

Item 4.**Development Application: 190-192 Victoria Street, Potts Point - D/2023/967**

File No.: D/2023/967

Summary**Date of Submission:** 26 October 2023**Applicant:** Dr Rajeev Soni**Architect/Designer:** Anton Kouzmin**Owner:** Dr Rajeev Soni**Planning Consultant:** Vaughan Milligan**Heritage Consultant:** John Oultram**Cost of Works:** \$509,300**Zoning:** MU1 - Mixed Use

Proposal Summary: The proposal is for alterations and additions to shop top housing including internal modifications and extension of Unit 15 to create a new dining and living room on the 7th storey of the building.

The proposal is referred to the Local Planning Panel for determination as the development is reliant on a clause 4.6 variation request to vary the height of buildings and floor space ratio development standards of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) by more than 10%. The existing building already exceeds the height of building and floor space ratio development standards.

The applicant has lodged a written statement addressing the provisions of clause 4.6 of the Sydney LEP 2012 with regard to the non-compliance with the height of buildings and floor space ratio development standards.

The non-compliance with the height of buildings development standard relates to the proposed works occurring 8.25m above the height standard. This equates to a 68.8% exceedance of the height of buildings control,

noting the existing building has an 81% exceedance of the height of buildings control.

The non-compliance with the floor space ratio development standard relates to the addition of 22sqm of gross floor area. This results in an increase in the buildings existing floor space non compliance from a 58.98% variation to a 63.01% variation.

The application was notified and advertised for a period of 21 days from 31 October 2023 to 22 November 2023. No submissions were received.

The proposal is generally consistent with the relevant objectives and provisions of the Sydney LEP 2012 and Sydney DCP 2012. Subject to the recommended conditions at Attachment A, the development application will not result in any unacceptable impacts to surrounding properties.

Summary Recommendation: The development application is recommended for approval, subject to conditions.

Development Controls: Environmental Planning and Assessment Act 1979

SEPP (Building Sustainability Index: BASIX) 2004

Sydney Local Environmental Plan 2012 (Gazetted 14 December 2012, as amended)

Sydney Development Control Plan 2012 (in force on 14 December 2012, as amended)

Attachments: Recommended Conditions of Consent

Selected Drawings

Clause 4.6 Variation Request - Floor Space Ratio

Clause 4.6 Variation Request - Height of Building

Recommendation

It is resolved that:

- (A) the variation requested to floor space ratio development standard and height of buildings development standard in accordance with Clause 4.6 'Exceptions to development standards' of the Sydney Local Environmental Plan 2012 be upheld; and
- (B) consent be granted to Development Application No. D/2023/967 subject to the conditions set out in Attachment A to the subject report.

Reasons for Recommendation

The application is recommended for approval for the following reasons:

- (A) The development complies with the objectives of the MU1 Mixed Use zone pursuant to the Sydney LEP 2012.
- (B) Based upon the material available to the Panel at the time of determining this application, the Panel is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3) of the Sydney LEP 2012, that compliance with the floor space ratio and height of buildings development standard is unreasonable or unnecessary and that there are sufficient planning grounds to justify contravening clause 4.3 and 4.4 of the Sydney LEP 2012; and
 - (ii) the proposal is in the public interest because it is consistent with the objectives of the MU1 mixed use zone and the floor space ratio and height of buildings development standard.
- (C) Having considered the matters in clause 6.21C(2) of the Sydney LEP 2012, the proposal displays design excellence because:
 - (i) the form and external appearance of the proposed alterations and additions will not have a detrimental impact on the quality or amenity of the public domain;
 - (ii) the alterations and additions will not have a detrimental impact on any private or public view corridors and will not result in any detrimental amenity impacts in terms of overshadowing, visual privacy or noise; and
 - (iii) the proposed bulk, massing and modulation of the alterations and additions are acceptable.
- (D) The development is generally consistent with the relevant objectives and controls of the Sydney LEP 2012 and Sydney DCP 2012.
- (E) Suitable conditions of consent have been applied and the development is considered to be in the public interest.

Background

The Site and Surrounding Development

1. The site has a legal description of Lot 8 within SP 97870, Lot 190 DP 1026206 known as 190-192 Victoria Street, Darlinghurst. It is rectangular in shape with an area of approximately 273 square metres. It has a primary street frontage of 10m to Victoria Street and a secondary street frontage of 10 metres to Earl Street. The site is located close to the intersection of Victoria and Earl Street.
2. The site contains a strata titled seven storey mixed-use development with ground floor retail and six levels of units above, comprising a total of 17 lots.
3. The proposed alterations and additions relate to Unit 15 within the subject site. Unit 15 is a split-level apartment located on level 5 and level 6 of the building. Level 5 of Unit 15 contains the kitchen, living/dining, bedroom, bathroom and laundry, while level 6 contains a bedroom and outdoor private open space in the form of a rooftop terrace.
4. The surrounding area is characterised by a mixture of land uses, being terrace style housing, shop top housing, commercial development and residential flat buildings.
5. The site is located within the Potts Point heritage conservation area (C51) and is identified as a detracting building.
6. The site is located within the Kings Cross locality and is not identified as being subject to flooding.
7. A site visit was carried out on 10 November 2023.
8. Photos of the site and surrounds are provided below.



Figure 1: Aerial view of site and surrounds



Figure 2: Site viewed from Victoria Street, looking east.

