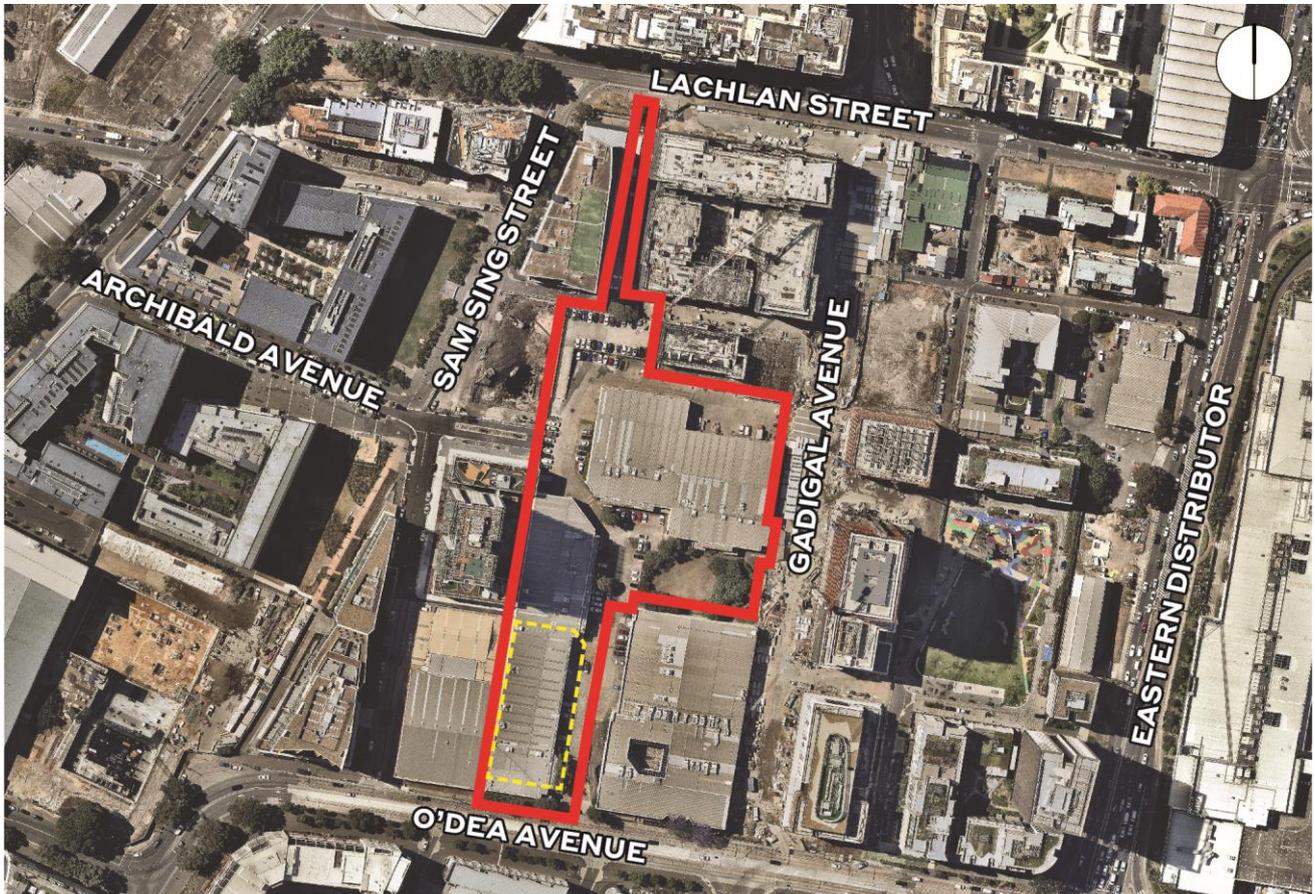
**Figure 11** Locational context

Source: Ethos Urban

#### 3.2 The Site

The site forms a part of a wider land parcel known as 44-48 O’Dea Avenue, Waterloo legally described as SP44338. As part of the Stage 1 DA consent (D/2016/1450), the site has an approved subdivision plan that subdivides the Stage 1 land parcel into multiple development lots consistent with Council’s vision for the master planned redevelopment of the Lachlan Precinct. A subdivision application (D/2018/159) is presently under assessment.

The proposed development is situated at the south western portion of the wider site, within the future Lot 12. The site is bound by Hatbox Place to the north and O’Dea Avenue to the south. The site’s eastern boundary is formed by future Reed Street, while the western boundary is contiguous with the adjoining lot at 40 and 42 O’Dea Avenue, Waterloo. **Figure 12** below, identifies the extent of the subject site within the wider Stage 1 land parcel.



 Stage 1 Site Boundary       The Site

**Figure 12** Aerial photo of the overall site (outlined red) and Building C development lot (outlined yellow)

Source: Ethos Urban + Nearmap

### 3.3 Planning Context and Competitive Design Alternatives Process

Condition 6 of the Stage 1 development consent for the broader site required a competitive design process to be undertaken for Building C. Further, the detailed design of Building C was required to exhibit design excellence in accordance with Clause 6.21 of the SLEP 2012. As such, a Competitive Design Alternatives Process was undertaken by the proponent for the site.

The Kengo Kuma and Associates (KKA) and KTA scheme was selected as the winning design from this process. As such, the KKA and KTA scheme progressed to a Stage 2 DA design. The core design principle of the winning scheme was to create a “stacked forest” that embodied a strong relationship to nature through extensive planting along the building facades, the use of timber-look horizontal façade battens and a warm materials palette.

As put forward in the Competitive Design Alternatives Report by SJB (February 2018), the strength of the KKA and KTA scheme and one of the primary reasons for it being selected as the winning design was “*in the power of the concept, with its consistency of elements and the culmination of the stepped form with a dramatic cantilevered communal terrace and pool*”. The core concept was said to comprise “*a singular and well expressed layered expression heavily reliant on an abundant landscape to terraces on all facades*”.

