

Attachment C

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| <p>Clause 4.6 Variation Request - Height of Buildings</p> |
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**ALTERATIONS AND ADDITIONS TO THE MINERVA THEATRE AND THE
ADAPTIVE REUSE OF THE BUILDING FOR THE PURPOSES OF
ENTERTAINMENT FACILITIES, FOOD & DRINK PREMISES AND TOURIST
AND VISITOR ACCOMODATION**

28 – 30 Orwell Street, Potts Point



Prepared by Planning Lab

Updated Version Issued 22 August 2023

Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the *Sydney Local Environmental Plan 2012* (SLEP 2012). It supports a Development Application (DA) submitted to City of Sydney Council for the adaptive reuse of the Minerva Theatre, a State heritage listed building located at 28-30 Orwell Street, Potts Point ('the site'). The proposal constitutes a mixed use development including performance spaces, tourist and visitor accommodation and food and drink premises.

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.3 Height of Buildings under the SLEP 2012. Specifically, this request seeks to vary the 22m height standard that applies to the site.

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

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011);
- The objectives of Clause 4.3 of the SLEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe* matter.

A revised version of this Variation Request has been prepared to respond to the following resolution made by the City of Sydney Local Planning Panel at its meeting of 19 July 2023, in which it determined to defer the Council officers' report relating to this application (D/2021/893):

"The Panel deferred consideration of Development Application No. D/2021/893 until a subsequent meeting of the Local Planning Panel to enable the applicant to submit additional information and amended plans which address the Panel's concerns regarding the inadequate clause 4.6 variation request – height of buildings and/or the potential to minimise the view impacts by reducing the height of part of the proposed development above the fly tower.

The question of reversibility is also required to be more effectively addressed.

The privacy and amenity of residents to the north requires more consideration with suitable design amendments, as well as further design resolution in separating the cabaret area from the hotel use.

The issues of hotel room amenity, hotel and venue circulation, the lack of hotel back-of-house facilities and the inadequacy of theatre back-of-house needs to be resolved.

The operational constraints imposed on the venue due to the number of hotel rooms and the potential conflicts between discrete uses also require further consideration.

Reasons for Decision

The Panel expressed reservations regarding the application in its current form, however considered it reasonable to defer rather than refuse the application as there appears to be reasonable potential for additional information and design refinements required to enable finalisation of the assessment."

In responding to this resolution, it is important to recognise that, since the lodgement of the original development application in 2021, the proponents have made a significant range of plan amendments to the proposal in response to address concerns raised by Council officers and public notification submissions, as well as the Technical Advisory Panel of Heritage NSW. The most notable of these changes were:

- A reduction of the proposed basement by two levels and reduction in the footprint of the basement, including deletion of a basement nightclub tenancy;
- Retention of the grand staircase within the foyer;
- Deletion of new openings within the flytower wall;
- A reduction in the north-eastern corner of the vertical addition to the main building to assist with view sharing; and
- Removal of 86.7m² of GFA from the auditorium, as a means of restoring the Level 1 heritage footprint.

Through this extensive assessment and iterative process of plan amendments, the general conclusion of proponent and Council officer assessment was that a suitable strategy was to mass the development so that:

- the height and bulk of the new development additions along the Orwell Street and Orwell Lane site frontages and mid part of the site are below the 22 metre height plane; and
- additional height (above the 22 metre height limit, but below a 25 metre height plane) is restricted to the existing flytower wing along the west and north-west parts of the site.

This strategy produced the latest design amendments which are:

- compliant with the maximum SLEP 2012 floor space ratio of 3.5:1; and
- generally compliant with other key Council planning controls.

The current proposal is considered to be the least impacting of building massing options across the site.

The redistribution of building mass above the site's flytower wing has resulted in a variation to the maximum SLEP 2012 height limit of 22 metres, which necessitates this justification under Clause 4.6 of the LEP to vary this development standard.

The following further plan amendments and additional information have also been submitted to address concerns raised in the recent Local Planning Panel consideration of this DA regarding the ground floor, back-of-house floor layout:

- Removal of a ground floor hotel room and changed to a VIP Performers' (green) room;
- Modifications to the ground floor layout to accommodate new hotel lobby and airlock; and
- Modifications to the design and location of the proposed Level 2 Lift to avoid conflict between proposed theatre and hotel uses.

This updated version of the Variation Request Report provides a more detailed analysis and commentary on the environmental impacts of the extent of the LEP height variation, particularly in respect of the visual, overshadowing, privacy, view loss and noise amenity of the surrounding public domain and private properties, and reaffirms the original assessment that strict compliance with the height requirement is unreasonable and unnecessary in this instance.

This assessment is consistent with the recent recommendation of conditional approval of the application put forward by Council officers in a recent report to the 19 July 2023 City of Sydney Local Planning Panel Meeting.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012, or any other environmental planning instrument.

However, Clause 4.6(3) states that 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 circumstance of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

In accordance with clause 4.6(3) the applicant requests that the height of building development standard be varied.

What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the SLEP 2012.

What is the zoning of the land?

The site is zoned MU1 – Mixed Use pursuant to the SLEP 2012. Refer to **Figure 1**. The proposed *'hotel and motel accommodation'*, *'entertainment facility'* and the complementary *'food and drink premises'* are permissible with consent in the zone.

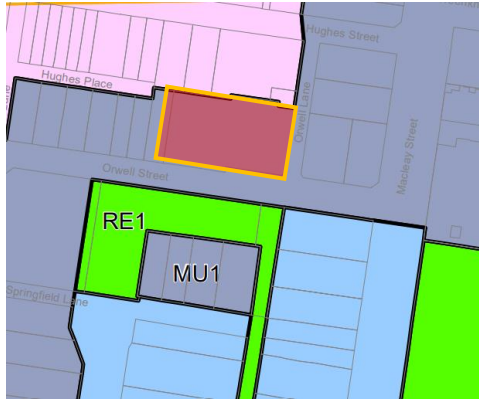


Figure 1 – The land zoning of the subject site extracted from the Land Zoning Map (Source: Sheet LZN_022 - SLEP 2012)

What is the development standard being varied?

Clause 4.3(2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area 'R' on the Height of Building Map and accordingly, a Height of 22m applies as shown in **Figure 2**.

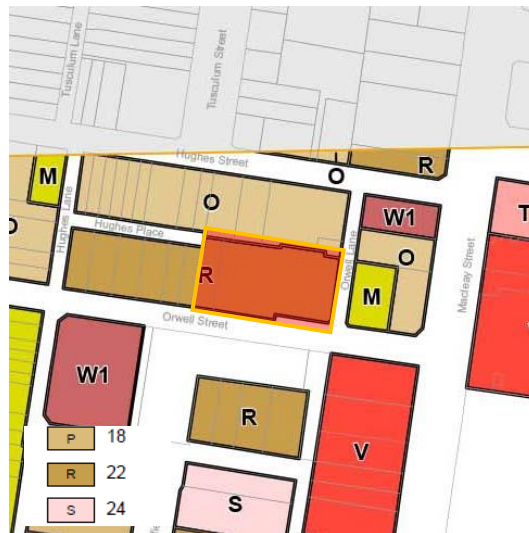


Figure 2 – The height of building of the subject site extracted from the Height of Building Map (Source: Sheet HOB_022 - SLEP 2012)

Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a

development standard that is expressly excluded under cl 4.6(6) or cl 4.6(8) of the SLEP 2012. The maximum height development standard is not identified under subclause 4.6(8) and is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

The site and its context

The site is located at 28-30 Orwell Street, Potts Point within the City of Sydney Local Government Area. The site is located east of central Sydney within the urban centre of Potts Point. The site is legally described as Lots 1,2,3 and 4 in DP 456456, and Lot 10 in DP 10682 and is privately owned by CE Minerva Pty Ltd. It is rectangular and has an area of 1,267m². It has a primary frontage to Orwell Street of approximately 46m and a secondary frontage of 27m to Orwell Lane.

The subject site houses the 'Metro Theatre', an Art Deco style building which consists of 5 storeys over a basement level bounded on two sides by road, and on the other two sides by residential blocks. A privately owned right of way (1.5 metres in width) separates the subject site and adjoining properties to the north. An aerial photo of the site is shown in **Figure 3**.

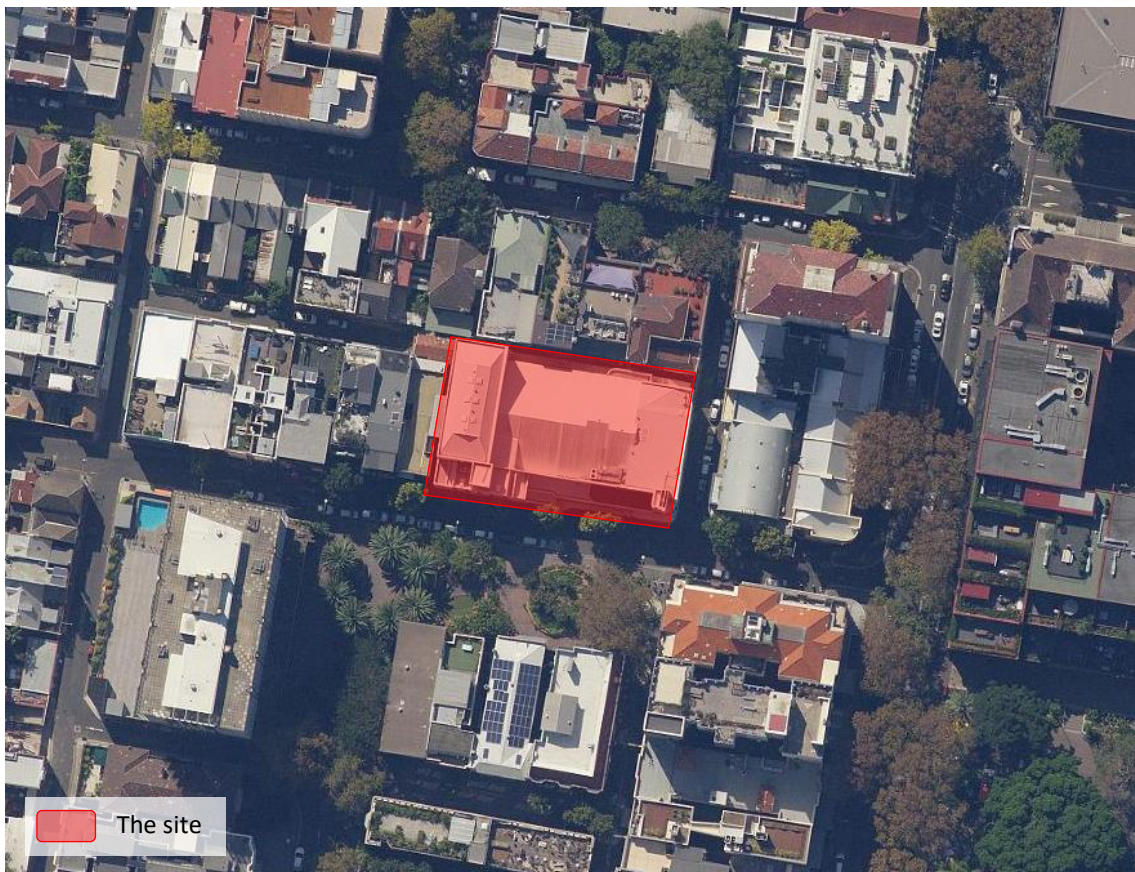


Figure 3: Aerial view extracted from NSW Government's SixMaps website, with the red annotation indicating the location of the subject site (Source: Six Maps 2021)

The immediately adjoining properties and surrounding blocks consist of a very diverse and densely developed mix and scale of use and building typologies, ranging from lower scale, 3-4 storey, residential flat buildings and shop top housing, similar scaled entertainment/food and drink/community/tourist accommodation uses, through to mid-rise 6-8 storey and higher 14+ storey mixed apartment/retail buildings, including a high proportion of historically and architecturally

significant building styles, reflective of the prevailing heritage item and listed and conservation area planning controls that apply to the Potts Point area.

The area is also well known for its highly active, and often intense generation of pedestrian and vehicular movement through the area, and its related late night, tourist entertainment/retail/food and drink premises attractions. This is an important consideration in the environmental impact assessment detailed in further sections of this report.

A more specific description of existing scale and use of key surrounding sites is provided below:

To the East

- 32-34 Orwell Street – 2 storey commercial building (known as The Roosevelt)

To The North-East

- 97-99 Macleay Street – 10 storey mixed residential apartments, ground floor retail (known as Byron Hall)
- 101-103 Macleay Street – 3 storey mixed residential apartments, ground floor retail (known as Ganray)

To the South-East

- 113-115 Macleay Street – 6 storey mixed residential apartments, ground floor retail (known as Gowrie Gate)
- 117 Macleay Street – 8 storey mixed residential apartments, ground floor retail (known as Cahors)

To the South

A series of buildings fronting the Springfield Gardens public open space:

- 29 Orwell Street – 4 storey mixed residential apartments, ground floor restaurant.
- 27 Orwell Street - 4 storey building containing backpackers' accommodation.
- 12 and 12A Springfield Lane – 3-4 storey residential flat buildings.