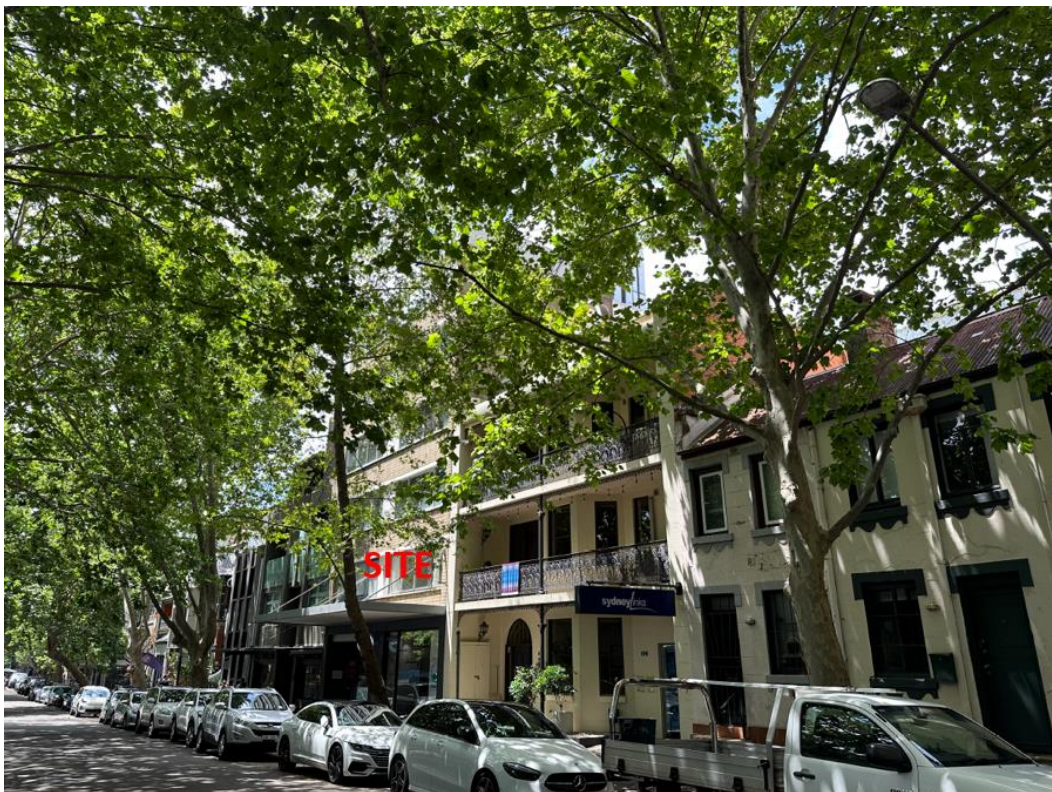


Figure 3: Site viewed from Victoria Street, facing north east.



Figure 4: Site viewed from Victoria Street, facing south east.



Figure 5: Rear viewed from Earl Street



Figure 6: Southern elevation viewed from Earl Street, facing north west.



Figure 7: Site viewed from Earl Street, facing south.



Figure 8: Internal view of Unit 15 - level 5 living room



Figure 9: Internal view of Unit 15 - stair to level 6.



Figure 10: Internal view of Unit 15 - level 6 bedroom.



Figure 11: View of Unit 15 viewed from rooftop terrace.



Figure 12: Looking north from rooftop terrace.



Figure 13: Looking south east from rooftop terrace.



Figure 14: Looking west from rooftop terrace.



Figure 15: Looking south east toward existing level 6 and rooftop terrace from tree canopy located on the eastern side of Victoria Street (captured via drone, image provided by applicant)

History Relevant to the Development Application

Development Applications

9. The following applications are relevant to the current proposal:
- **D/2011/1913** – Development consent was granted on 25 June 2011 for a new four-storey addition to the rear of the existing mixed-use building, containing basement storage, roof terrace, ground floor retail, and residential apartments, upgrade common areas and communal facilities, and internal alterations. This application has been subject to numerous modifications (A-G). These works were completed in 2016.
 - **D/2019/1349** – Development consent was granted on 18 December 2019 for the erection of two signs and window decals to the Victoria Street elevation of the ground floor retail premises.

Compliance Action

10. The site is not subject to any compliance action.

Amendments

11. Following a preliminary assessment of the proposed development by Council Officers, a request for additional information and amendments was sent to the applicant on 27 November 2023, as follows:
- Additional views from the western side of Victoria Road;
 - Provision of a set back at the upper level in accordance with 4.2.2 Building setbacks of the DCP;
 - Specific materials, colours and finishes are keyed to an elevation;
 - Removal of the dark roof;
 - Requirement for the replacement of level 5 windows to the western elevation must be 'like for like'; and
 - Structural Engineering Report to confirm the proposed additions will not adversely impact on the structural integrity of the existing building.
12. The applicant responded to the request on 17 January 2024, and submitted the following information:
- Structural report, prepared by Cantilever Consulting Engineers Pty Ltd;
 - Proposed level 6 floor plan;
 - Existing and proposed 3D view of the proposal;
 - Existing and proposed western elevation of the subject building with additional existing facade detail modelled; and
 - Recent photographs showing the inconsistent street elevation and the extent of tree canopy coverage in the area.

13. Following a review of the additional information by Council Officers, further correspondence was sent to the applicant on 29 February 2024 requesting additional site lines from the public domain.
14. Updated site lines were provided by applicant 5 March 2024.
15. The final DA submission, as amended by the revisions summarised above, is the subject of this assessment report.

Proposed Development

16. The application seeks consent for the following alterations and additions to the residential apartment Unit 15 located at levels 5 and 6 of the existing 7 storey mixed use building:
 - Internal alterations and refurbishment of the existing apartment, within the existing building envelope;
 - Modification of fenestration to the western elevation of level 5;
 - Construction of a new addition to the upper level of the apartment (level 6), outside of the existing building envelope, to accommodate a new dining/living room addition (located on the existing rooftop terrace area). The proposed addition will result in the creation of 22 square metres of additional gross floor area (GFA); and
 - New heat pump condenser unit to southern elevation of proposed rooftop addition.
17. Plans and elevations of the proposed development are provided below.