In progressing the winning scheme to a Stage 2 DA, the core principles of extensive façade and terrace landscaping, a terraced podium form and the use of timber-look battens have been retained while developing the scheme to comply with the relevant detailed planning controls. These core principles were pursued notwithstanding a variation to the height of building development standard and exceedance of the Stage 1 building envelope (which was noted on page 12 in the Competitive Design Alternatives Report, prepared by SJB). As such the resulting detailed design is entirely comparable to the winning competition design. A comparison of the eastern elevation between the Stage 2 DA submission and the competition proposal is shown at **Figure 13** to **14** below.



**Figure 13** Stage 2 DA – Eastern Elevation



**Figure 14** Competition Proposal – Eastern Elevation

## 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the SLEP 2012 provides that:

### 4.6 Exceptions to development standards

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4) of the SLEP 2012 provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *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, and*
  - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 100;
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
4. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511; and
5. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552.

The relevant matters contained in clause 4.6 of the SLEP 2012, with respect to the maximum building height development standard, are each addressed below, including with regard to these decisions.

### 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court identified five ways in which it could be demonstrated that compliance with a development standard is unreasonable or unnecessary in the circumstance of the case. His Honour in that case (and subsequently in *Initial Action*) confirmed that the types of ways that it could be shown that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case, was not limited to the five ways identified in *Wehbe*.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis is applicable to variations made under Clause 4.6 where subclause 4.6(3)(a) uses the same language as Clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the SLEP 2012 is the same as the language used in Clause 6 of SEPP 1, the principles contained in *Wehbe* are applicable to this Clause 4.6 variation request. Specifically, this Clause 4.6 variation request establishes that primarily compliance with the development standard is unreasonable

or unnecessary in the circumstances of the proposed development because objectives of the standard are achieved notwithstanding the non-compliance with the standard (First Way).

#### 4.1.1 First Way: The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the building height development standard as set out by Clause 4.3(1) of the Sydney LEP 2012 are as follows:

- (a) *to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) *to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*
- (c) *to promote the sharing of views,*
- (d) *to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) *in respect of Green Square:*
  - (i) *to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
  - (ii) *to ensure the built form contributes to the physical definition of the street network and public spaces.*

The proposed development achieves the objectives of Clause 4.3 Height of Buildings as discussed below.

#### **Objective (a): To ensure the height of development is appropriate to the condition of the site and its context**

The proposal, inclusive of the variation, achieves the above objective as the site is identified as being an appropriate location for a landmark building as per the SLEP 2012 and accompanying detailed provisions for the Lachlan Precinct within the SDCP 2012. It has been determined that a tower building typology in this location is appropriate to the condition of the site and its surrounding urban context. The proposed development, inclusive of the variation, delivers a tower substantially in accordance with the vision for the Lachlan Precinct, with the same overall height and in the same location as envisaged by these controls. In addition, the proposal will deliver an architecturally distinct building which has been demonstrated to achieve design excellence.

Importantly, the proposed height variation does not increase the overall maximum height of the building and respects this spatial relationship and overall built form character of the Lachlan Precinct. The variation to height proposed is due to the footprint of the building extending slightly further north compared to what was envisaged in the SLEP 2012. The terraced podium form allows for a transition down from the tower to better integrate with the fine grain character of the surrounding streetscape and adds to architectural diversity in the locality.

Despite the technical height exceedance, the proposal still delivers a building that is consistent with the height envisaged for the site and is therefore considered to still provide an outcome that is appropriate to the condition of the site and its context.

#### **Objective (b): To ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas**

The proposed development, inclusive of the variation, achieves the above objective in that there are no heritage items, conservation areas or special character areas surrounding the site.

#### **Objective (c): To promote the sharing of views**

The proposed development, inclusive of the variation, achieves the above objective since it will not impact on any significant views. Views to the city are the primary significant views in the Green Square and Lachlan Precinct. The additional massing related to the variation is located along the building's northern elevation and will therefore not typically impact on distant views to the city, which are generally to the north of the building. Furthermore, the building has been designed to achieve compliance with minimum separation distances to promote views sharing.

**Objective (d): To ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas**

The proposed development, inclusive of the variation, achieves the above objective in that the overall height of the building remains the same and provides appropriate transition to the surrounding areas. The proposed variation of the height control is due to the building footprint being marginally longer on its north-south axis compared to that envisaged in the SLEP 2012. The extension of the building footprint to the north is of a scale that will not impact the height transition between Central Sydney or Green Square and their surrounding areas. Further, the stepped form of the podium provides a more sensitive transition to the surrounding areas than a scheme that complied with and maximised the approved building envelope would.

**Objective (e): In respect of Green Square:**

**(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and**

The proposed development, inclusive of the variation, achieves the above objective in that the tallest part of the building is still restricted to the south-eastern corner of the site. The proposed variations to maximum building heights at the lower levels are designed to respond to the surrounding street network, with a tapering form from the tower fronting O'Dea Avenue towards Hatbox Place and its intersection with Reed Street and appropriate building setbacks to the public domain. As such, the proposed building inclusive of the proposed variation, will continue to maintain the amenity of the public domain as the taller building will still be located in the same general area.

**(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.**

The proposed development, inclusive of the variation, achieves the above objective as the building will continue to respond to the surrounding street network in a manner consistent to that envisaged by the controls. The main tower fronts O'Dea Avenue and is of the same height as envisaged by the planning controls. The tower serves as a gateway to the precinct from O'Dea Avenue and acts as one of the key built form anchors of the City's Lachlan Precinct vision. In the northern portion of the site, the proposed building inclusive of the variation of height, progressively steps down parallel to Reed Street to a lower podium height. This ultimately results in a built form podium with an appropriate street frontage height to Hatbox Place, which responds to the quieter and local nature of this street, which is consistent with the street network typologies set out within the City's Lachlan Precinct DCP controls.