To the South-West

- 5-15 Orwell Street - 14 storey mixed residential apartments, ground floor retail.

To the West

- 26 Orwell Street – 4 storey residential flat building (similar scale of mixed RFB/ground floor commercial buildings further west along Orwell Street).

To the North

- 23 Hughes Street – 3 storey residential building containing backpackers' accommodation.
- 25 Hughes Street – 4 storey residential flat building.
- 27-37 Hughes Street – a series of three, 3-4 storey buildings all part of the charity/community service operations of the Wayside Chapel, consisting of a chapel, offices, crisis centre, meeting room, shop, café and a single dwelling).
- 1 Orwell Lane – a 2 storey, heritage listed, electrical substation building.

This densely developed pattern of this neighbourhood is also reflected in the maximum permissible building height controls of SLEP 2012 (provided in an LEP map extract in **Figure 4** below), which again highlights a wide range of allowable height of buildings, from 12 to 40 metres, and is an important reference in considering the suitability of the proposed 2.9 metre variation of the maximum 22 metre height limit applying to the subject site.

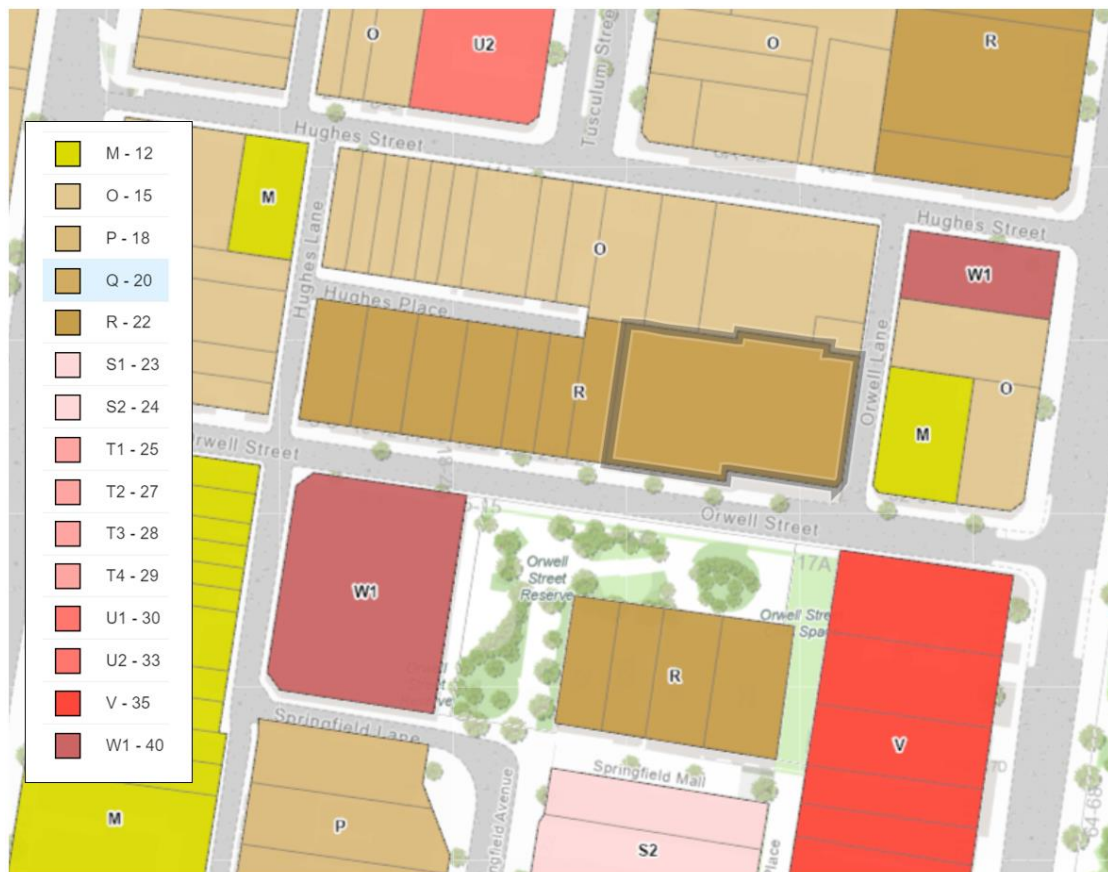


Figure 4: Extract of Height of Building Map Sydney Local Environmental Plan 2012 (Source: City of Sydney Interactive Mapping Web Tool)

Extent of Variation to the Development Standard

The vast majority of the proposed building envelope is below or in line with the 22m height limit. However, the maximum building height, as measured from the 'existing' ground level, is 24.92m at the parapet of the proposed vertical addition above the flytower of the theatre as indicated in the architectural drawings prepared by Tonkin Zulaikha Greer Architects. Therefore, the proposed development breaches the height standard by a maximum of 2.92m (13.27%).

The exceedance, being the portion of the building above the 22m height limit, is attributed to the proposed two storey hotel addition to the flytower (RL +62.10 or 24.92m) along the western boundary and the adjacent vertical circulation element (RL +61.39 or 24.76m) proposed to provide lift and fire egress throughout the building. The extent of the height breach is shown in axonometric view, and selected plan elevations and section in **Figures 5,6,7 and 8** below.

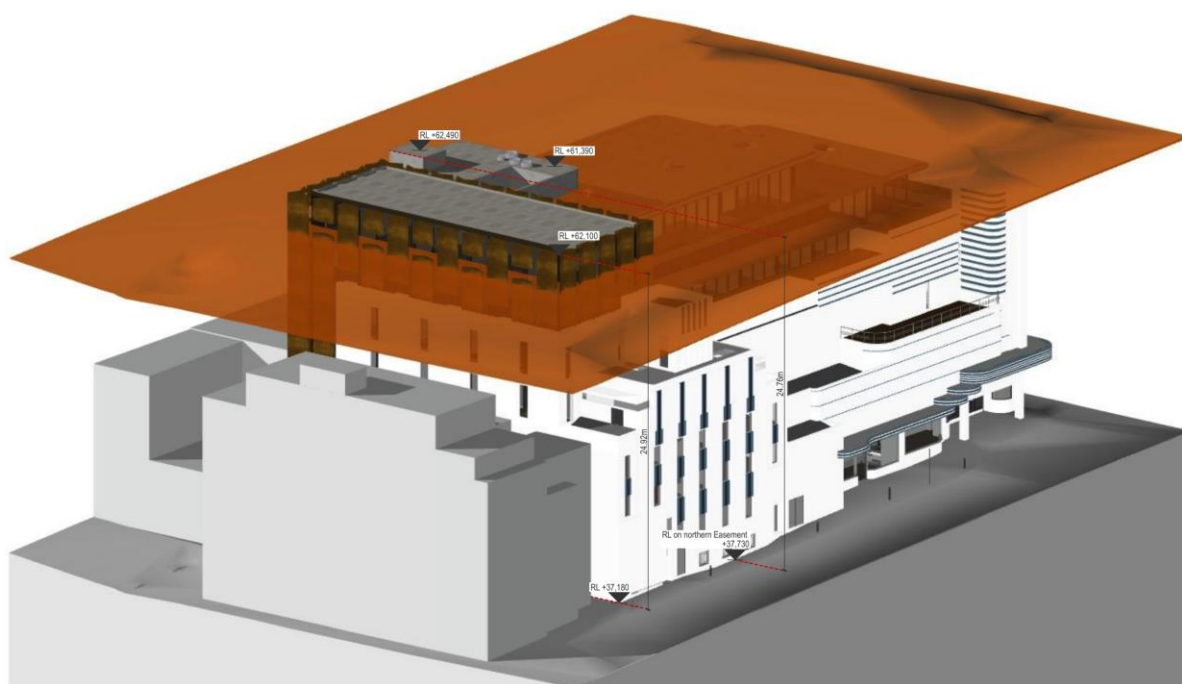


Figure 5: 22m Height Plan Overlay - Axonometric View (Source: Tonkin Zulaikha Greer Architects)



Figure 8: 22m-25m Height Plane – Long Section (Source: Tonkin Zulaikha Greer Architects)

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe* at [42] – [51] and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 (as confirmed by Preston CJ in *Initial Action* at [16]).

The 5 ways in *Wehbe* are that:

1. the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

3. the objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreasonable; or,
5. the zoning of the land is unreasonable or inappropriate.

The five ways are not exhaustive, and it may be sufficient to establish only one to satisfy cl 4.6(3)(a). For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of the proposed development because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Judge held, "*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*".

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Development Standard Objectives

| Objective | Discussion |
|--|---|
| <p>1(a) to ensure the height of development is appropriate to the condition of the site and its context,</p> | <p>In considering this objective, it is important to cross-reference with the detailed description in “The Site and its Context” section of this report.</p> <p>The proposal has been through an extensive, collaborative, site-specific design process. The design process has been more detailed and comprehensive than would have been possible when the height control under the SLEP 2012 was established.</p> <p>As a result of this design process, the height and bulk of the new development additions located above the theatre have been stepped down along the Orwell Street and Orwell Lane site frontages and mid part of the site below the maximum 22 metre height plane by between approximately 1.5 metres and 9 metres at key points (see Figure 9 below).</p> <div data-bbox="831 711 1733 1278" data-label="Figure"> </div> <p><i>Figure 9: 3D Plan and Section View (Source: Tonkin Zulaikha Greer Architects)</i></p> |

Instead, this building mass has been redistributed to the part of the site that is more able to sustain it, that is, the location of the existing flytower wing along the west and north-west parts of the site.

This is a re-massing only. The maximum floor space ratio is not exceeded.

The current proposed building envelope has been formed through a detailed technical analysis of the following main elements:

- Extensive research and design testing of how to sensitively respond to the highly significant State and local heritage elements for the adaptive reuse and alterations and additions to the existing Minerva Theatre building and site, which has gained the support and approval of the NSW Heritage Council;
- A detailed review and response to relevant Council statutory and planning policy controls. This has included the technical guidance from Council staff and advice from Council's Design Advisory Panel on a previous redevelopment proposal for this site in 2019, who were supportive of more of the thin, tower style design adopted for the current proposal, encouraging a maximum height variation of 3 metres, up to 25 metres as the optimal means of achieving the allowable floor space in a limited part of the site in the existing taller flytower structure along the western boundary, whilst still minimising the environmental impacts for surrounding properties and heritage integrity of the Minerva site; and
- A thorough understanding of the potential environmental impacts of this proposal upon the public domain and adjoining and surrounding property owners, residents and business operators, informed by the proponents' own community consultation process.

Through a balanced response to each of these elements it is considered that the design of the current proposal achieves an optimal and appropriate distribution of floor space and massing in the least impacting part of the site, ensuring that the vast majority of the new development will be compliant with the site's maximum 22 metre height limit (and key parts of the building will be below the height limit), as evidenced in the plan section in **Figure 10** below, and demonstrating that any resulting adverse environmental impacts from the limited extent of the development where the height is varied will be minimal, and supported by a detailed range of operational management plans for future use of the site.