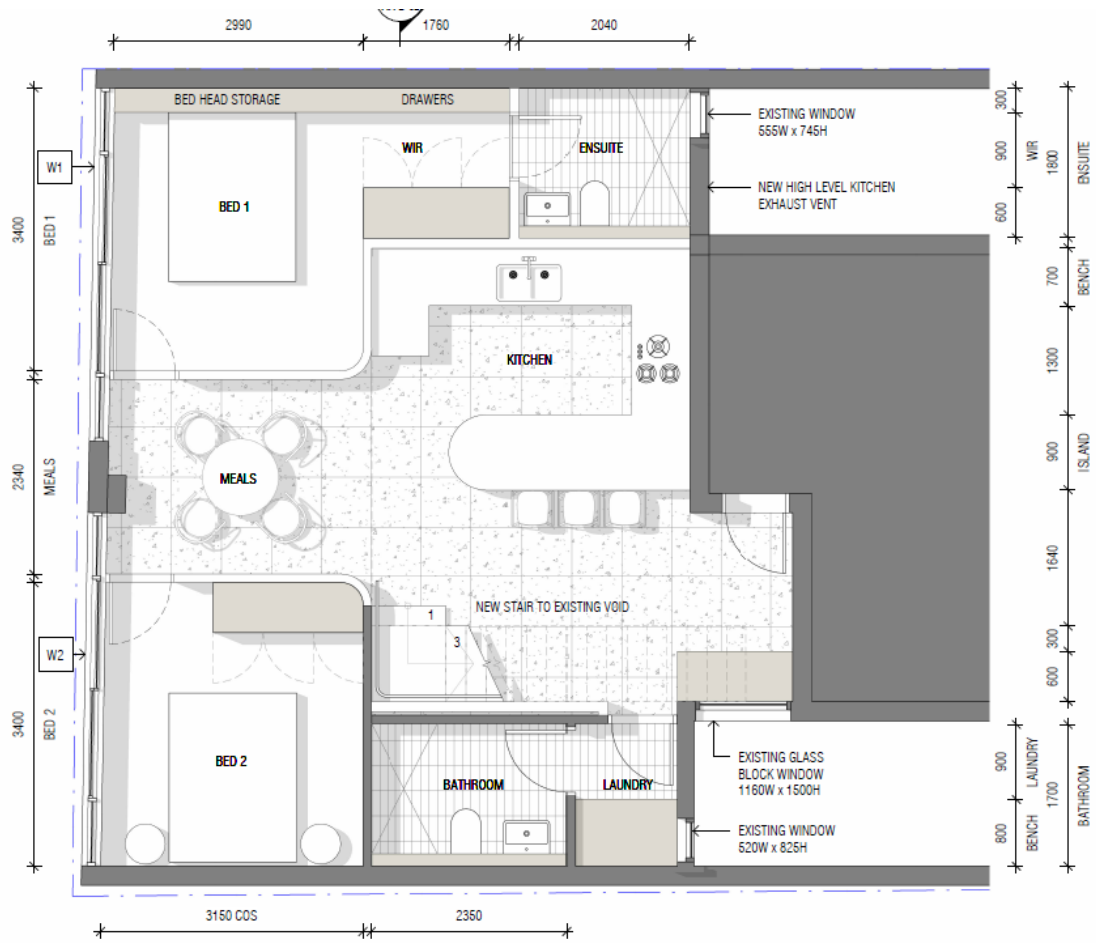


Figure 16: Proposed level 5 floor plans.

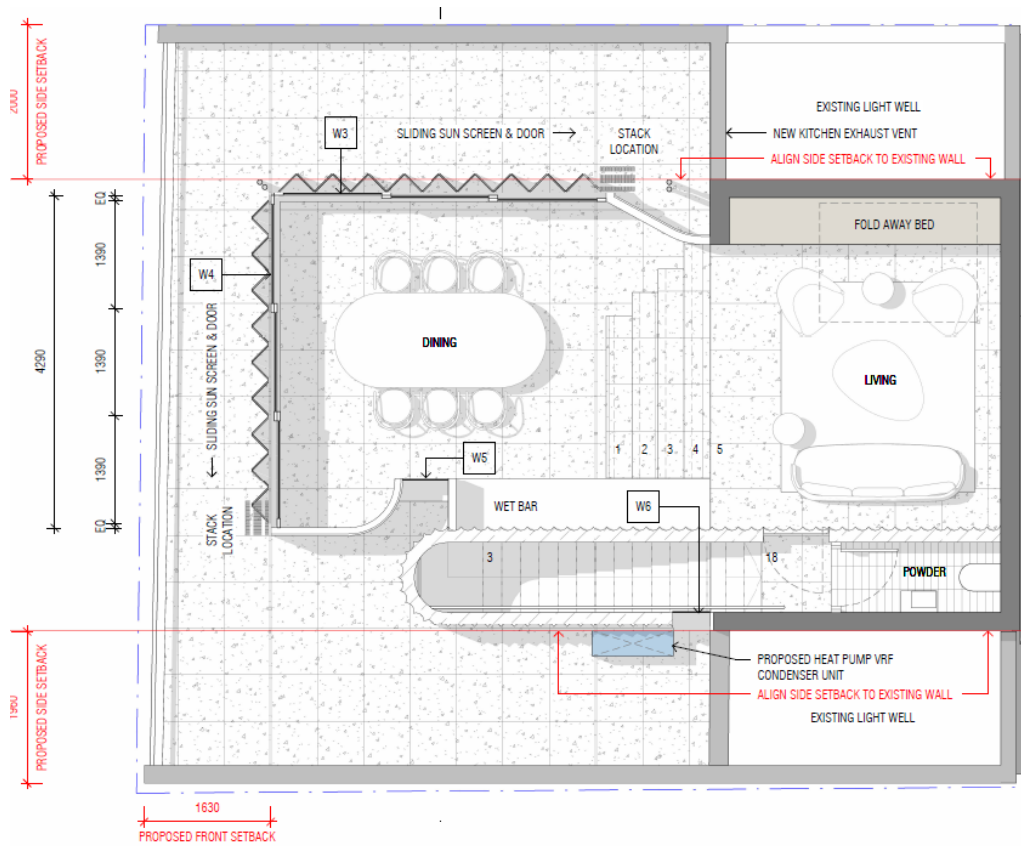


Figure 17: Proposed level 6 floor plan.