Building form at the street edge will continue to 'define' the street network. The proposed land uses, particularly at ground and lower levels of the building, are also compliant with the DCP and will ensure that the building continues to positively define and reinforce the street network and public domain of the Lachlan Precinct.

**4.1.2 Conclusions on Clause 4.6(3)(a)**

In summary, compliance with the maximum height of building development standard is unreasonable or unnecessary in this case, because the development achieves the objectives of the height of building development standard set out within Clause 4.3 of the SLEP 2012:

- The proposal provides a landmark tower of the same height and in the same location as envisaged by the SLEP 2012 and the SDCP 2012 (Lachlan Precinct);
- No heritage items, conservation areas or special character areas are located in the vicinity of the site and therefore none are impacted by the proposal;
- The proposed development does not impact any significant views, particularly views towards the Sydney CBD and has been designed to achieve compliance with minimum separation distances to promote the sharing of views;
- The minor additional tower massing does not impact the height transition from Green Square Town Centre to adjacent areas, while the stepped podium form improves the height transition to directly surrounding areas; and
- The proposal generally restricts the primary tower form to the southern portion of the site as envisaged in the SLEP 2012 and the SDCP 2012, defining the entry to the precinct from O'Dea Avenue. Terracing of the podium toward the north responds to the finer grain street network within the Lachlan Precinct itself and ensures amenity of the surrounding public domain.

## 4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the SLEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]). Further, compliance with other planning instruments, such as SEPP65 and the Apartment Design Guide, does not justify non-compliance with the development standard and is not sufficient environmental planning grounds to justify contravening the development standard (*Baron Corporation Pty Ltd v The Council of the City of Sydney* [58]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. In this instance the relevant aspect of the development is the additional building height that exceeds the development standard.

There are sufficient environmental planning grounds to justify contravention of the height development standard in this specific instance which include:

- An acceptable visual impact and appropriate height transition;
- An appropriate built form and massing outcome; and
- An acceptable solar access and overshadowing impact.

These environmental planning grounds are discussed below.

### Visual impact and height transition

The building massing envisaged by the SLEP 2012 and approved as part of the Stage 1 development consent reads as three distinct volumes, with a 20-storey tower to the south which then steps down to two smaller podium elements to the north, which are 6 and 4 storeys in height. This massing is intended to provide a visual transition in height from the landmark tower fronting O'Dea Avenue to the smaller local streets such as Hatbox Place within the Lachlan Precinct.

The Stage 2 proposal which is the subject of this Clause 4.6 variation request, further refines this transition from the tower stepping down towards Hatbox Place in staggered one-storey increments. The introduction of additional stepping in the terrace form of the building results in variations to the RL 40.15m and RL 46.35m height limits as described in **Section 2.3**. The variations to these podium height limits results in a more gradual and less abrupt visual transition from the landmark tower towards Hatbox Place when compared to the LEP height limits.

The distribution of massing at the podium levels (Buildings C1A and C1B) has been carefully allocated to create an appropriate height transition from the landmark tower form to the lower scale, finer grain residential frontages along Hatbox Place and Reed Street. Further, the elongation of the tower's north-south axis does not result in any view impacts towards any regional Sydney CBD views which are directed northwards.

Given the above, the proposed variation to height will facilitate more a gradual and visually appealing transition of mass from the 20-storey tower down to the 4 storey streetscape on Hatbox Place and importantly, will not result in any adverse view impacts for the surrounding area. As such, there are environmental planning grounds relating to visual impact and height transition that justify contravention of the development standard.

### Built form and massing

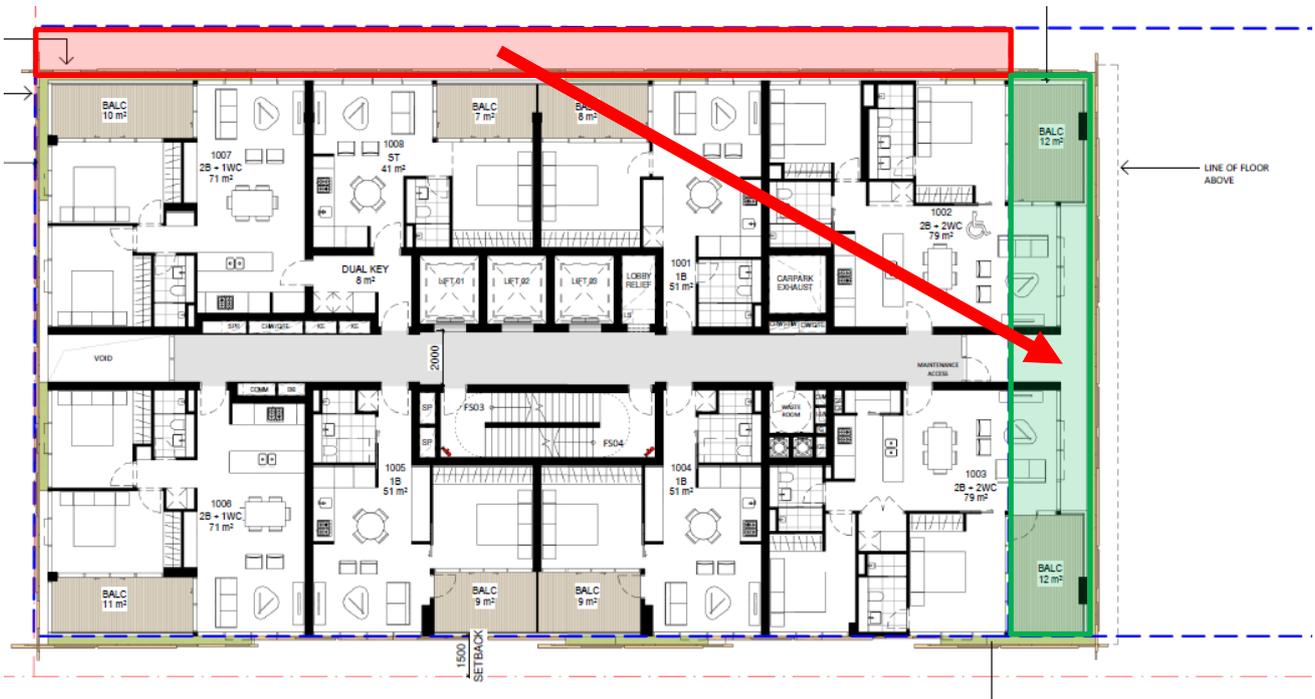
The variation caused by the encroachment of the tower footprint to the north of the building envelope is a result of the redistribution of tower bulk from the western aspect to the northern aspect, as shown in **Figure 15** below. This redistribution of bulk allows for the following:

- A more slender east-west presentation of the tower form;

- Increased setback from the western boundary, allowing potential future building separation and privacy issues to be mitigated in the case of a tall development on the adjacent lot; and
- Appropriate east-west apartment depths.

The specificity of the LEP height limits is such that they result in the provision of built form in a very specific location, which may not have had the benefit of the rigour of a detailed design process to optimise building amenity for occupants. The LEP height limit for the tower is unfortunately too broad across the east-west axis and a building designed to directly align with the LEP envelope would provide a tower that is too wide and apartments that would be too deep, thus having inferior amenity.

The building envelope proposed allows for a more slender building on the east-west axis and will facilitate an improved design outcome with apartments that have a higher level amenity for occupants. As such there are environmental planning grounds relating to built form and massing that justify contravention of the development standard.



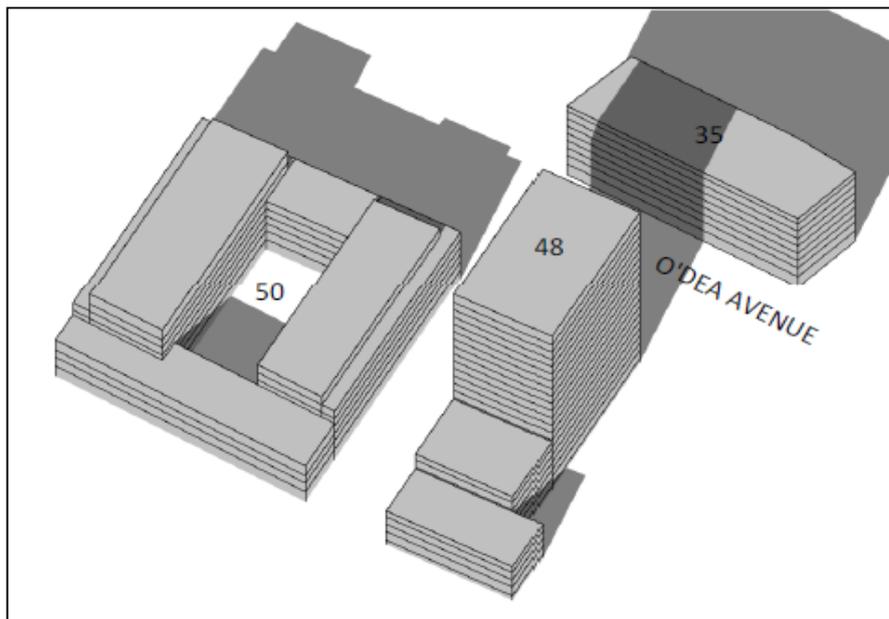
**Figure 15 Typical floor plan for Levels 10-17 – redistribution of tower bulk**

Source: Adapted from KKAA and KTA

**Solar access and overshadowing**

The building’s additional bulk and mass that is proposed to sit outside of the SLEP 2012 maximum building height envelope, has been limited to the northern section of the site. The location of this additional mass will result in some additional overshadowing on surrounding buildings. Solar analysis undertaken by project architects KKAA and KTA (**Appendix A**), confirms that there is both a loss and an increase to sunlight to these surrounding buildings at different times of the day.

The solar access study undertaken considers impacts in midwinter (21 June) from 9am to 3pm, in accordance with ADG provisions, as a guide to measure impacts on surrounding buildings and to consider amenity impacts on current and future occupants. This time period resulted in two key properties, 35 O’Dea Avenue an existing residential flat building directly to the site’s south, and 50 O’Dea Avenue to the east which is currently the Nurses and Midwives Association building. Both sides were modelled in 3D and inserted into a sun eye model (with the Lachlan Precinct built form envelope used for a future 50 O’Dea Avenue redevelopment), refer to **Figure 16** over the page, for an extract of the key plan used in the solar impact analysis.