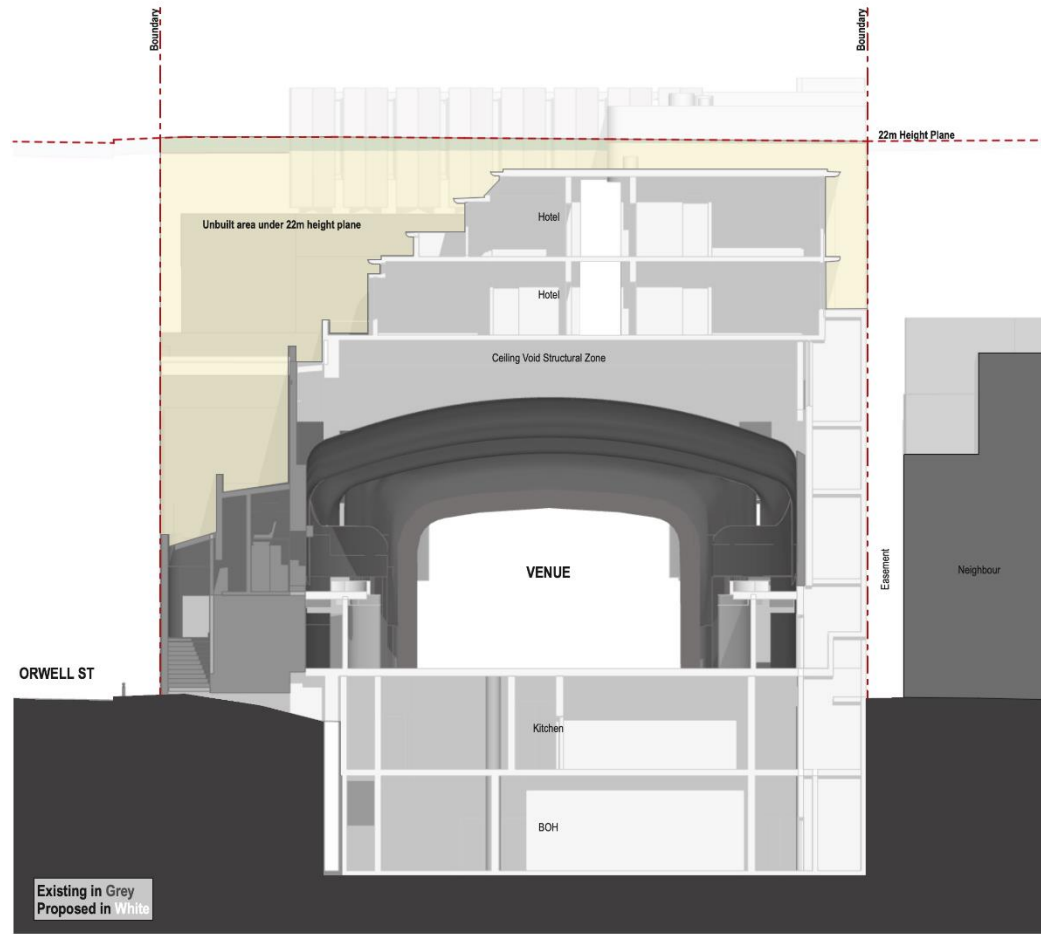


Figure 10: A plan section through the proposed building envelope demonstrating the large extent of unbuilt area in yellow that will be unbuilt and under the maximum 22 metre height limit plane (Source: Tonkin Zulaikha Greer Architects)

The key points of assessment of the environmental impacts of both the broader site context as well as the non-compliant component of the building are provided below and are further addressed in later sections of this report.

Visual Impacts

The overall proposal will have a minimal visual impact on the setting of the original building. The proposed redistribution of building mass to the location of the existing flytower wing along the west and north-west parts of the site will have a beneficial visual impact (when compared with a hypothetical, compliant development).

The principal façades on Orwell Street and Lane including the decorative corner tower and characteristics of the Streamline Modernist style will be retained and will continue to read as the primary element in the composition.

The form of the proposed addition above the flytower corresponds with the original building below. As such, it will be read clearly as a secondary element. Because of the contemporary detailing and the use of a complementary palette of material and finishes, the original form of the building remains legible. Its bulk and scale are considered appropriate as they are respectful to the historic building below through setbacks and building alignments which closely follow that of the building below.

Along the northern boundary, the new lift and fire stairs have been designed as simple forms that respond to the gradual rise of the building towards the flytower; a five-storey structure on the eastern end and seven storeys next to the flytower.

As previously identified in **Figures 9 and 10** above, the re-massing allows the major part of the height and bulk of the new development additions located above the theatre to be stepped down and set back along the Orwell Street and Orwell Lane site frontages and mid part of the site, below the maximum 22 metre height plane by between approximately 1.5 metres and 9 metres at key points.

This re-massing has provided a major beneficial reduction in visual, view and overshadowing impact, particularly for both the public domain along Orwell Street and Orwell Lane, as well as the surrounding properties to the south and south-east.

This improved visual amenity is also demonstrated in **Figure 11** below through a 3D plan and modelling comparison between a compliant building envelope within the SLEP 2012 maximum height limit of 22 metres, and the proposed building envelope:

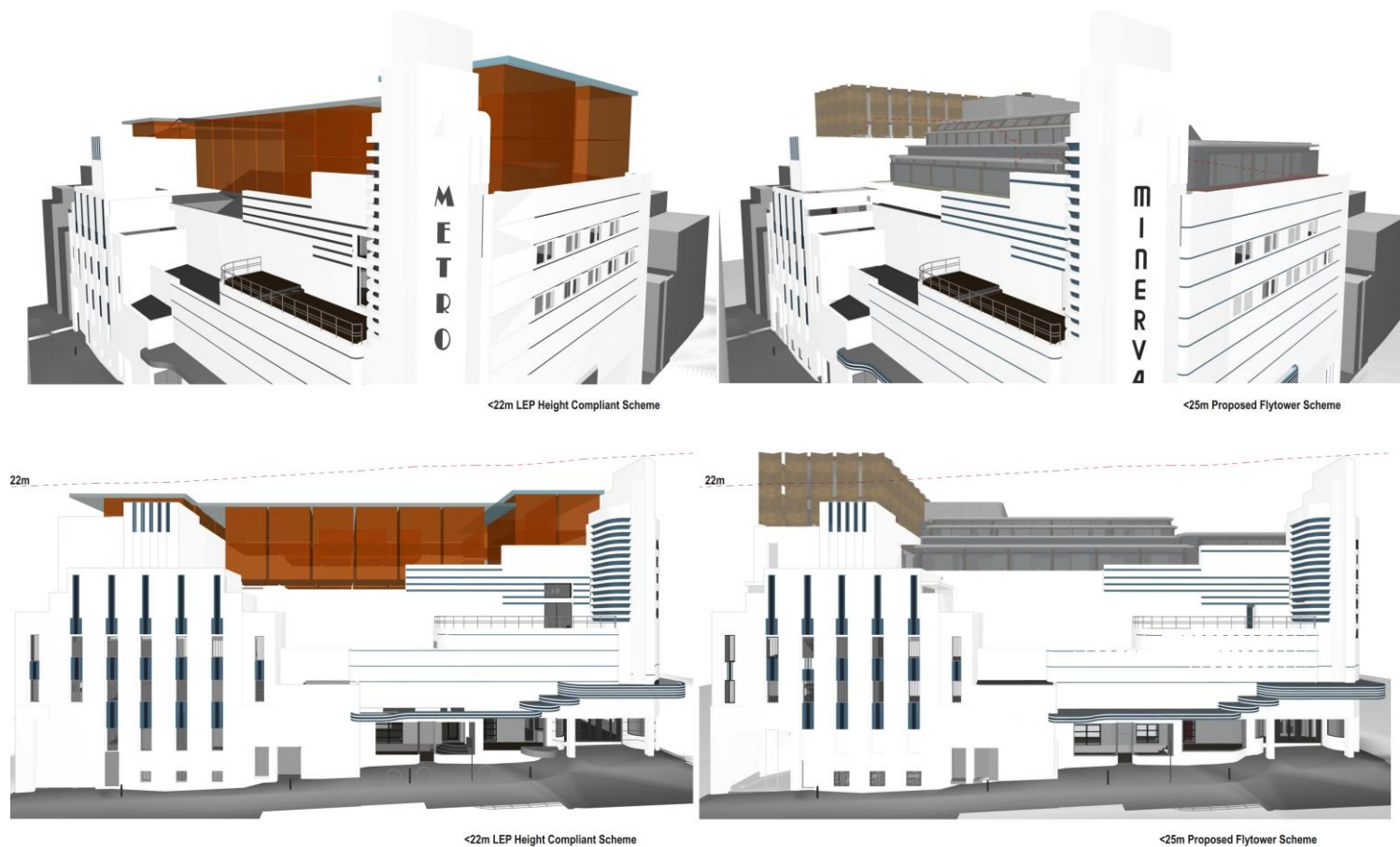


Figure 11: 3D plan comparison of the visual amenity of a compliant (left) vs the proposed (right) building envelope along the site's Orwell Street and Orwell Lane elevations (Source: Tonkin Zulaikha Greer Architects)

Overshadowing Impacts

The proposed additions have been designed to ensure that the current level of solar access to surrounding properties is maintained and little significant additional overshadowing of the public domain, such as the Springfield Gardens, is caused.

The below Shadow Diagrams (Drawings Nos. A500 & A501) (**Figure 12**) have been prepared by the project's architect, Tonkin Zulaikha Greer Architects to demonstrate compliance with clause 4.2.3.1 Solar Access of the SDCP 2012.

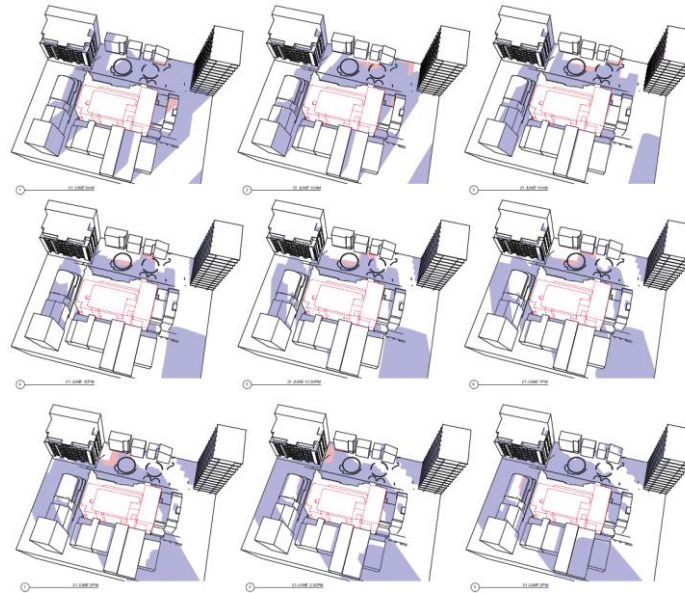


Figure 12 – Shadow Diagrams 21 June | 9.00 am to 3.00 pm (source: Tonkin Zulaikha Greer Architects)

The SLEP and Sydney Development Control (SDCP 2012) both have a range of quantitative and qualitative controls to assess the overshadowing impacts of new developments on both the public domain and private properties.

The key assessable controls of Section 3.2.1.1 of SDCP 2012 that apply to the public domain are:

- Overshadowing effects of new buildings on publicly accessible open space are to be minimised between the hours of 9am to 3pm on 21 June; and

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| | <ul style="list-style-type: none"> Shadow diagrams are to be submitted with the development application and indicate the existing condition and proposed shadows at 9am, 12 noon and 2pm on 14 April and 21 June. <p>The key assessable controls of Section 4.2.3.1 of SDCP 2012 that apply to surrounding private properties are:</p> <ul style="list-style-type: none"> Proposed apartments in a development and neighbouring developments must achieve a minimum of 2 hours direct sunlight between 9am and 3pm on 21 June onto at least 1sqm of living room windows and a minimum 50% of the required minimum area of private open space area; and New development must not create any additional overshadowing onto a neighbouring dwelling where that dwelling currently receives less than 2 hours direct sunlight to habitable rooms and 50% of the private open space between 9am and 3pm on 21 June. <p>The shadow diagrams prepared by Tonkin Zulaikha Greer Architects indicate that the properties most affected by the proposed envelope overshadowing on 21 June are the Gowrie Gate mixed residential building (113-115 Macleay Street) to the south-east, and a series of backpacker's and residential buildings to the south (Nos. 27-29 Orwell Street and 12/12A Springfield Avenue), with direct frontage to Springfield Gardens. Extracts from the shadow diagram package of the latest amended plans identify the most significant of these impacts:</p> |
|--|---|



Figure 13: Extracts from shadow diagram package (as amended) (Source: Tonkin Zulaikha Greer Architects)

The results of these diagrams take into account the amended plans that incorporate a more concentrated massing of floor space above the site's existing flytower wing, which has led to a maximum building height variation of 2.92 metres to the maximum SLEP 2012 allowable of 22 metres.

As submitted through this Clause 4.6 Variation Request, the amended massing of floor space and building height above the flytower wing is considered to be the most optimal distribution of allowable and compliant floor space (within the 3.5:1 maximum FSR of SLEP 2012), and least impacting in terms of impacts for surrounding properties, and that the loss of direct solar access for the above properties to the south-east and south, as well as the adjoining Springfield Reserve is relatively minimal and restricted to a small number of dwellings. Furthermore, it needs to be recognised that the current proposal is compliant with the solar access controls of SDCP 2012.

This assessment of overshadowing impacts is supported by Council officers in the planning report submitted to the 19 July 2023 Local Planning Committee Meeting, in which they provide comment:

“3.2.1.1 Sunlight to Publicly Accessible Spaces

As discussed above, the design of the addition has provided a stepped building form to setback the upper levels, in order to minimise overshadowing impacts to Springfield Gardens which satisfies the control.

It is also noted that during the assessment of the application the applicant put forward an option to reduce the street setback of the upper level, which resulted in additional overshadowing impacts to the park, which was not supported.