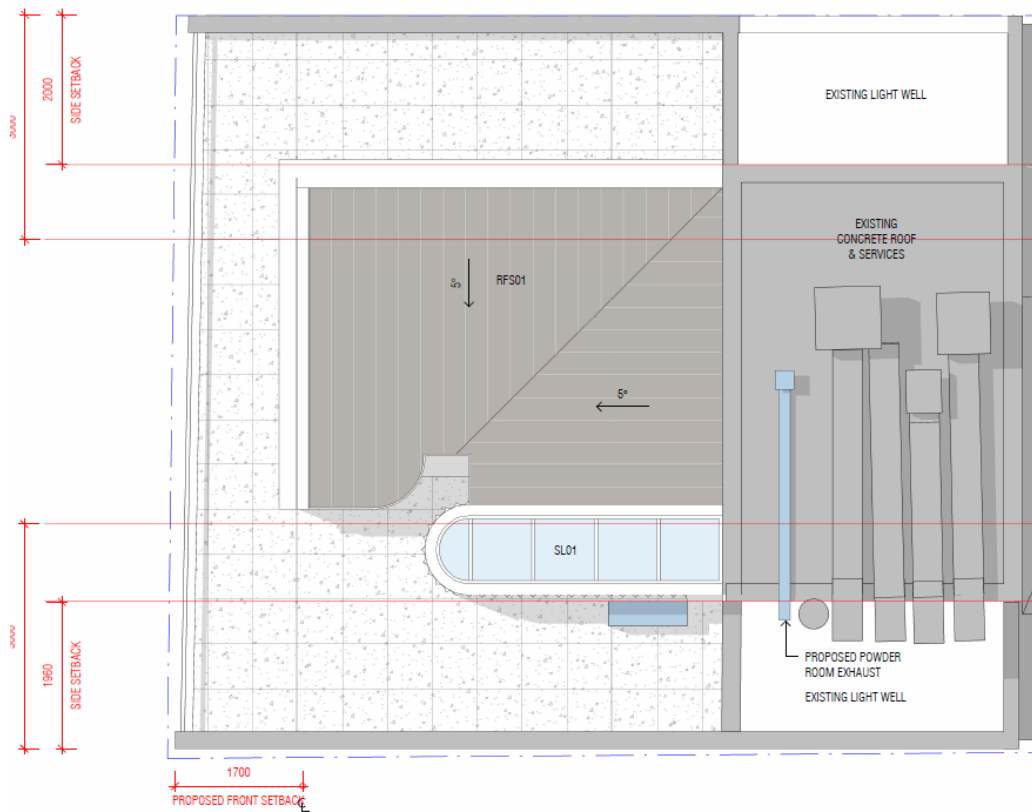


Figure 18: Proposed roof plan.

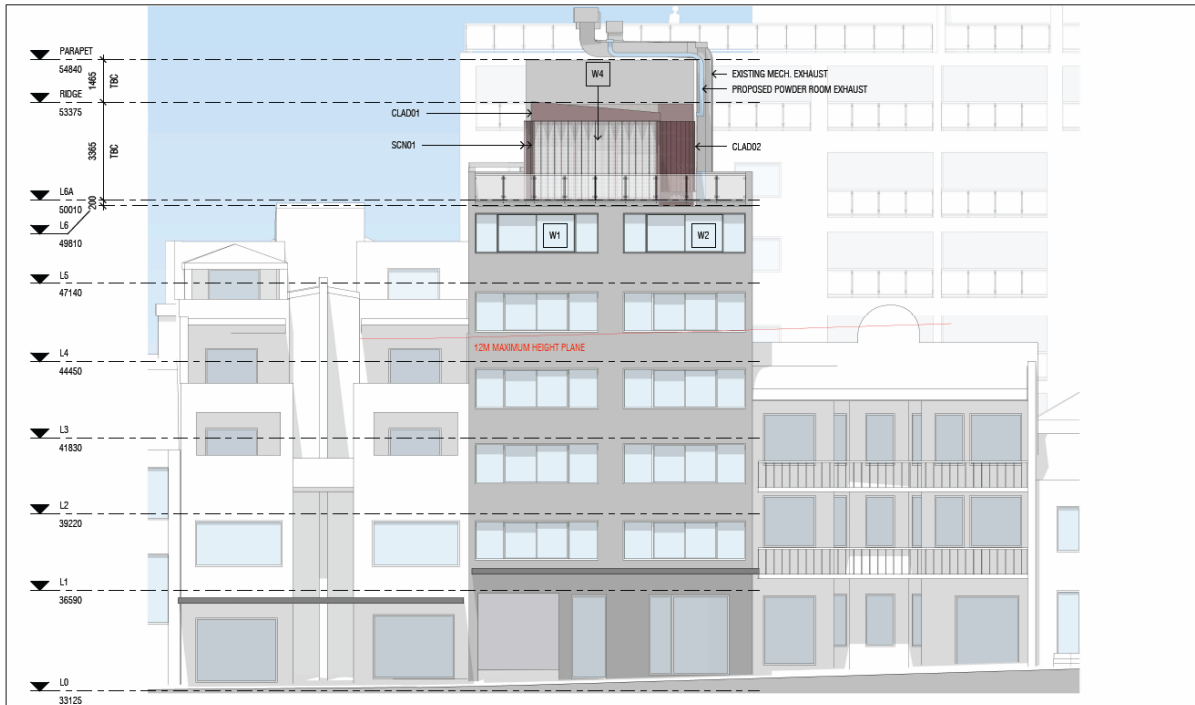


Figure 19: Proposed western elevation (Victoria Street).