KEY PLAN - SOLAR STUDIES 21 JUNE

**Figure 16 Key Plan of the Clause 4.6 Solar Study using LEP massing**

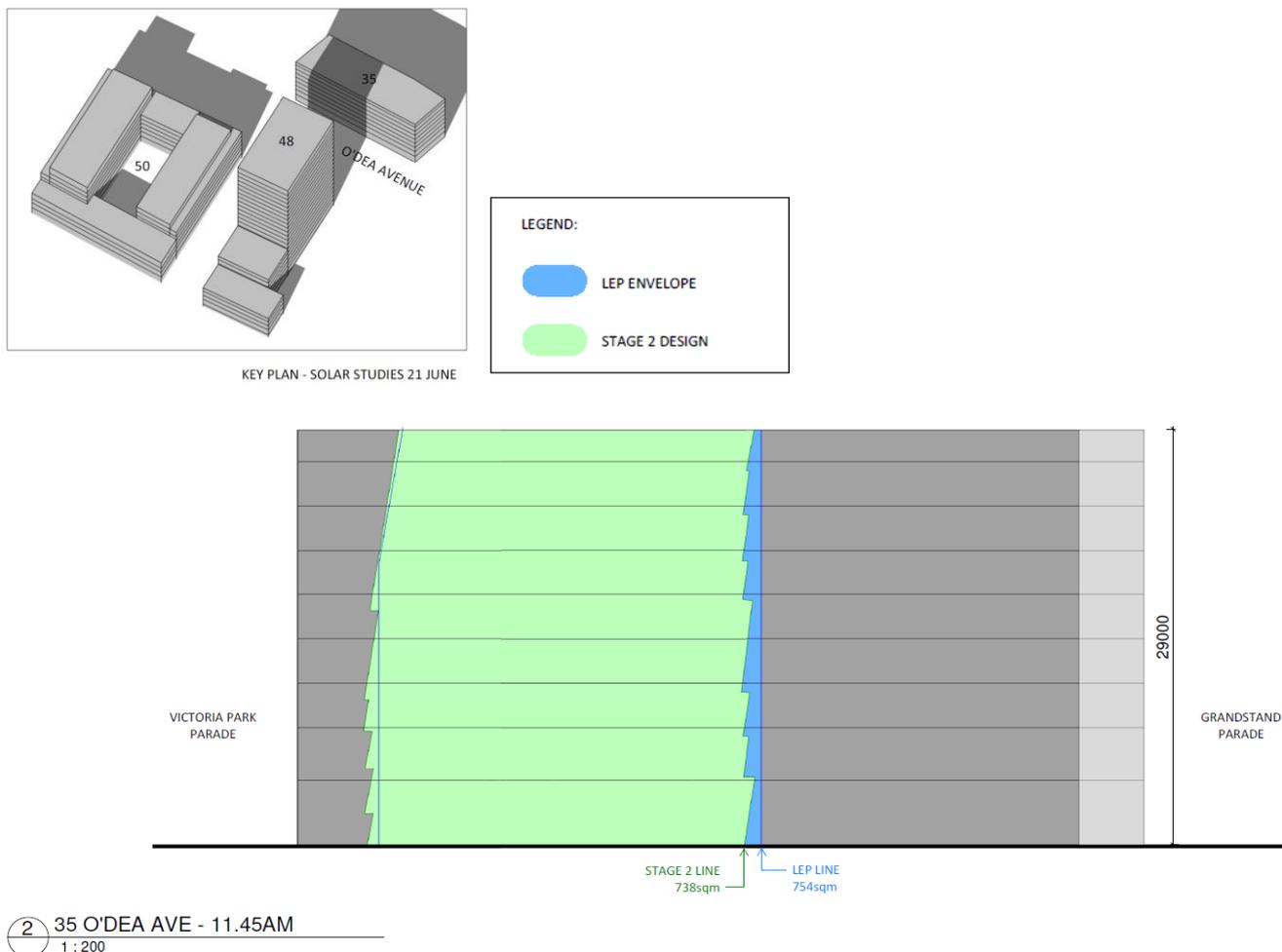
Source: KKAA and KTA

The following extract at **Figure 17**, indicates where the proposed Stage 2 building, inclusive of the additional massing in the northern section of the site, results in a reduced solar impact to 35 O'Dea Avenue. This is achieved through the following design measures within the Stage 2 proposal compared to the LEP envelope:

- A 450mm setback from the southern O'Dea Avenue frontage, resulting in improvements from 9am to 10am; and
- A 3m reduction at levels 4 to 7 and 1.1m reduction from level 8 to roof level on the western façade, resulting in improvements from 10.45am to 2.15pm.

It is noted that this has resulted in minor reductions in overshadowing of the northern façade to 35 O'Dea Avenue (in the realms of up to -3%) when compared to those envisioned under the SLEP 2012. Accordingly, the apartments within this existing building will receive marginally greater solar access and improved amenity than they would have received under a building that strictly aligned with the maximum building height envelope under SLEP 2012.

Provided at **Figure 17** over the page is an extract from the solar study showing 35 O'Dea northern façade solar performance at 11.45am, by way of example.