The final amended proposal has not increased overshadowing beyond the extent originally proposed.

4.2.3.1 Solar access

The site is located to the north west of a residential building at 113-115 Macleay Street, known as Gowrie Gate.

The proposal results in additional overshadowing to the windows on the lowest level of residential uses at 3pm, however maintains the existing level of solar access at other times, and 2 hours of direct sunlight is maintained.

The site is located to the north of three residential flat buildings and a backpacker's accommodation on the opposite side of Springfield Gardens.

The proposal results in some minimal additional overshadowing to these buildings, however 2 hours of direct sunlight is maintained to the front facade of these buildings."

Residential Amenity Impacts – Visual Privacy

Within such an active, built-up and densely populated, urban environment, it was always a key consideration of this proposal to ensure that the visual privacy amenity and outlook of adjoining and surrounding residents and occupants were thoroughly addressed.

An initial site context analysis and other technical studies were critical to gaining an understanding of the variable exposure to such amenity impacts in all surrounding aspects of the site.

Through the inclusion of the following design techniques, the current proposal is expected to achieve a high performance of visual privacy for the site's future operations:

- minimising the amount and sizing of windows and balconies along the new building elevations;
- providing substantial setbacks of the new hotel development to the Orwell Street and Orwell Lane frontages;
- the use of a metal perforated design screening on the upper levels of the flytower addition;
- the use of strategically placed blade walls, shroud projections and window screens along the site's northern elevation to restrict the extent of overlooking from proposed new, upper-level hotel rooms towards adjoining properties to the north; and
- the sensitive location of plant equipment towards the centre of the site.

An analysis of the extent of impacts for properties facing each of the subject proposal's four elevations is provided below.

Eastern Elevation (Orwell Lane)

A plan extract of the proposed eastern elevation is provided below:

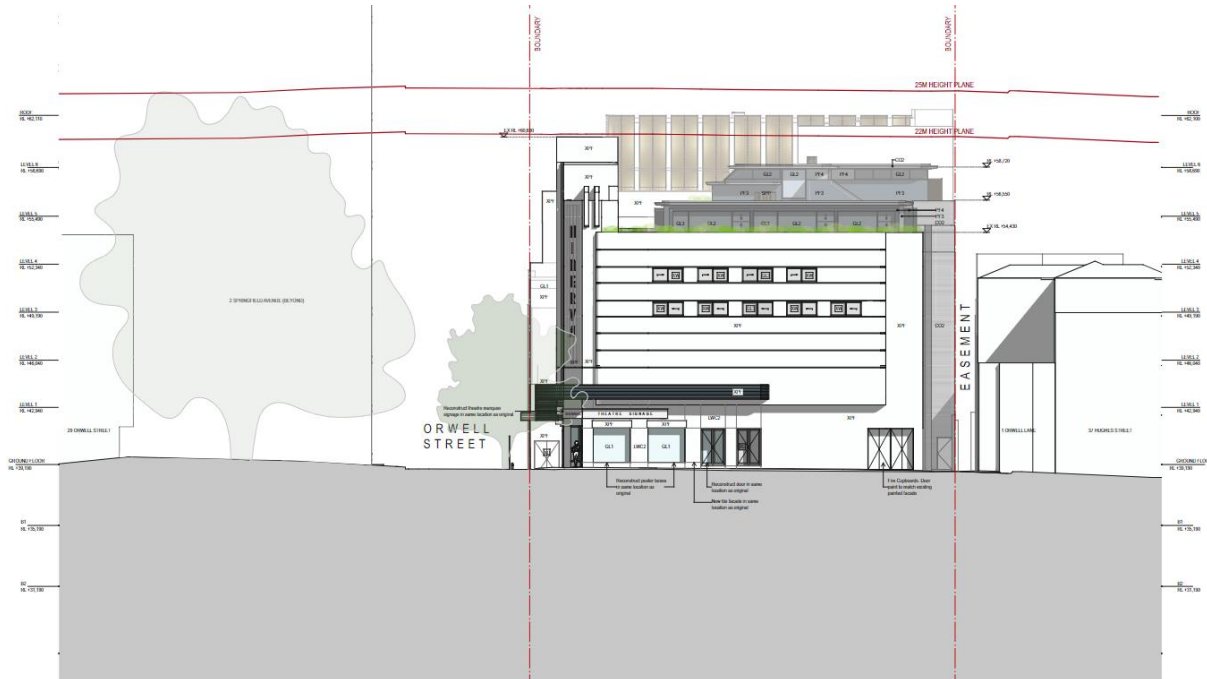


Figure 14: Eastern Elevation (Source: Tonkin Zulaikha Greer Architects)

The main site directly affected is the rear elevations of the commercial “The Roosevelt” (very limited range of facing windows) and to a lesser extent, the “Ganray” mixed use apartment building to the north-east (windows for each of the units along this elevation, but with limited direct opportunity for overlooking from the Minerva site), on the opposite side of Orwell Lane.



Figure 15: The Roosevelt building opposite to the east
(Source: City of Sydney Local Planning Panel Report 19 July 2023)



Figure 16: View further to the north-east showing elevations of the rear of the Gantry and Byron Hall buildings (Macleay Street) (Source: City of Sydney Local Planning Panel Report 19 July 2023)

In terms of potential for overlooking from the proposed development, minimal impacts are expected from the use of existing window openings for the proposed new hotel rooms on Levels 2 and 3 of Orwell Lane frontage.

A greater potential for overlooking arises from the new east-facing hotel rooms on Levels 4 and 5. The extent of this impact has been reduced to a reasonable level by the use of screening design elements to limit views from the windows of the hotel rooms and the stepping back and planter bed and balcony buffering of these two new levels from the Orwell Street and Orwell Lane frontages.

In terms of that portion of the non-compliant height of the upper flytower additions and new plant and access structures, these are at a much higher level above the eastern elevation, and its metal decorative screening will minimise any potential for direct overlooking of adjacent or nearby sites.

On that basis, the threat to a loss of privacy for surrounding properties is minimal from either the development along the eastern elevation, or the non-compliant height of the upper flytower additions and plant equipment and stairwell.

Southern Elevation (Orwell Street)

A plan extract of the proposed southern elevation is provided below:

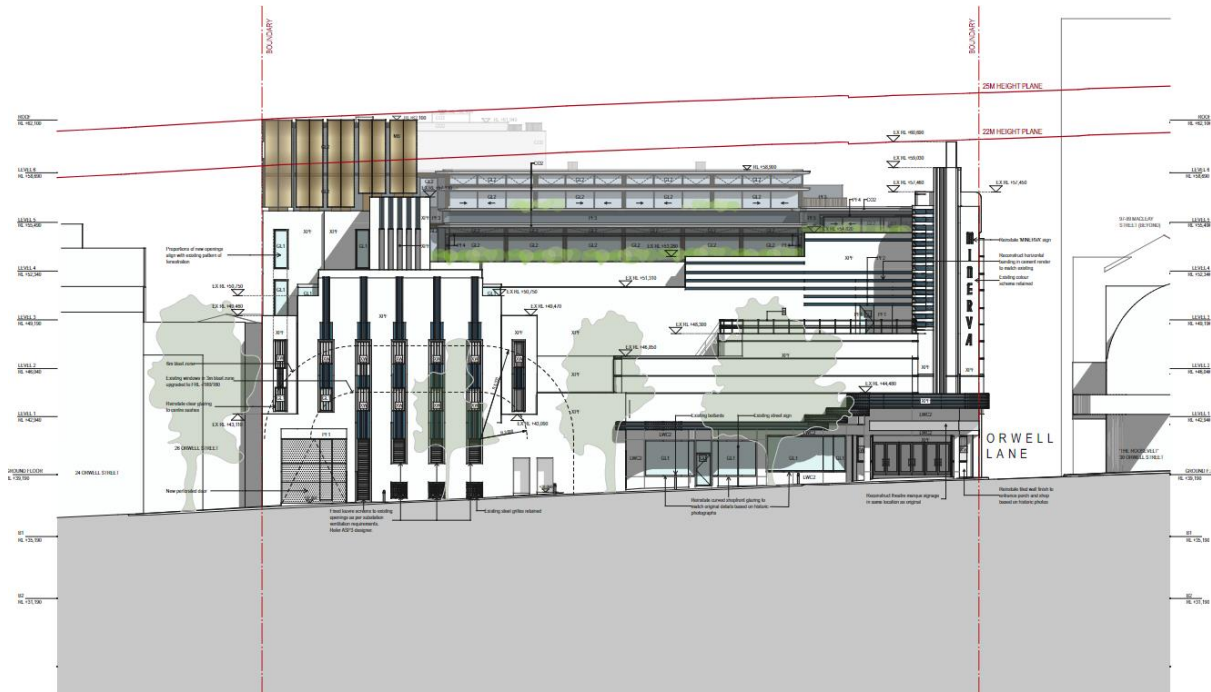


Figure 17: Southern Elevation (Source: Tonkin Zulaikha Greer Architects)

The main sites affected are from the northern facing windows of the apartments of the properties to the south-east, south and south-west, as shown in the photos below:



Figure 18: The Gowrie Gate building opposite to the south-east (Source: City of Sydney Local Planning Panel Report 19 July 2023)



Figure 19: Buildings opposite to the south and south-west (Source: City of Sydney Local Planning Panel Report 19 July 2023)

The potential for overlooking from the southern elevation of the proposal has been minimised by the layering of setbacks of the Levels 4 and 5 of the new hotel rooms and their related balconies in the middle and eastern part of the site from the site's Orwell Street frontage.

Similarly, the proposed flytower addition has been setback from the Orwell Street frontage, and its metal decorative screening on the upper levels will minimise any potential for direct overlooking of adjacent or nearby sites.

Given the more substantive distance of the buildings to the south from the south facing windows of the new Levels 4 and 5 (the closest being 18.8 metres to the Gowrie Gate building to the south-east), the threat to a loss of privacy is minimal from either development along the eastern elevation, or the non-compliant height of the upper flytower additions.

Western Elevation

A plan extract of the proposed western elevation is provided below:

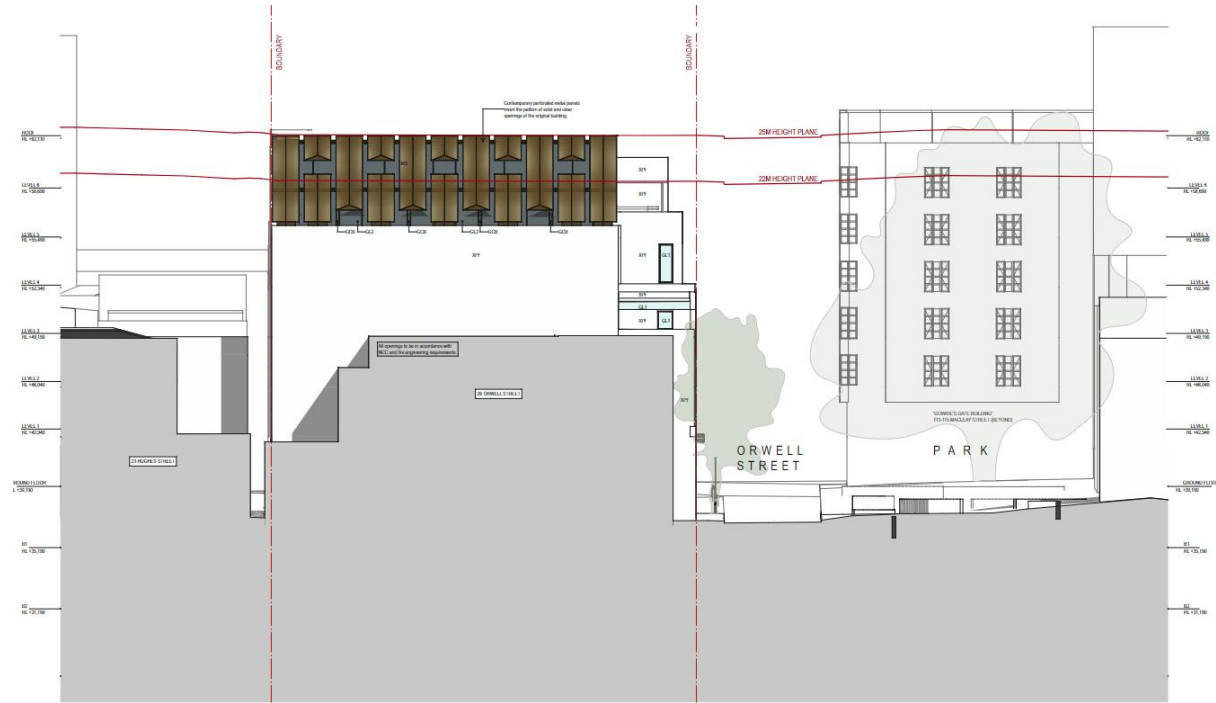


Figure 20: Western Elevation (Source: Tonkin Zulaikha Greer Architects)

The main sites affected are the immediately adjoining site to the west, 26 Orwell Street, and adjoining properties further to the west along Orwell Street, as shown in the photo below:



Figure 21: View of 26 Orwell Street immediately to the west, and looking further west along Orwell Street (Source: Google Maps)

Given the lack of windows along the existing and proposed elevations, and the metal decorative screening on Levels 5 and 6, the threat to a loss of privacy for properties to the west is very minimal, particularly from that part of the non-compliant height of the upper flytower additions.