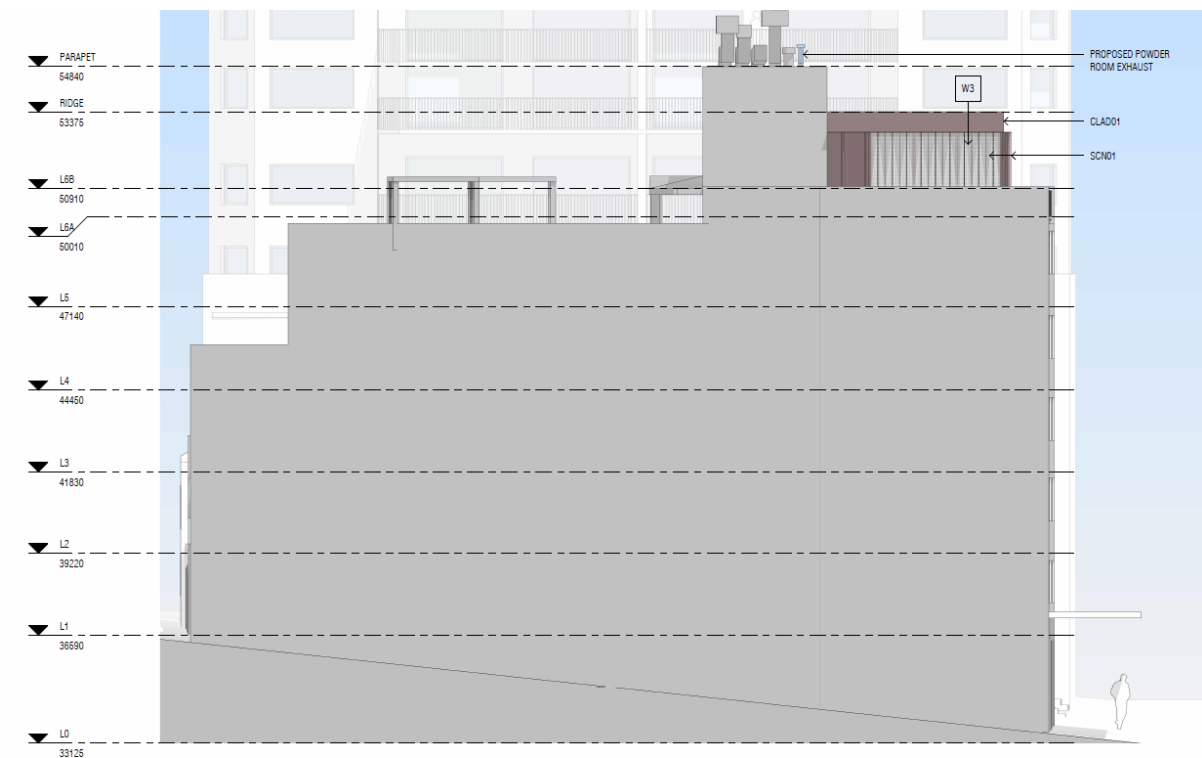


Figure 20: Proposed northern elevation.

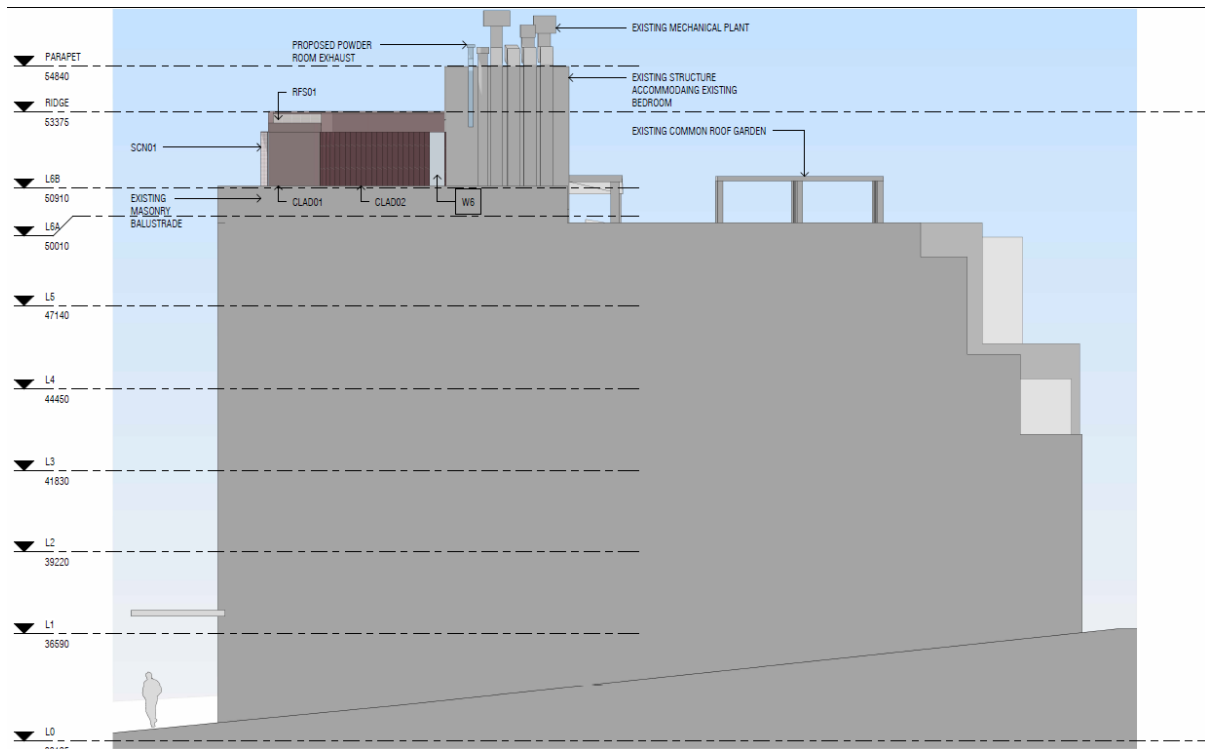


Figure 21: Proposed southern elevation.

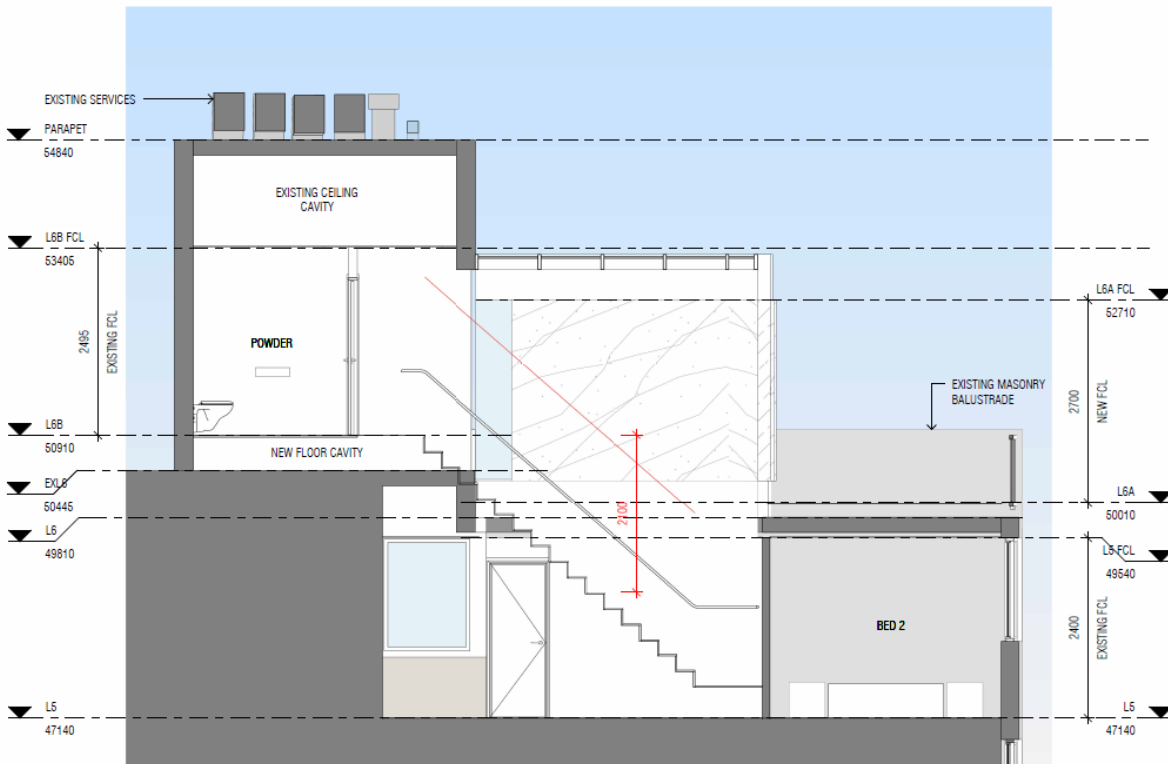


Figure 22: Proposed east west section.