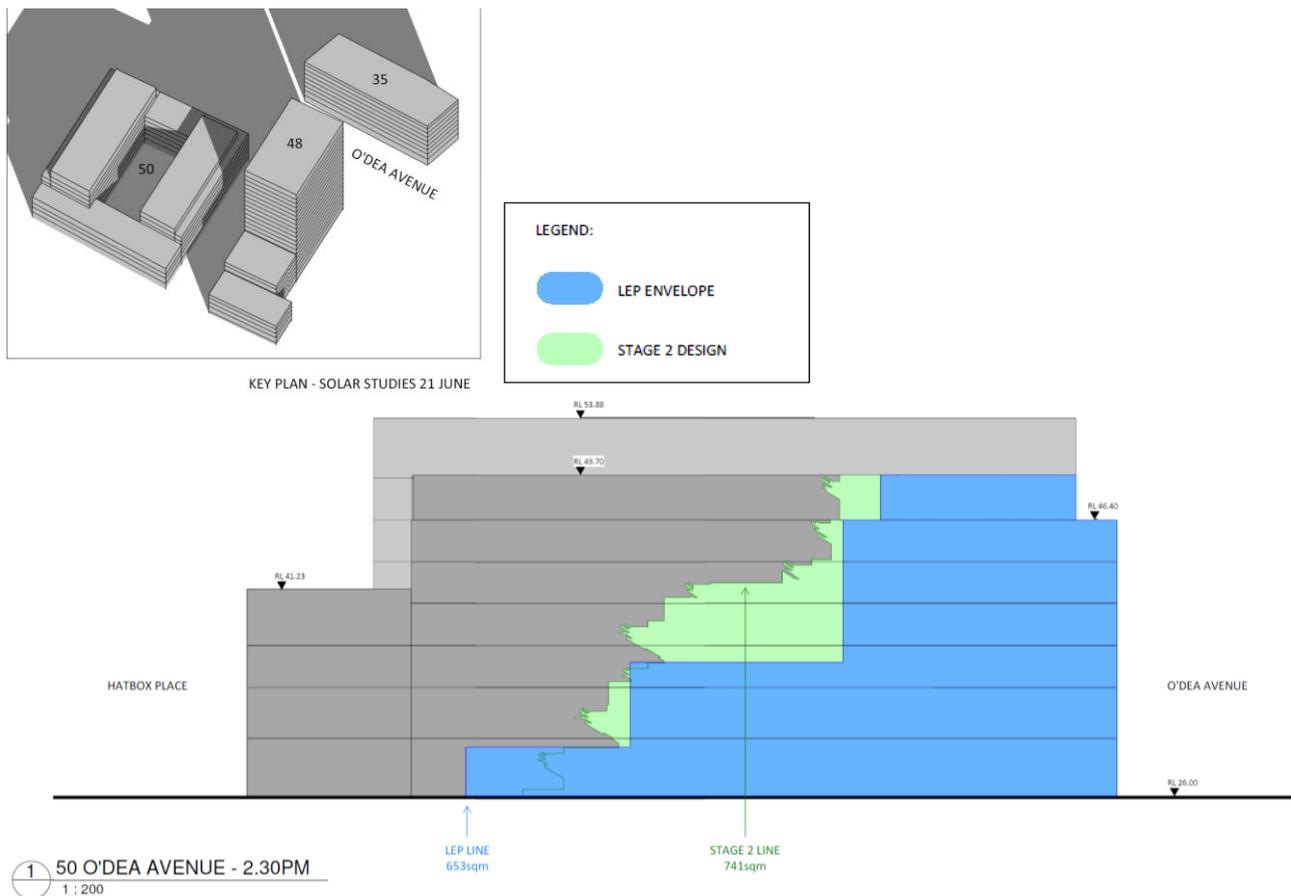


**Figure 17 Solar access study extract for 35 O'Dea at 11:45am**

Source: KKAA and KTA

To the east of the proposed building is 50 O'Dea Avenue, is identified for future residential development under the SLEP 2012 under the Lachlan Precinct Plan. It is worthwhile noting that this site is yet to be developed and is not the subject of an existing development application. Any impacts on this site have been analysed against a theoretical scenario as per the LEP and DCP envelopes. The Stage 2 proposal inclusive of the additional massing for the 'stacked forest' terracing effect to the north, results in a solar access impact to the western façade of 50 O'Dea Avenue between 1pm to 3pm. Notwithstanding, this is partially offset by a step down in massing on levels 2 and 3 on the north-eastern corner which provides some solar access relief when compared to the SLEP 2012 allowable massing between 2.15 and 3pm. Overall, there is increased overshadowing to the western façade of the building envelope of up to +11%.

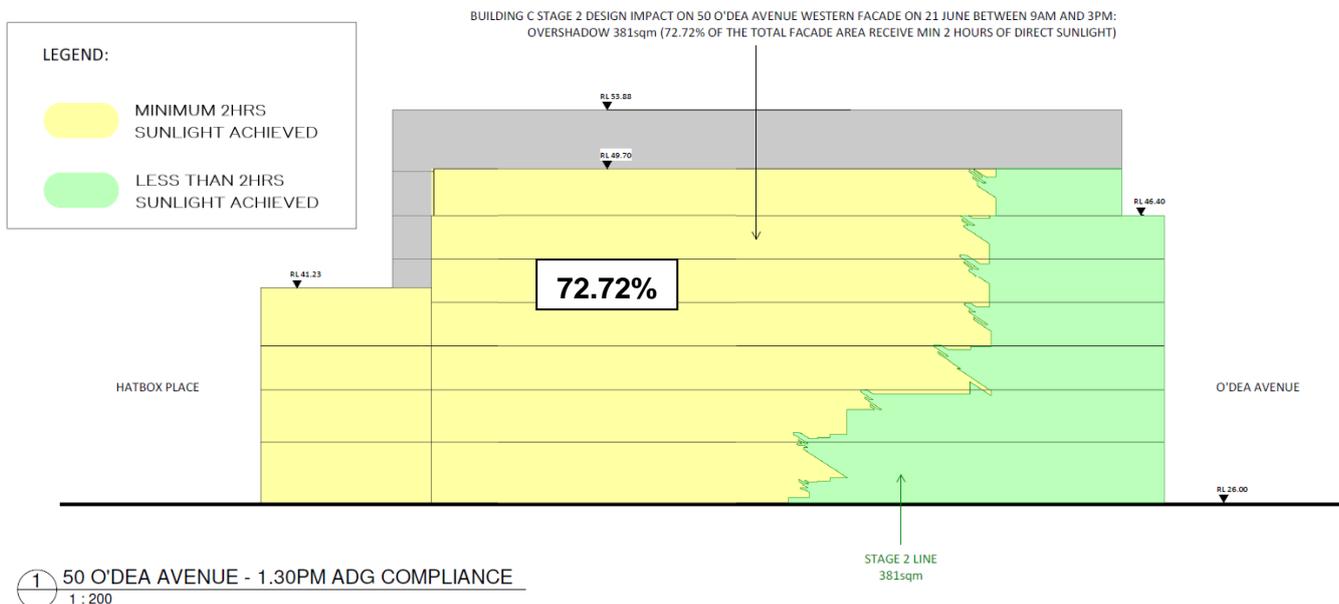
Provided at **Figure 18** over the page is an extract from the solar study showing 50 O'Dea northern façade solar performance at 2.30pm, by way of example.



**Figure 18** Solar access study extract for 50 O'Dea Avenue at 2:30pm

Source: KKAA and KTA

Importantly, the Stage 2 proposal allows for the future western façade of the LEP envelope for 50 O'Dea Avenue to achieve at least 2 hours of direct sunlight between 11.30am and 1.30pm in midwinter (21 June) for 72.72% of the façade, refer to **Figure 19**. At a conceptual envelope level, this is consistent with Objective 4A-1 of the Apartment Design Guide which includes design criteria that *“Living rooms and private open spaces of at least 70% of apartments in a building receive a minimum of 2hrs direct sunlight between 9am and 3pm”*.