Northern Elevation

A plan extract of the proposed northern elevation is provided below:



Figure 22: Northern Elevation (Source: Tonkin Zulaikha Greer Architects)

The sites that have the greatest potential for a loss of privacy from the proposed development are those directly opposite the northern elevation, separated only by a limited access right of way (approximately 1.5 metres in width). The rear of these properties is shown in the aerial photo below.



Figure 23: View of the rear of properties immediately to the north (Source: City of Sydney Local Planning Panel Report 19 July 2023)

The walls of the existing northern elevation of the main Minerva/Metro building and flytower wing are generally blank, with the exception of three small windows on the ground floor of the flytower wing.

The proposed northern elevation generally seeks to maintain these blank walls, with overlooking from these limited number of proposed hotel rooms on the new Levels 4 and 5 being restricted by the use of a series of blade walls and shroud projections between the hotel rooms. In addition, the metal decorative screening of the upper levels of the flytower additions will minimise any potential for direct overlooking of the properties to the north.

A more detailed analysis of the potential privacy impacts for the each of the main properties to the north is provided below:

1 Orwell Lane

This site consists of a heritage listed, two storey electricity substation building, with a dual frontage to both Orwell Lane and its southern boundary. There are a number of windows along its southern elevation, but given its restricted use, there are minimal privacy impacts expected.



Figure 24: View of the frontage of 1 Orwell Lane (Source: City of Sydney Local Planning Panel Report 19 July 2023)

27-37 Hughes Street – Wayside Chapel

These properties have a main frontage to Hughes Street, and are owned by the Wayside Chapel, consisting of three, 3-4 storey buildings all part of the charity/community service operations of the Wayside Chapel, consisting of a chapel, offices, crisis centre, meeting room, shop, café and a single dwelling. The rear elevations of these buildings are in close proximity and face the northern elevation of the Minerva/Metro Theatre site.

In 2008, the Wayside Chapel gained development consent (D/2008/912) for a major upgrade of the site, including the erection of a new four storey building on No. 27 Hughes Street. Extracts of the approved plans for this DA below provide a good guide to the current range of land uses and the extent of its visual access along the rear elevation of these buildings.



Figure 25: View of rear elevations of Nos. 27-37 Hughes Street and 1 Orwell Lane (Source: Extract from plans of approved D/2008/912 - City of Sydney)

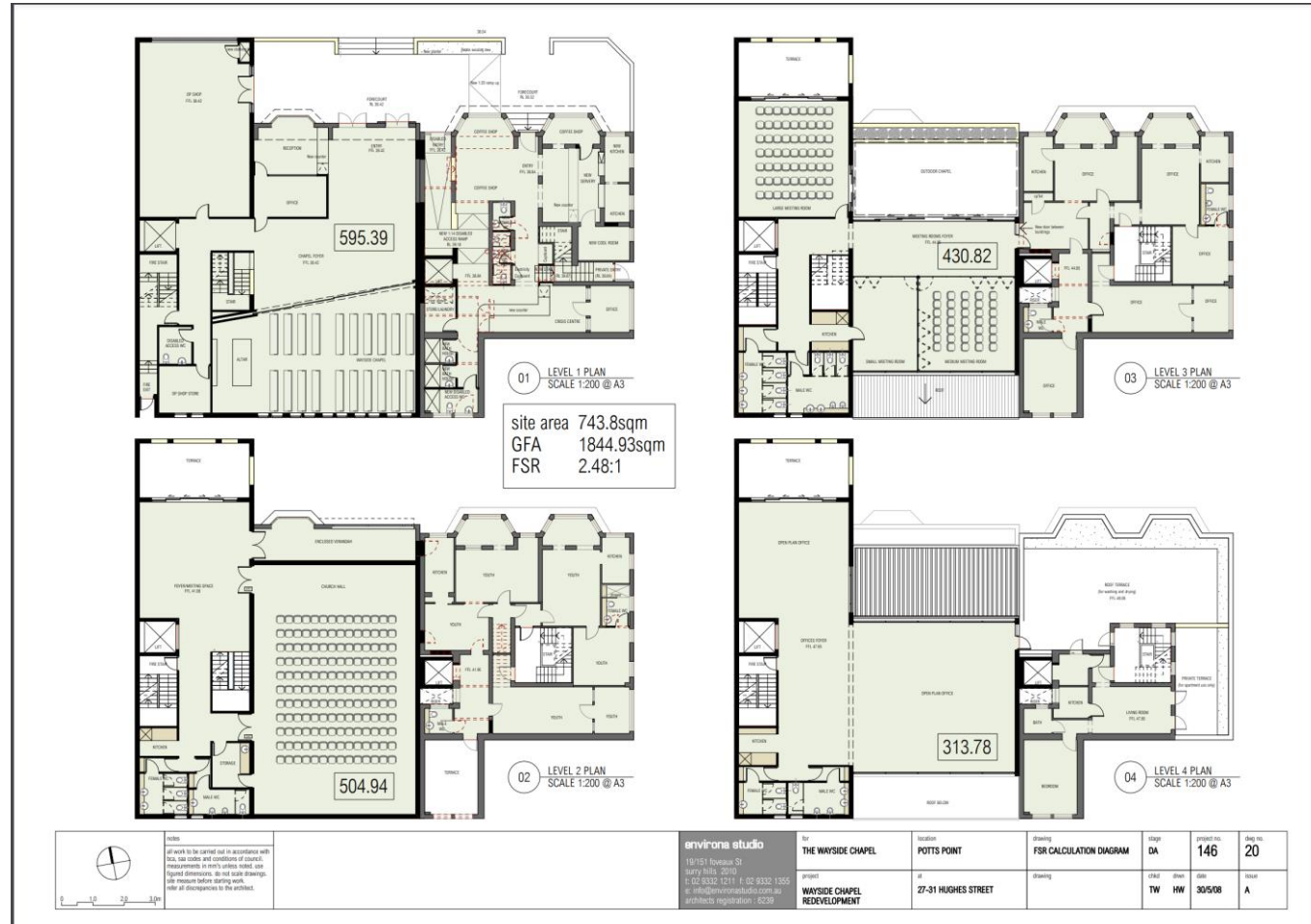


Figure 26: View of floor plans of Nos. 27-37 Hughes Street (Source: Extract from plans of approved D/2008/912 - City of Sydney)

As shown in **Figure 25** above, the rear, four storey wing of the Wayside building at 31-37 Hughes Street contains south facing windows at each level. Of the four levels, only the top level (Level 4) is used as a residential dwelling. The other levels contain a variety of operational uses, such as an office, toilets and a terrace on Level 2.

In terms of the adjoining, more contemporary building, there are a series of south facing windows at various levels, on the western wing, whilst the other section is used primarily for the operations of the Wayside Chapel. The rear windows of the western wing are connected to areas used for toilet and other operational amenities on each level, whilst the adjoining wing is used as the primary assembly and operational space of the Chapel.

Given that the windows of the southern elevations of the Wayside buildings face the blank wall of the proposed northern elevation of the new development, and their spaces are primarily used for the daytime operational and community functions, it is considered that the any overlooking from the balconies and windows of Levels 4 and 5 of the northern section of the proposed hotel use will have minimal impact on the amenity of users of the Wayside Chapel.

It is also considered that the threat to a loss of privacy is minimal from the non-compliant height of the upper flytower additions.

Nos. 23 and 25 Hughes Street

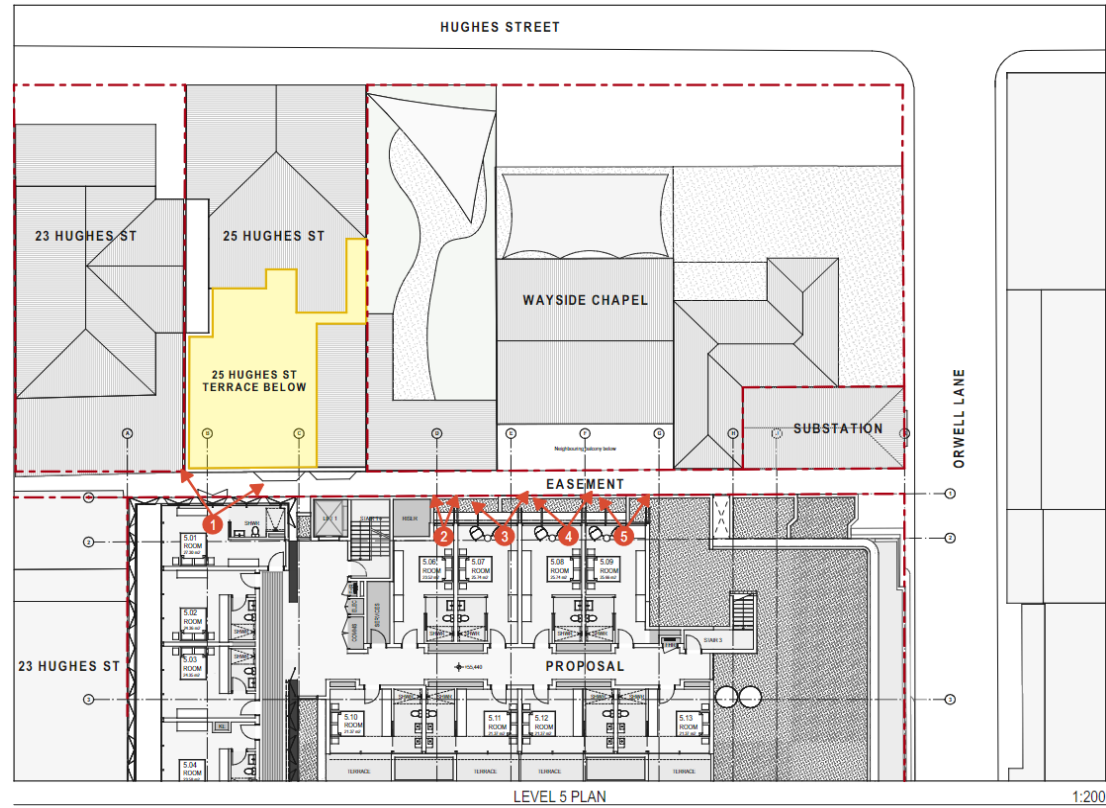
Both of the southern elevations of these two buildings, one a 3 storey backpackers' hostel (23) and the other, a 4 storey residential flat building (25) have a series of south facing windows from their living spaces. The RFB at 25 Hughes Street also has a rear, upper-level community terrace adjoining the subject site, as shown in **Figure 27** below.

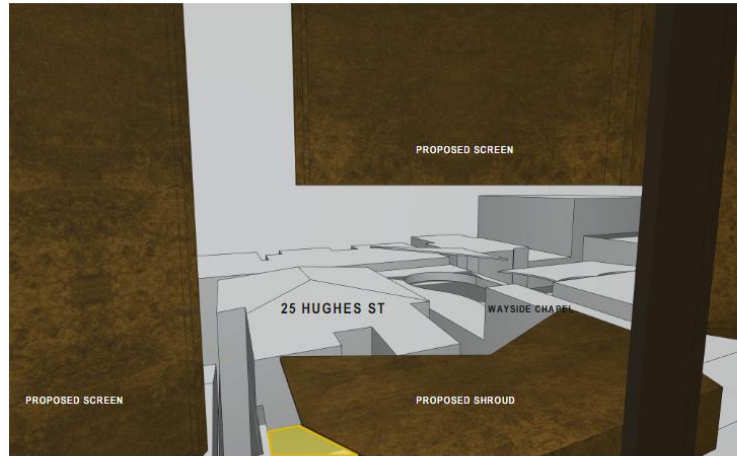


Figure 27: View of northern elevation of the existing Minerva/Metro Theatre flytower wing from the roof terrace of Nos. 25 Hughes Street
(Source: City of Sydney Local Planning Panel Report 19 July 2023)

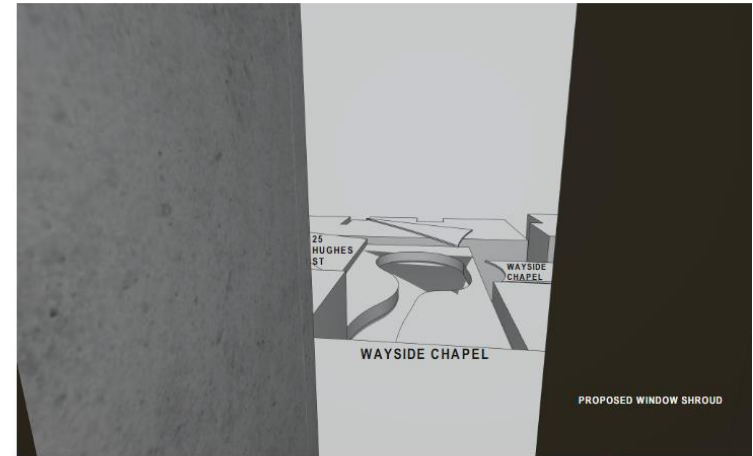
In response to the specific concerns raised at the 19 July 2023 Local Planning Panel meeting regarding the extent of loss of privacy for the rear of the properties directly to the north (in particular, 25 Hughes Street), additional 3D plan modelling of the view lines from the proposed, north-facing, hotel rooms on proposed Level 5 (Nos. 501 – Flytower, 5.06, 5.07, 5.08 and 5.09) and Level 6 (Flytower – 6.01) has been prepared and provided below to provide a more detailed analysis of these impacts. These plans are based on the latest amended architectural plans prepared by Tonkin Zulaikha Greer Architects.