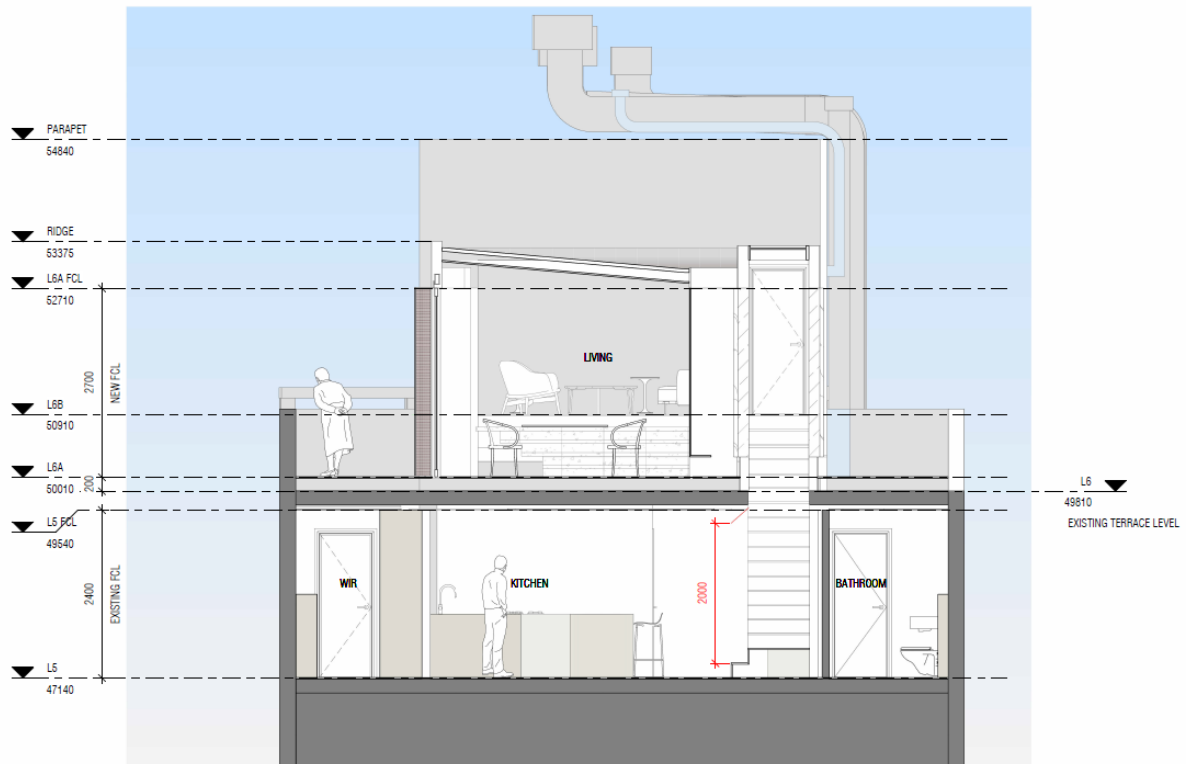


Figure 23: Proposed north south section.

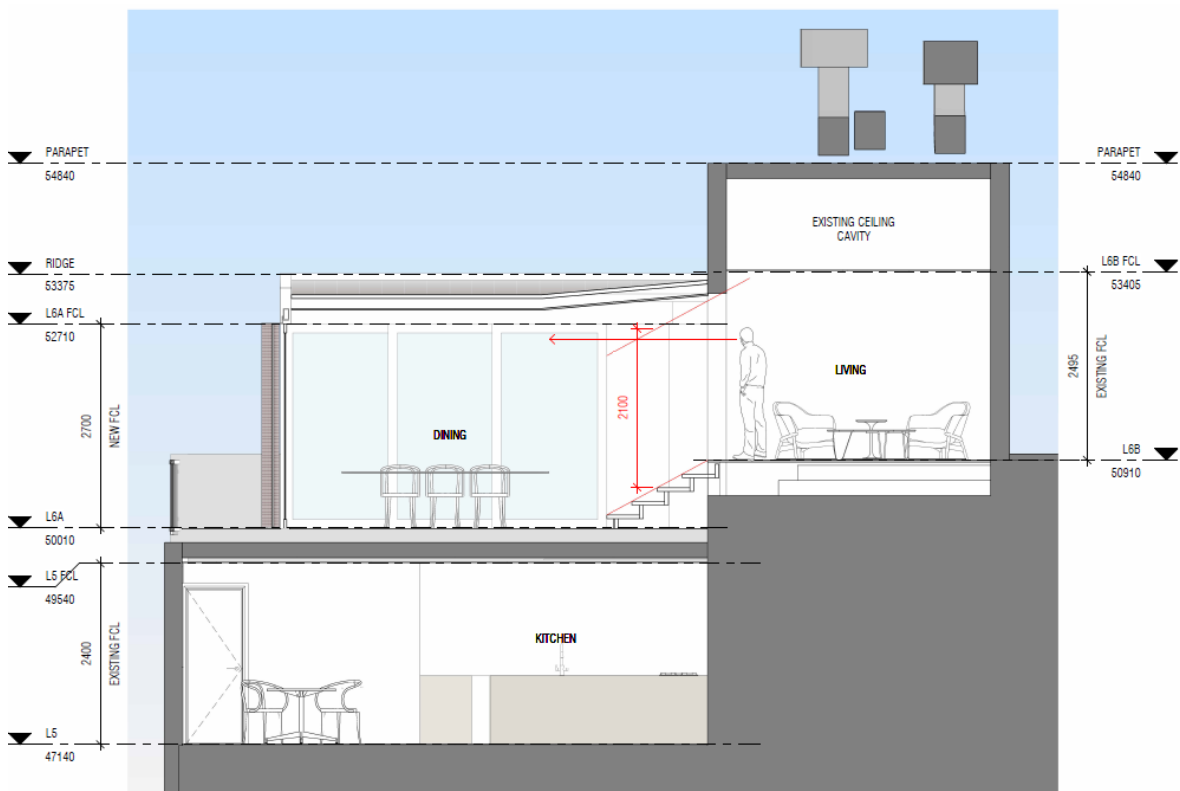


Figure 24: Proposed east west section.