**Figure 19** Solar access study extract for 50 O'Dea Avenue at 1:30pm

Accordingly, whilst the proposed Stage 2 design includes additional bulk and mass, it is demonstrated through the solar analysis prepared by KKAA and KTA that the western elevation of the future building on the Nurses and Midwives Association site will continue to receive an acceptable level of solar access. Accordingly, there is an acceptable impact on existing and future residential apartments surrounding the site. Residential amenity, when compared against the provisions of the ADG are ensured for the Lachlan Precinct, notwithstanding the proposed variation to the maximum building height provisions of SLEP 2012.

**Design excellence**

As described in **Section 3.3**, the main design principle of the competition winning scheme was its sense of connection to nature and presentation as a “stacked forest”. This was demonstrated through extensive façade landscaping, heavily landscaped stepping outdoor terraces building materials that provide a visual connection back to nature such as the timber battens across the façade. The proposed variations to the height of building development standard directly contribute to the achievement of these principles by:

- Allowing for the stepped expression of the podium terraces that accommodate extensive landscaping;
- Providing sufficient space for landscaped planters and timber battens along the building’s northern façade and which are integral to the visual effect for the ‘stacked forest’; and
- Allowing for the rooftop outdoor terrace and pool to read as a cantilevered building element.

Hence the variations allow for the expression of the core design principles that underpin the competition winning scheme and which were seen as critical to the development achieving design excellence as required under the Stage 1 development consent. Therefore, there are environmental planning grounds relating to design excellence that justify contravention of the development standard.

**Consistency with Objects of the EP&A Act**

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **Table 1** over the page, we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the height development standard.

**Table 1 Assessment of consistency of the proposed development with the Objects of the EP&A Act**

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources	The proposed development will promote the economic and social welfare of the community by improving the built form in the area and delivering additional residential dwellings and retail floorspace in the Lachlan Precinct. A connection to nature is created through the expression of the building’s planted facades (referred to the “stacked forest”), which are enhanced through the progressive transformation in vertical height only achievable by virtue of the proposed maximum height variation.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The development will promote ecologically sustainable development by creating a strong connection and reference to nature through the expression of the building as a “stacked forest” with extensive landscaping and the use of timber-look materials. Further, these additional façade elements, whilst contributing to the overshadowing impacts of the building (as discussed separately) also provide an element of self-shading particularly on the western element, which provides heat effect relief to occupants
(c) to promote the orderly and economic use and development of land	The proposed development promotes the orderly and economic use and development of land by locating a landmark tower at the gateway to the Lachlan Precinct, as deemed appropriate in the SLEP 2012 and the SDCP 2012. The proposal comprises an appropriate mix of

Object	Comment
	retail and residential land uses which, inclusive of the variation, provides for an economically viable use of the land.
(d) to promote the delivery and maintenance of affordable housing	The proposal will make monetary contributions to the provision of affordable housing as per Council policy. These contributions will be based on total floor area, inclusive of any floor area that exists as a result of the variation.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	The proposed development will not have any impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	No items or areas of built or cultural heritage will be negatively impacted by the proposal. Therefore, the sustainable management of heritage can continue in light of the proposal (including the variation).
(g) to promote good design and amenity of the built environment	The proposed development has been through a competitive design process and has been collaboratively designed by international and local architects to exhibit design excellence. By remaining consistent with the design principles of the winning competition design, the proposal will promote good design and amenity of the built environment by exhibiting design excellence.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposed development, inclusive of the variation, will comply with the relevant provisions of the BCA and will promote the health and safety of occupants.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	The object is not relevant to this proposed development. However, the proposal has adhered to the required planning processes for the site and scale of development, including a Stage 1 DA, competitive design alternatives process and a Stage 2 Detailed DA.
(j) to provide increased opportunity for community participation in environmental planning and assessment	The proposed development has been publicly exhibited in accordance with the requirements of Council's DCP.

#### 4.2.1 Conclusion on clause 4.6(3)(b)

Considering the above, there are sufficient environmental planning grounds to justify contravening the height of building development standard in this case. These include:

- Acceptable overshadowing impacts on the surrounding public domain and existing and future surrounding developments;
- A less abrupt and more progressive height transition to surrounding lower areas by allowing a stepped podium form;
- Benefits resulting from the redistribution of tower massing from the western aspect to the northern aspect including:
  - A more slender east-west presentation of the tower form;
  - Increased setback from the western boundary; and
  - Appropriate east-west apartment depths.
- Allowing the core design principles that are integral to the competition winning scheme to be expressed thus ensuring that the development achieves design excellence in a manner consistent with the competition panel's decision; and
- Demonstrated consistency with the objects of the EP&A Act.

### 4.3 **Clause 4.6(4)(a)(i): The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

Subclause (3) has been adequately addressed above.

### 4.4 **Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard**

In *Initial Action v Woollahra Municipal Council* [27], it was held that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. The proposal is in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

#### **Consistency Caselaw**

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190
- *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21
- *Raassis v Randwick City Council* [2019] NSWLEC 1040
- *Abrams v Council of City of Sydney* [2018] NSWLEC 1648
- *Kingsland Developments v Parramatta Council* [2018] NSWLEC 1241
- *Dem Gillespies v Warringah Council* (2002) 124 LGERA 147

In these cases, consistency is considered to be different to that of 'achievement'. The term 'consistent' has been considered in a judgements of the Court in relation to zone objectives and has been interpreted to mean "compatible" or "capable of existing together in harmony" (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or "not being antipathetic" (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of "consistency" is less onerous than that of "achievement".

#### 4.4.1 Consistency with objectives of the development standard

Having demonstrated that the objectives of the height of building development standard are achieved by the proposal notwithstanding the variation, the proposed development is also consistent with the objectives of the maximum building height development standard. Refer to **Section 4.1.1** for detail:

#### 4.4.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use zone, as demonstrated in the following subsections.

#### **Objective (a): To provide a mixture of compatible land uses**

The proposed development includes residential and retail land uses, with the retail provided at ground level fronting O'Dea Avenue. The arrangement of land uses in the development are permissible within the zone and have been arranged within the development in such a way that they are considered to be compatible and complementary to the surrounding area.