View from Level 5 Hotel Rooms

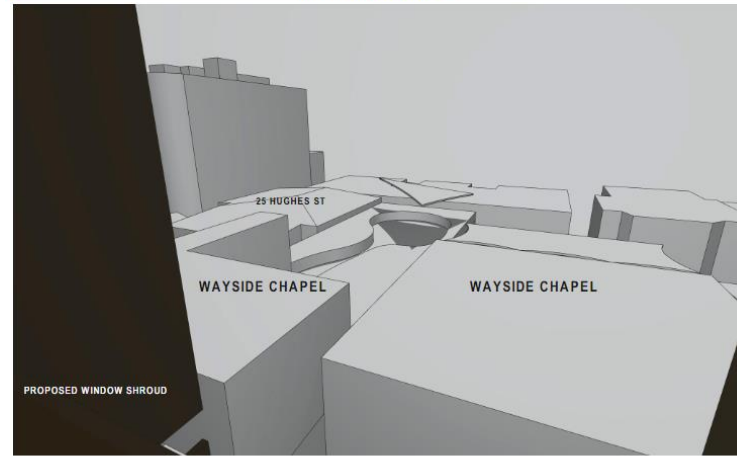




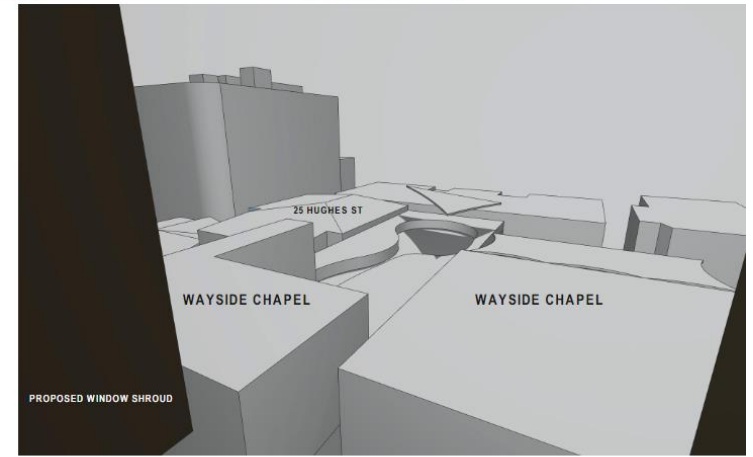
1 VIEW FROM ROOM 5.01



2 VIEW FROM ROOM 5.06



3 VIEW FROM ROOM 5.07



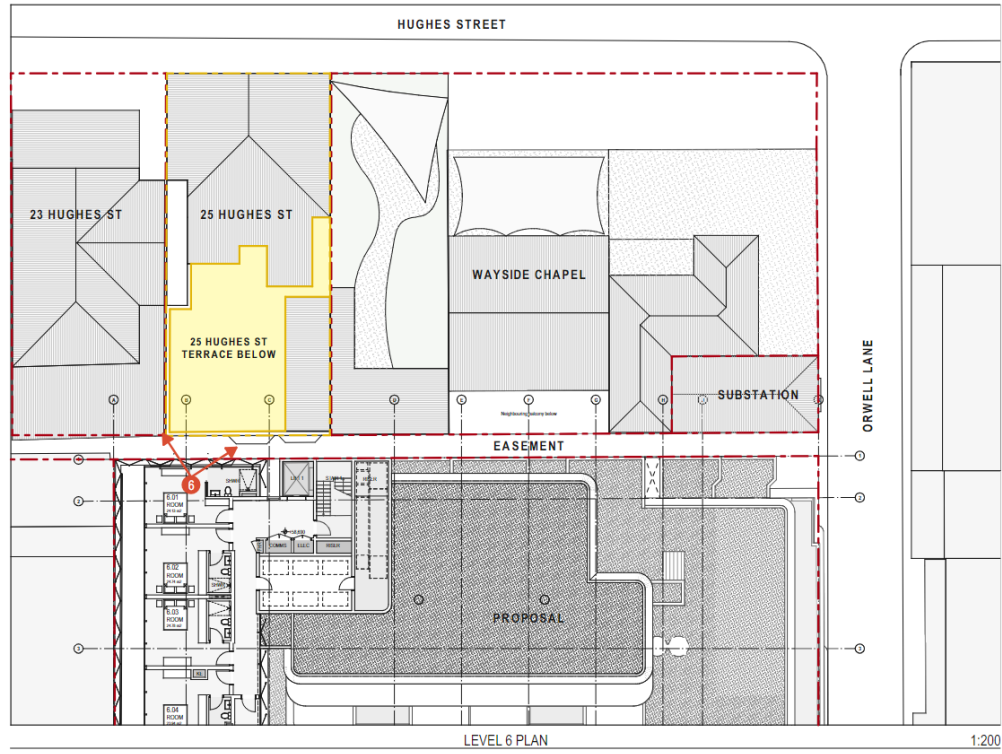
4 VIEW FROM ROOM 5.08



5

VIEW FROM ROOM 5.09

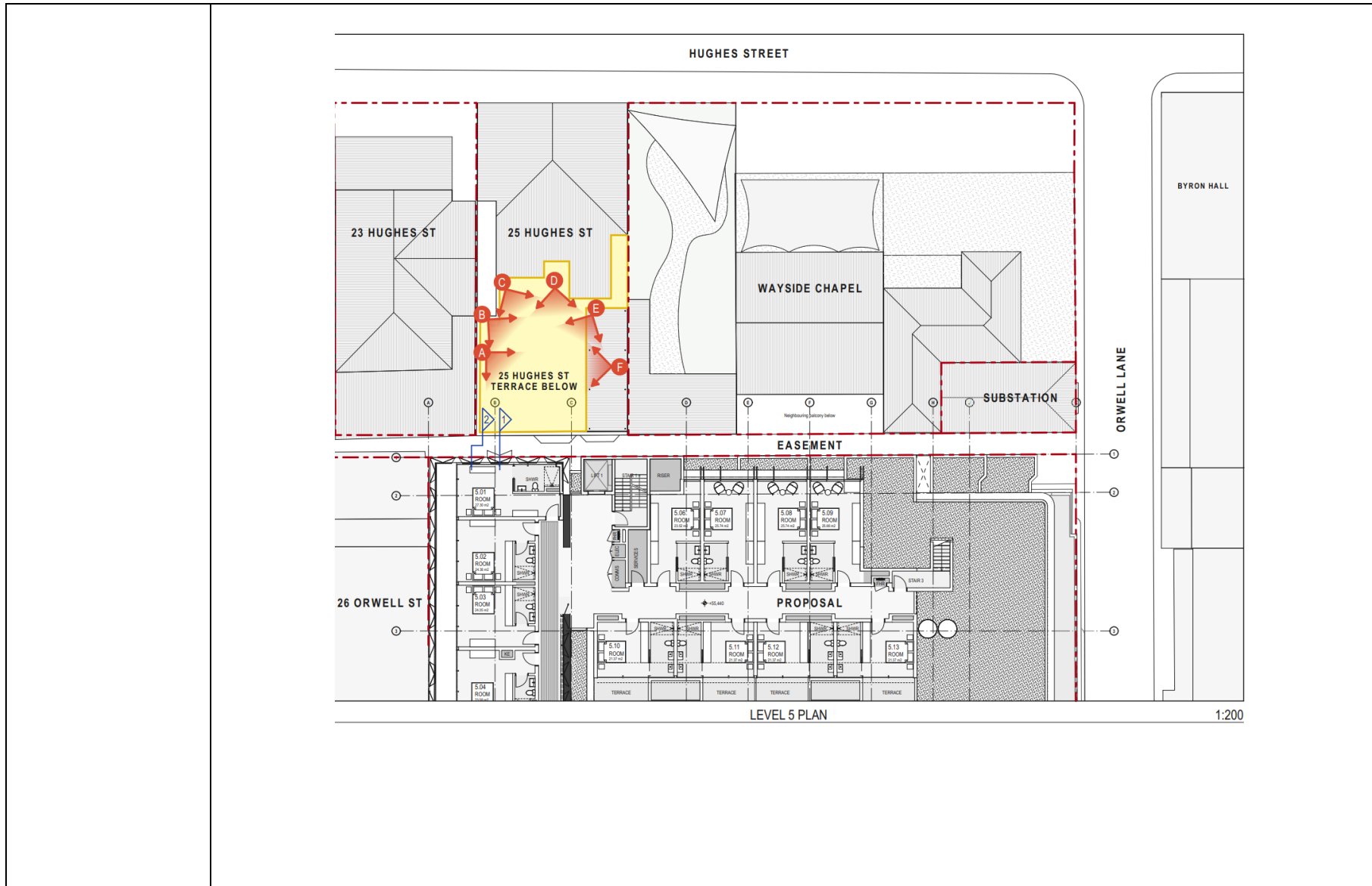
Views from Level 6 Hotel Room

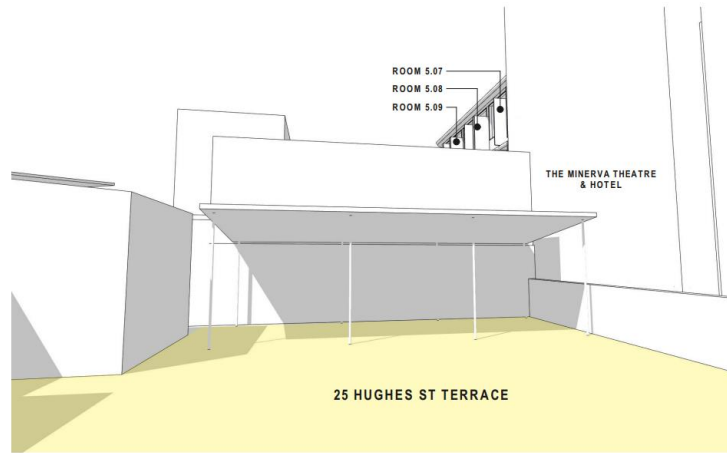




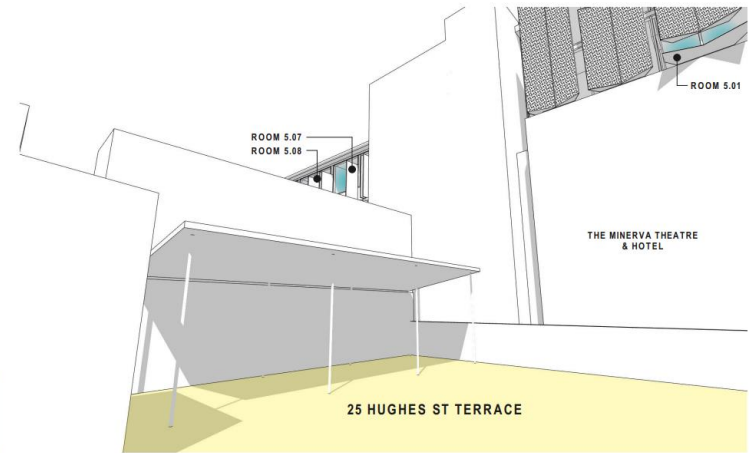
Each of the view lines provided above demonstrate that the potential for overlooking of the southern and side elevation windows and upper level terrace of 25 Hughes Street from the north-facing windows of the proposed Level 5 and Level 6 hotel rooms are extremely limited, given the height, distance and angle of these views, and further mitigated by the additional design elements of the shroud projections between hotel rooms, blade walls along the northern elevation, and the metal screening surrounding the upper level elevations of the Flytower additions. The image above from the proposed hotel room 6.01 in the flytower wing clearly demonstrates the relationship between the external screening, glazing line and views of the hotel guests. The guests have context specific framed views between the screening at 900mm-1800mm high, which with the offset from the glazing line, restricts the viewing aperture from hotel rooms to maintain privacy to neighbours, whilst still providing views to Sydney Harbour.