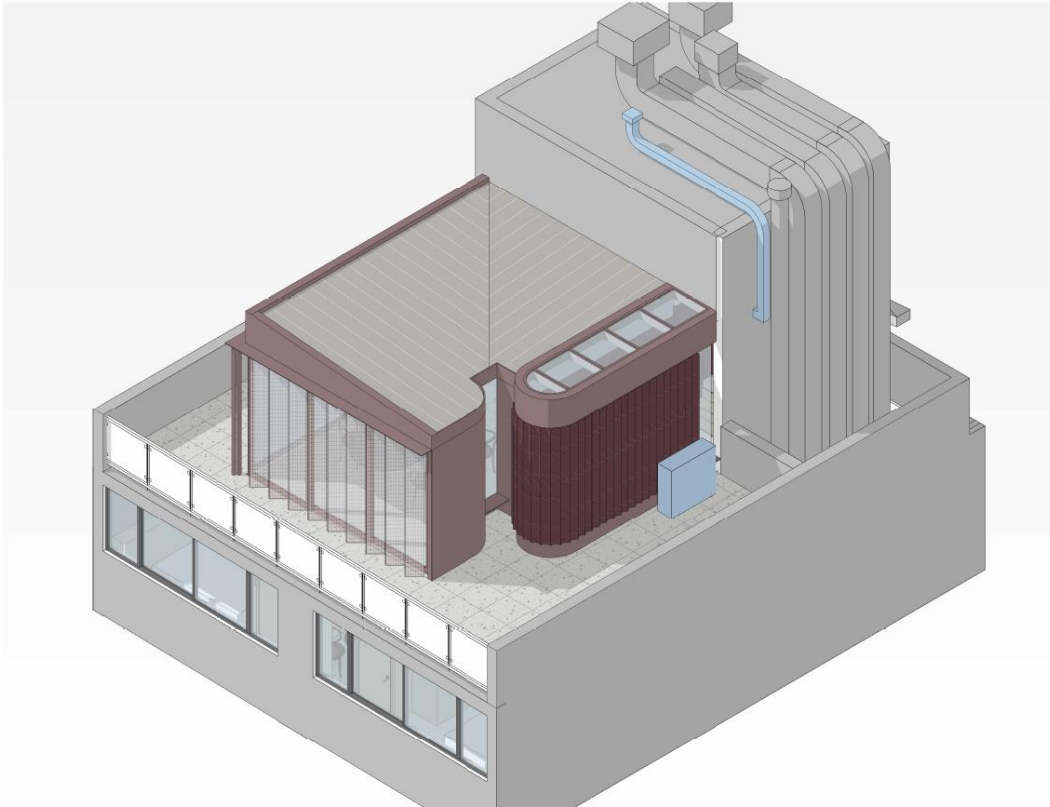


Figure 25: Proposed perspective.

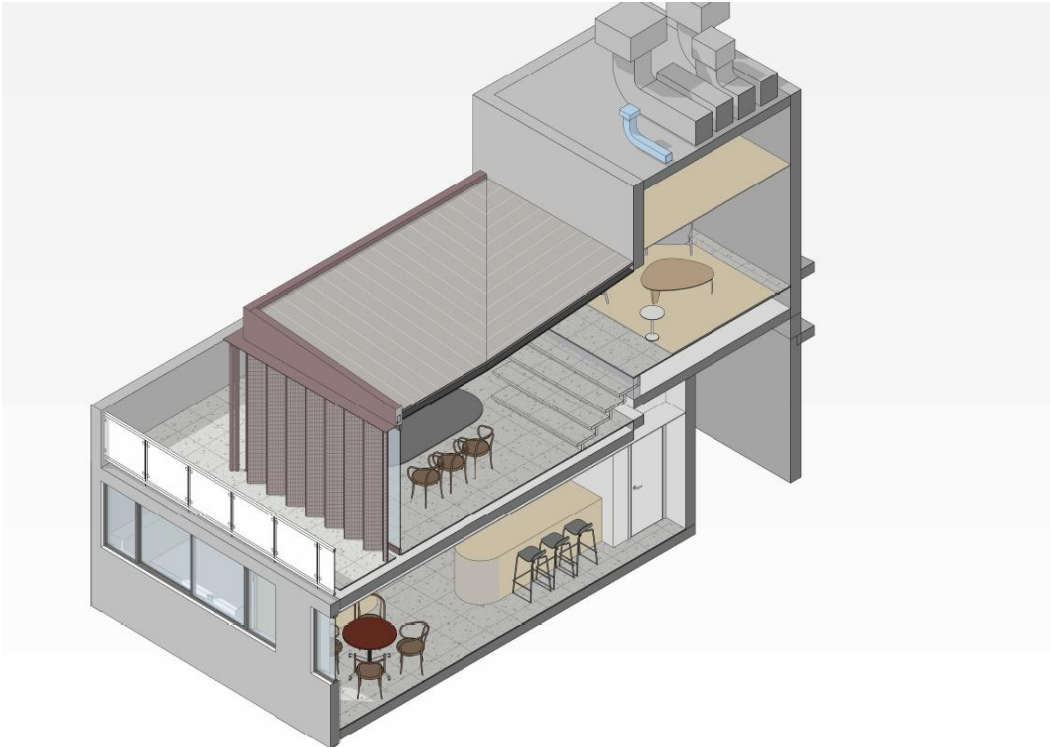


Figure 26: Proposed perspective section.



Figure 27: Proposed perspective - aerial view of north west corner.

Assessment

18. The proposed development has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

State Environmental Planning Policies

State Environmental Planning Policy No 65 - Design Quality of Residential Flat Development

19. The aim of State Environmental Planning Policy (SEPP) 65 is to improve the design quality of residential apartment development in New South Wales.
20. When determining an application for a residential flat development of three or more floors and containing four or more apartments, SEPP 65 requires the consent authority take into consideration a number of matters relating to design quality, including the design quality principles as set out in Schedule 1.