#### **Objective (b): To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.**

The site has been determined as suitable for a landmark tower in the SLEP 2012 and the SDCP 2012. The site is well located to benefit from existing cycle infrastructure, rail infrastructure (through Green Square Railway Station) and light rail infrastructure with the construction of the CBD and Eastern Suburbs Light Rail and provision of future light rail provision by the City along Gadigal Avenue. The proposal includes a substantial number of residential apartments that will benefit from this accessible location. Further, the land uses proposed are supported by provision of a sufficient number of bicycle parking and end-of-trip facilities.

**Objective (c): To ensure uses support the viability of centres**

The proposal has been designed in accordance with the controls for the Lachlan Precinct in the SDCP 2012 and will contribute to its viability. In particular, Section 5.4.1 of the SDCP 2012 provides various objectives for development within the Green Square – Lachlan Precinct centre. The proposal is consistent with the relevant overarching objectives in support of the centre as:

- The proposed land uses are entirely consistent with those envisaged for the centre;
- The proposed building inclusive of the proposed height variation, will facilitate bulk and mass of the proposal provides a unique building form and better responses to the transition of the tower from the busy O'Dea Avenue down to fine grain laneways and lower rise residential flat buildings;
- The built form has been optimised to improve or reduce impacts to solar access as far as practical, resulting in a balanced approach to residential amenity; and
- The tower proposed inclusive of the variation to building height, is considered to be of a varied and high standard of architectural quality when compared to other tower forms within the locality, effectively enriching the Green Square – Lachlan Precinct and contributing to the quality of the area.

**4.5 Secretary Concurrence**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

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

These matters are addressed in detail below.

**4.5.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

The variation of the maximum building height development standard does not raise any matter of significance for State or regional planning. The proposal is consistent with the most recent metropolitan plan for Greater Sydney Region Plan in that it:

- Provides accommodation to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- Is well located for public transport connections, open space and services;
- Is designed to a high standard and offers a unique architectural design within the Lachlan Precinct, which is a key urban renewal precinct in the inner Sydney area; and
- Achieves well designed residential units that meet the design objectives and design criteria under Part 3 and Part 4 of the Apartment Design Guide.

Further, the exceedances of the RL heights proposed does not result in any significant adverse impact on the surrounding area and enables a more appropriate design response to the opportunities presented by the site.

**4.5.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard**

There is no public benefit in maintaining the numerical building height development standard in this instance. As outlined in Section 4.2 above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

**4.5.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence.**

None.

## 5.0 Conclusion

The assessment above addresses and demonstrates that compliance with the maximum building height development standard contained in Clause 4.3 of Sydney LEP 2012 is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention.

It is considered that the height variation allows for the orderly and economic use of the land in a similar manner to that envisaged under the Sydney LEP 2012, with the additional building height limited to the northern façade, primarily as a result of the need to maintain the design intent of the competition winning building by locating planter boxes and landscaped terraces on all building façades and creating a building form that terraces down to the north.

This Clause 4.6 variation request addresses the matters in Clause 4.6 (3) of Sydney LEP 2012, which demonstrates that notwithstanding the technical non-compliance with the maximum building height development standard. This is summarised as follows:

- a) The height variation relates to the redistribution of massing from the western aspect of the tower to the northern aspect of the tower, and the stepped form of the building podium;
- b) The objectives of the height control are achieved notwithstanding the variation in that:
  - The site has been identified as an appropriate location for a landmark building under the SLEP 2012 and SDCP 2012 and the proposal is consistent with the intention of these controls;
  - There are no impacts on height transitions to any heritage items, conservation areas or special character areas;
  - Important view corridors, primarily views to the Sydney CBD, are unaffected by the proposal and appropriate building separation has been maintained to ensure sharing of views is promoted;
  - The stepped form of the building results in an appropriate height transition to surrounding areas;
  - Amenity of the public domain is retained as the primary tower form maintains its position within the southern portion of the site; and
  - The southern tower form emphasises the O'Dea Avenue frontage and provides a gateway to the Lachlan Precinct, while the stepped podium form responds to the more sensitive street frontages within the precinct.
- c) There are sufficient environmental planning grounds to justify contravening the development standard, namely:
  - Acceptable solar access to surrounding buildings is retained in a manner that is generally consistent with the LEP envelopes;
  - The proposed variation to the lower levels allows for a more gradual visual impact and height transition to surrounding lower areas by allowing an improved stepped podium form;
  - Benefits resulting from the redistribution of tower massing from the western aspect to the northern aspect including:
    - A more slender east-west presentation of the tower form;
    - Increased setback from the western boundary; and
    - Appropriate east-west apartment depths.
  - Allowing the core design principles of the competition winning scheme to be expressed and contributing to the achievement of design excellence; and
  - Demonstrated consistencies with the objects of the EP&A Act.
- d) The proposal is consistent with the objectives of the height of buildings development standard; and
- e) The proposal is consistent with the objectives of the B4 Mixed Use zone.

In particular, the variation proposed to building height will result in a positive planning outcome as it will facilitate the development of a viable mixed-use redevelopment of the site, with the absence of any significant or unreasonable impacts on the amenity of existing or future residential occupants. Overall, the proposal results in an opportunity to develop the site in a manner consistent with the intent of the LEP and DCP controls, both of which envisage a tower in this location and *Eastern City District Plan* which seeks to “increase housing within the right locations” such as Green Square and the Lachlan Precinct, which are identified urban renewal areas, in a way that will have an acceptable level of impact on adjoining properties and the public domain areas.

Therefore, the consent authority can be satisfied that there is sufficient justification for the height variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.