A further set of 3D and section plan modelling is provided below, to specifically demonstrate the minimal opportunity for overlooking from the proposed new Level 5 and Level 6 hotel rooms to the roof terrace of 25 Hughes Street, also prepared by Tonkin Zulaikha Architects.

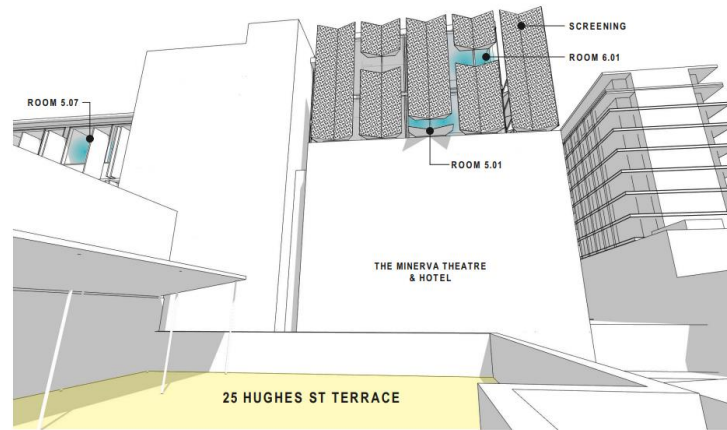




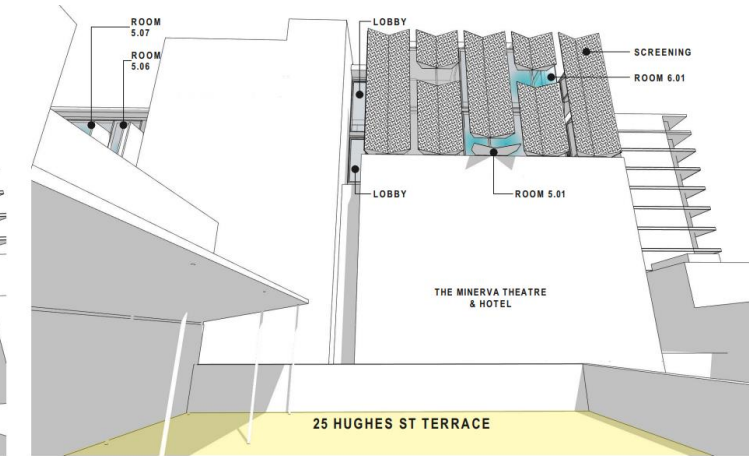
A VIEW A FROM 25 HUGHES ST TERRACE



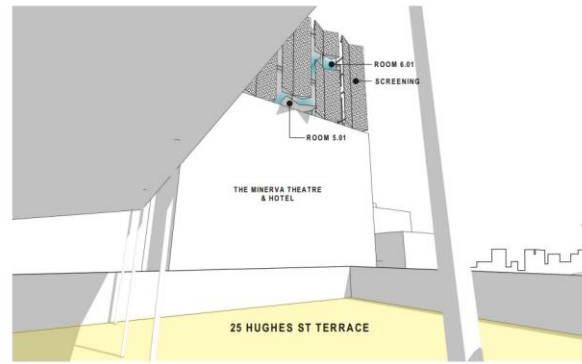
B VIEW B FROM 25 HUGHES ST TERRACE



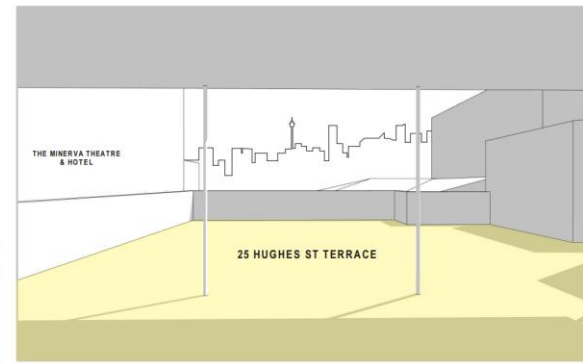
C VIEW C FROM 25 HUGHES ST TERRACE



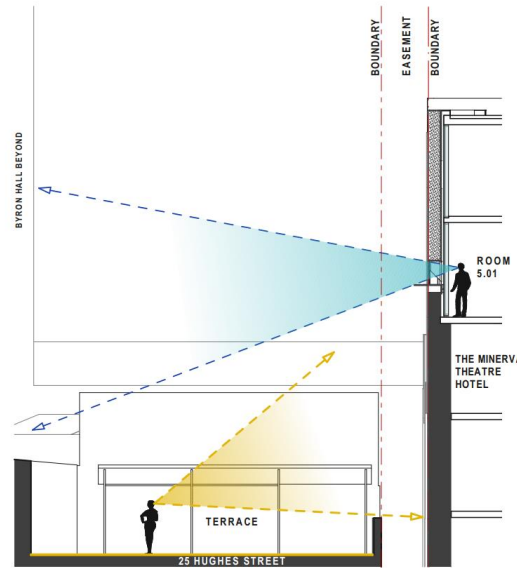
D VIEW D FROM 25 HUGHES ST TERRACE



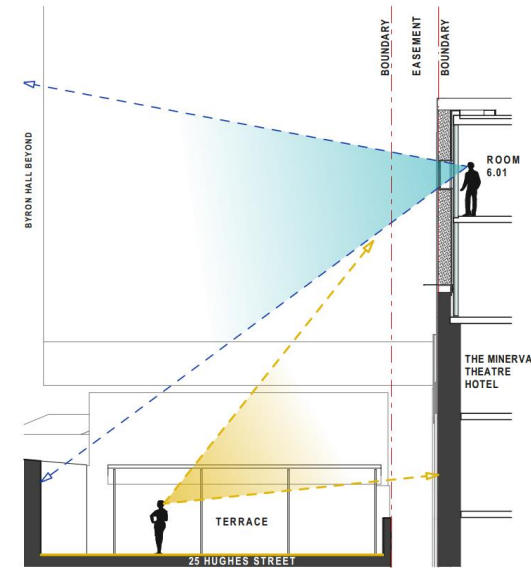
E VIEW E FROM 25 HUGHES ST TERRACE



F VIEW F FROM 25 HUGHES ST TERRACE



1 SECTION 1 - LEVEL 5 VIEW



2 SECTION 2 - LEVEL 6 VIEW

Residential Amenity Impacts – Noise

Given the range of the publicly accessible and late night trading uses of the subject proposal (hotel, entertainment facility, café and small bar), a more detailed assessment of the potential noise impacts has been undertaken to support this application, particularly in respect of the requirements of SLEP 2012 and SDCP 2012.

In accordance with Section 3.15 of SDCP 2012 – Late Night Trading Management, a noise impact assessment (or acoustic) report, prepared by the firm Pulse White Noise Acoustics Pty Ltd was submitted with the original development application. The report was prepared on the following basis:

“This assessment includes the acoustic investigation into the potential for noise impacts from the operation of the completed project, including entertainment operations, as well as potential noise impacts from existing noise sources within the vicinity of the site which predominantly includes traffic noise from surrounding noise sources.”

The development will be assessed against relevant statutory regulations and guidelines including the Sydney Development Control Plan (DCP) 2012, Australian / New Zealand Standard AS/NZS 2107:2016 Acoustics - Recommended design sound levels and reverberation times for building interiors, the acoustic requirements of the Environment Protection Authority’s (EPA) Noise Policy for Industry (NPI) and Liquor & Gaming NSW’s noise criteria which is relevant for the assessment of licensed premises. The acoustic criteria required by the Building Code of Australia (BCA) section of the National Construction Code (NCC) for internal construction within the development will also be identified.”

Following a detailed assessment of these matters, the report concluded:

“This report details the required acoustic constructions of the building’s façade, including external windows, to ensure that the future internal noise levels comply with the relevant noise levels of the Australian Standard AS2107:2016. Providing the recommended constructions detailed in this report are included in the construction of the project the required internal noise levels will be achieved.

External noise emissions from the site have been assessed and detailed in accordance with the NSW Environmental Protection Authorities Noise Policy for Industry. The future design and treatment of all building services associated with the project can be acoustically treated to ensure all noise emissions from the site comply with the EPA NPfI

criteria including the following: 1. Operation of mechanical services on the site. 2. Operation of the proposed basement venues. 3. Use of the venue for cabaret or acoustic performances within the event atrium.

Providing the proposed acoustic treatments and controls detailed in this report are included in the design, construction and operation of the proposed development compliance with the relevant noise emissions criteria will be achieved.”

A Plan of Management was also submitted as part of the original development application to further address the requirements of Section 3.15 of SDCP 2012 and provide appropriate management procedures to minimise any of the noise and anti-social behaviour impacts of the site’s future use.

As part of the planning report to the 19 July 2023 City of Sydney Local Planning Panel Meeting, it was identified that Council officers had reviewed both of these documents, and provided the following comments:

Acoustic Privacy

“The Sydney DCP 2012 requires that a Noise Impact Assessment is provided for uses which may affect the acoustic privacy of adjacent residential uses. A Noise Impact Assessment has been provided which has been reviewed by Council’s Acoustic Specialist. The submitted information has not demonstrated that the proposal is able to satisfy the relevant acoustic criteria based on the capacity and hours of operation proposed. Conditions are recommended in Attachment A to restrict the patron capacity and hours of operation.”

Plan of Management

“A Plan of Management (Attachment F) has been submitted with the development application which generally satisfies the requirements of the Sydney DCP 2012. The Plan of Management has not provided management practices for operating with 450 patrons for up to 20 days per year. This is discussed further under the discussion heading below. A condition is included in Attachment A that requires the Plan of Management to be amended to ensure that it is consistent with the conditions of consent.”

As a means of addressing the above concerns, the Council officers recommended a series of draft conditions to restrict the initial operations of the proposed facilities, and allow for a 12 month trial period to assess the extent of any impacts for surrounding properties:

- The hours of operation for the entertainment facility, small bar and café will be restricted to 7am-11pm, Monday to Sunday, with an initial, 12 month trial allowing extended hours 11-12pm (the subject proposal sought later trading hours up until 2 and 3am);
- The capacity of the entertainment facility being restricted to 250 patrons (a maximum of 450 patrons proposed);
- Access and egress to the small bar, being restricted to Orwell Street, and not Orwell Lane; and
- The applicant's Plan of Management be modified to reflect these restrictions.

It should also be noted that there are a further, extensive range of amenity related conditions recommended by the Council officers in their recent report to the Local Planning Panel.

View Impacts

It is important to note that the proposed building envelope of this DA has been developed in consideration of the detailed design parameters provided by the City of Sydney's Design Advisory Panel concerning an earlier re-development proposal for the site (Advise sheet: No. 53/2019). According to the Panel, a successful strategy to the provision of a vertical addition to the building should consider the following: *'A thin tower may have less of an impact– allowing the character of the architecture of the rest of the existing building to remain intact, and result in less overshadowing of Springfield Gardens. Noting that the building height limit is 22m, the Panel suggested providing some **additional height for a tower element of up to 25m, to encourage design excellence**'*. (**Emphasis Added**).

The SLEP and SDCP 2012 have a range of quantitative and qualitative controls to assess the impacts of new developments on the existing views of both the public domain and private properties. In terms of view corridors most relevant to developments in this locality, the most significant for residents in this locality are the Sydney Harbour Bridge, Sydney Harbour and CBD Skyline.

The assessment of view impacts was also undertaken in accordance with the view sharing principles and recommended practices of the judgement of the Land and Environment Court matter, *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

As a means of addressing these impacts, a Visual Impact Assessment Report was prepared by Urban Design Group and submitted with the original application. Following a request from Council staff, an amended report was submitted to provide an updated assessment of amended plans that redistributed floor space of the new additional hotel development away from the north-east and mid-part of the site, to the new additional levels above the flytower wing along the western boundary of the site. Among other amenity improvements, these amendments were advanced to address potential view loss from residential properties to the south of the site.

The results of the amended assessment indicated that the properties most likely to have the views of a limited number of upper level, residential dwellings affected by the proposed building envelope were the Gowrie Gate building (113-115 Macleay Street) to the south-east and 5-15 Orwell Street to the south-west.

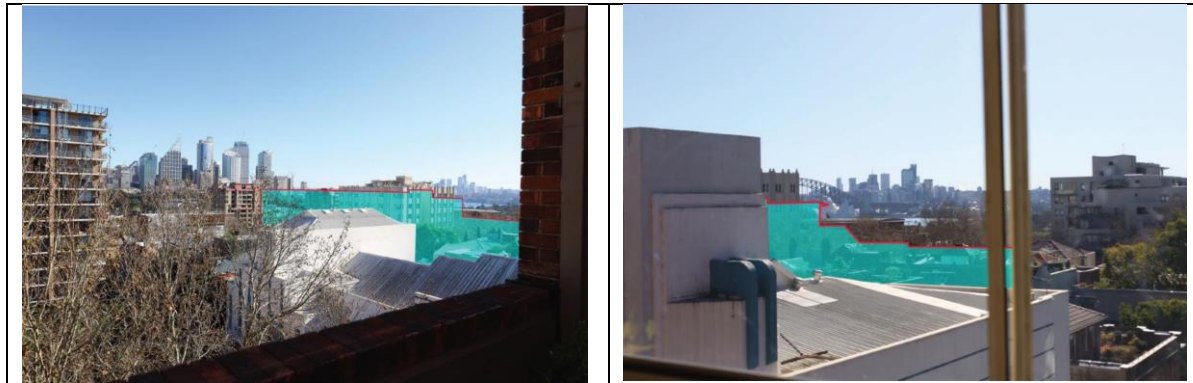
In the further analysis of this assessment, and as identified in the planning report submitted, to the 19 July 2023 City of Sydney Local Planning Panel Meeting, these buildings were affected in the following manner:

5-15 Orwell Street

Existing views from Unit 1107 and the communal rooftop terrace will not be impacted by the latest plans.

113-115 Macleay Street

Photomontages of the views from those four units most impacted by the latest amended plans are provided below:





| | | | |
|--|--|---|--|
| | <p style="text-align: center;">Unit 604, Level 6</p>  <p style="text-align: center;">Unit 506, Level 5</p> | <p style="text-align: center;">Unit 505, Level 5</p>  <p style="text-align: center;">Unit 404, Level 4</p> | |
|--|--|---|--|

Figure 29: *Photomontages of View Impact Assessment of Units in 113-115 Macleay Street (Source: Extract from report to 19 July 2023 Local Planning Panel Meeting)*

On the basis of this assessment, the Council officers concluded:

“125. The view sharing assessment found that the protection of views from adjoining properties is not reasonable in this instance. This is due to several reasons outlined below:

(a) Despite the proposal obscuring views from some apartments in buildings, the value of views that would be retained from these properties from other vantage points remains high, with Unit 604 retaining views towards Sydney Harbour Unit 505 retaining views to the Sydney Harbour Bridge and a partial view to the Opera House Unit 506 retaining a partial view to the City skyline Unit 404 retaining views to the Sydney Harbour Bridge to varying degrees within the apartment.

(b) Only partial views of the Sydney Harbour Bridge, Opera House are currently achieved, with the nearest objector being 1.74 kilometres from the Opera House, 2.4 kilometres from the Sydney Harbour Bridge.

(c) Opportunities for a more skilful design to reduce the view impact would result in other impacts, such as streetscape and heritage impacts.”

| | |
|--|---|
| | |
| <p>1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</p> | <p>As discussed above, the proposed addition is appropriately scaled and designed as a secondary component which defer to the architecture of the original building. The addition has been setback from the principal façades and adopts contemporary materials and colour palette to minimise the visual impact on the heritage listed building and the Potts Point Heritage Conservation Area (C51).</p> |
| <p>1(c) to promote the sharing of views, outside Central Sydney,</p> | <p>There will be minimal impact on views to and from the heritage item as the proposed vertical addition above the flytower is setback from the principal elevation of the building and detailed as a discrete extension of the form below.</p> <p>The Visual Impact Assessment by Urbaine Architecture which is submitted with the Development Application demonstrates that the significant district views, particularly from the neighbouring residential developments are protected. This assessment forms part of this clause 4.6 request.</p> |
| <p>1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</p> | <p>Not applicable.</p> |

| | |
|--|------------------------|
| <p>1(e) in respect of Green Square:</p> <p>(i) <i>to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</i></p> <p>(ii) <i>to ensure the built form contributes to the physical definition of the street network and public spaces.</i></p> | <p>Not applicable.</p> |
|--|------------------------|

In conclusion, compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this proposed development because the objectives of the height standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of the SLEP 2012, despite non-compliance.

3. the underlying object of purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable;

In *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 it was accepted (at [24]) that these grounds could extend to circumstances where the object of a purpose was **undermined**.

Clause 4.3(1)(a)-(b) of the Sydney LEP is 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,

For reasons described above (in dealing with the first ground under Wehbe) and further detailed below (in relation to environmental planning grounds) a compliant development would:

- undermine objective 1(a) in that the compliant development would be less adapted to the condition of the site and its context than the proposed development; and
- undermine objective 1(b) in that the compliant development would have less appropriate height transitions between new development and the existing heritage fabric on the site than the proposed development.

The underlying objectives or purpose of the standard would be undermined if compliance was required.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

Council has varied the height of building standard in circumstances where the objectives of the standard are achieved. It is not suggested that the standard has been abandoned.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the proposed development in that:

- The proposal is consistent with the objectives of the 'Height of Building Standard' as detailed above;
- A strictly height-compliant proposal would undermine objectives 1(a)-(b) of the 'Height of Building Standard' as detailed above;
- The vast majority of the proposed building envelope is below or in line with the 22m height limit. As such, the scale of the building remains consistent with the desired character of the locality notwithstanding the proposed minor variation;
- The proposal retains, conserves and adapts to the building, respecting its aesthetic significance. The existing streetscape is varied, with a range of scales and architectural styles. The proposed additions have been designed to minimise visual impacts on the streetscape and the local Heritage Conservation Area; and
- The proposed variation to the Height of Buildings control does not give rise to an impact on the amenity of the locality.

As the proposal is consistent with the objectives of the height of buildings standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

An assessment of the broader environmental impacts of the subject proposal were addressed in the earlier section of this report, *"Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?"*

A major part of this assessment also has strong relevance in an assessment of the more specific impacts of that part of the proposed building envelope that is non-compliant with the maximum 22 metre height restriction of CI 4.3 of SLEP 2012.

As identified earlier, the vast majority of the proposed building envelope is below or in line with the 22m height limit. However, the proposed maximum building height, as measured from the 'existing' ground level', is 24.92m at the parapet of the proposed vertical addition above the flytower of the theatre as indicated in the architectural drawings prepared by Tonkin Zulaikha Greer Architects. Therefore, the proposed development breaches the height standard by a maximum of 2.92m (13.27%).

The exceedance, being the portion of the building above the 22m height limit, is attributed to the proposed two storey hotel addition to the flytower (RL +62.10 or 24.92m) along the western boundary and the adjacent vertical circulation element (RL +61.39 or 24.76m) proposed to provide lift and fire egress throughout the building.

The further assessment below provides a specific focus on the extent of impacts arising from the non-compliant part of the proposed building envelope. It addresses both the lack of amenity impacts arising from the proposed height contravention, as well as the environmental planning benefits of allowing the contravention. The lack of amenity impacts can be a reason advanced in support of environmental planning grounds, when it is accompanied by other reasons too (cf *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [49]).

Visual Impacts

Similar to the broader assessment, the concentrated massing of floor space above the existing flytower wing, and the adjoining plant equipment provides the least overall visual impact across the remaining part of the site when viewed from both the public domain of the main street frontages, Orwell Street and Orwell Lane, and surrounding properties.

The impacts of the non-compliant portion of the building height in this location are also less significant given the identifiable height of the existing flytower wing.

Overshadowing Impacts

The shadow diagrams provided to accompany this application, and subsequent amended plans, clearly identify that the proposed building envelope will only have a very minimal overshadowing impact on a limited number of properties to the south and south-east, as well as the public open space, Springfield Reserve, in mid winter. The latest proposed envelope is also compliant with the solar access controls of SLEP and SDCP 2012.

The non-compliant section of the building height above the existing flytower wing and adjoining plant equipment has only a limited component of the overall overshadowing impact of the amended building envelope, and a compliant building height in this location would provide only a limited amount of additional mid-winter solar access for those most affected properties.

The alternative of reallocating higher built forms in the mid and north-east of the site was not supported by Council officers during the DA Process, given its potential to create a greater degree of overshadowing for a greater number of properties and Springfield Reserve to the south.

Residential Amenity Impacts – Visual Privacy

The earlier section addressing Clause 4.6(3)(a) provided a very detailed analysis of the potential impacts upon the visual privacy of all the elevations of the proposed building envelope. This assessment concluded that the massing of floor space above the flytower wing, and the significant setbacks provided from the new hotel additions and their frontages to Orwell Street and Orwell Lane, greatly reduced the potential for overlooking to surrounding residential properties and other buildings.

Those parts of the flytower wing and plant/access structures that exceed the 22 metre height restriction provide very limited opportunity for overlooking of adjoining and surrounding properties (given the metal decorative screening applied to the hotel addition and windowless plant/access

structures), and are located well above most adjoining and surrounding residential properties, particularly those properties to the north of the site.

Residential Amenity Impacts - Noise

Similar to the visual privacy issue, those parts of the proposed envelope and plant equipment that exceed the 22 metre height limit are well screened and located well above, and are reasonably separated from most surrounding residential properties, and are therefore unlikely to result in any unreasonable noise generation.

As identified in the earlier Clause 4.6(3)(a) section, the application has been accompanied by both an Acoustics report and Plan of Management to address the requirements of Section 3.15 – Late Night Trading of SDCP 2012 and provide appropriate management procedures to minimise any of the noise and anti-social behaviour impacts of the site's future use.

As a means of further mitigating these potential impacts, the Council officers recommended a series of draft conditions in the recent report to the Local Planning Panel to restrict the initial operations of the proposed entertainment and bar facilities, and allow for a 12 month trial period to assess the extent of any impacts for surrounding properties:

- The hours of operation for the entertainment facility, small bar and café will be restricted to 7am-11pm, Monday to Sunday, with an initial, 12 month trial allowing extended hours 11-12pm (the subject proposal sought later trading hours up until 2 and 3am);
- The capacity of the entertainment facility being restricted to 250 patrons (a maximum of 450 patrons proposed);
- Access and egress to the small bar, being restricted to Orwell Street, and not Orwell Lane; and
- The applicant's Plan of Management be modified to reflect these restrictions.

View Impacts

The very detailed view impact analysis that accompanied both the original application and subsequent plan amendments, have closely examined the potential view loss of those surrounding residential properties with views to the Sydney Harbour Bridge, Sydney Harbour and the Sydney CBD skyline.

As with the other main environmental impacts above, the applicant has worked closely with Council staff to produce an overall building envelope and floor space massing which provide the least impact on existing views of surrounding residents, and through various plan amendments made throughout the DA process, the view impact analysis demonstrated that the latest plans will result in only a minimal loss of significant views to a limited number of residential units in the upper levels of the Gowrie Gate building (113-115 Macleay Street) to the south-east.

In the recent report on this DA to the Local Planning Panel, the Council officers supported this assessment of the view impacts of the latest building envelope plans, and recognised that the design satisfied the view sharing principles and recommended practices of the judgement of the Land and Environment Court matter, *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

It is therefore considered that it would be unreasonable to seek any further reduction of that part of the flytower wing additions and plant/access structures which are non-compliant with the 22 metre SLEP 2012 height restriction, as it is unlikely to provide any further substantive view impact improvement for those four residential units in the Gowrie Gate building identified as the most affected by the current proposal.

Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.

Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 - Mixed Use. The objectives of the zone are:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To ensure land uses support the viability of nearby centres.*
- *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*

The subject proposal meets the objectives for the zone in that:

- The proposed development includes ‘*hotel and motel accommodation*’, ‘*entertainment facility*’ and complementary ‘*food and drink premises*’ which are permissible with consent within a MU1 – Mixed Use Zone.
- The proposal will see the subject site continue to connect with its rich history through its reinstated function as a performance venue, while also bringing new visitors via the proposed hotel and food and beverage spaces.
- The mix of uses will enhance the distinctive, mixed character of the Potts Point locality.
- The development will have a positive economic impact on the Potts Point area with the potential to attract visitors to the area and to provide employment opportunities.
- The site has excellent access to public transport being located in close proximity to the Kings Cross Railway Station to the south, which provides excellent access to the Eastern Suburbs & Illawarra Line. The nearest bus stop is located on Macleay Street which provides frequent public bus services to the CBD and eastern suburbs.

For the reasons given the proposal is consistent with the objectives of the MU1 zone.

Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the proposed development. Further, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is appropriate to vary the height of buildings development standard to the extent proposed.