21. The proposal, however, does not seek to convert the existing building and does not constitute a substantial redevelopment or substantial refurbishment of the existing building for the following reasons:
- The proposal involves alterations and additions to one residential apartment in building comprising 15 apartments and one commercial tenancy. As a percentage of the total number of apartments, the proposal relates to 6 per cent of the development.
 - The proposal does not include any works to any other apartments or floors within the building and does not result in any additional apartments above what currently exists in the building.
 - The increase in floor area to the building, as a result of the development, is an increase of 22 square metres above the existing floor area of 869 square metres.
 - The increase in floor area to the building is 4 per cent above the existing floor space.
 - The proposed built form extending outside the existing envelope sits below the existing height of the building.
 - When viewed from the public domain, the view impact will be minimal.
22. In accordance with clause 4(1) of the SEPP, an assessment against SEPP 65 and the Apartment Design Guide (ADG) is therefore not required.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

23. The aim of the SEPP BASIX is to encourage sustainable residential development. A BASIX Certificate has been submitted with the development application A316153.
24. The BASIX certificate lists measures to satisfy BASIX requirements which have been incorporated into the proposal. A condition of consent is recommended ensuring the measures detailed in the BASIX certificate are implemented.

Local Environmental Plans

Sydney Local Environmental Plan 2012

25. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 is provided in the following sections.

Part 2 Permitted or prohibited development

Provision	Compliance	Comment
2.3 Zone objectives and Land Use Table	Yes	The site is located in the MU1 Mixed Use zone. The proposed development is defined as shop top housing and is permissible with consent in the zone. The proposal generally meets the objectives of the zone.

Part 4 Principal development standards

Provision	Compliance	Comment
4.3 Height of buildings	No	<p>A maximum building height of 12 metres is permitted.</p> <p>The existing building has a maximum height of 21.72 metres.</p> <p>The proposed works have a maximum height of 20.25 metres.</p> <p>The proposal does not increase the maximum height of the existing building.</p> <p>The proposed development does not comply with the height of buildings development standard.</p> <p>A request to vary the height of buildings development standard in accordance with Clause 4.6 has been submitted. See further details in the 'Discussion' section below.</p>
4.4 Floor space ratio	No	<p>A maximum floor space ratio of 2:1 or 546 square metres is permitted.</p> <p>The existing building has a floor space ratio of 3.18:1 or 869 square metres.</p> <p>A floor space ratio of 3.26:1 or 891 square metres is proposed.</p> <p>The proposal creates an additional 22 square metres of gross floor area.</p> <p>The proposed development does not comply with the floor space ratio development standard.</p> <p>A request to vary the floor space ratio development standard in accordance with Clause 4.6 has been submitted. See further details in the 'Discussion' section below.</p>
4.6 Exceptions to development standards	Yes	<p>The proposed development seeks to vary the development standard prescribed under Clause 4.3 and 4.4. A Clause 4.6 variation request has been submitted with the application.</p>

Provision	Compliance	Comment
		See further details in the 'Discussion' section below.

Part 5 Miscellaneous provisions

Provision	Compliance	Comment
5.10 Heritage conservation	Yes	<p>The site is located within the Potts Point heritage conservation area (C51).</p> <p>The proposed development was referred to Councils Heritage Specialist who advised the works will not have a detrimental impact on the heritage significance of the heritage conservation area.</p>

Part 6 Local provisions – height and floor space

Provision	Compliance	Comment
Division 4 Design excellence		
6.21 Design excellence	Yes	Subject to the design modification conditions included in the recommended conditions of consent, the proposed development is of a high standard and is compatible with the site's context. The development achieves the principle of ecologically sustainable development and has an acceptable environmental impact regarding the amenity of the surrounding area and future occupants.

Part 7 Local provisions – general

Provision	Compliance	Comment
Division 3 Affordable housing		
7.13 Contribution for purposes of affordable housing	Yes	The application is for alterations to an existing building that will not result in the creation of 200 square metres or more of residential gross floor area (GFA). The development is therefore excluded

Provision	Compliance	Comment
		and is not subject to a Section 7.13 affordable housing contribution.

Development Control Plans

Sydney Development Control Plan 2012

26. An assessment of the proposed development against the relevant provisions within the Sydney Development Control Plan 2012 is provided in the following sections.

Section 2 – Locality Statements

27. The site is located within the Kings Cross locality (2.4.7). The proposed development is in keeping with the unique character and the design principles of the Kings Cross locality.
- (a) The proposed development is located at the rooftop terrace level of an existing apartment building and will have a limited impact on the surrounding historic buildings or the surrounding heritage conservation area.
 - (b) The level 6 extension will not significantly impact on views from within and beyond the neighbourhood, including the neighbouring buildings at 204 - 212 Victoria Street and 10 Earl Place.
 - (c) The proposed alterations and additions are located substantially above street level and will maintain view corridors over terraces along Victoria Street towards the city skyline.
 - (d) The proposed alterations and additions complement the appearance of the existing building and will not alter the character of the area.

Section 3 – General Provisions

Provision	Compliance	Comment
3.5 Urban Ecology	Yes	The proposed development does not involve the removal of any trees and will not have an adverse impact on the local urban ecology.
3.6 Ecologically Sustainable Development	Yes	The proposal seeks to retain and upgrade an existing residential apartment. The proposed alterations and additions satisfy BASIX and environmental requirements.
3.9 Heritage	Yes	The site is located within the Potts Point heritage conservation area (C51). The

Provision	Compliance	Comment
		<p>building is identified as a detracting building.</p> <p>As detailed in the LEP compliance table the proposal was referred to Councils Heritage Specialist who advised the proposal will not have a detrimental impact on the heritage significance of the heritage conservation area.</p>

Section 4 – Development Types

4.2 Residential Flat, Commercial and Mixed Use Developments

Provision	Compliance	Comment
4.2.1 Building height		
4.2.1.1 Height in storeys and street frontage height in storeys	No	<p>The site is permitted a maximum building height of six storeys.</p> <p>The existing development is seven storeys in height. The proposed development does not seek to add any additional storeys.</p> <p>See further details under the sub-heading Building height in the 'Discussion' section below.</p>
4.2.1.2 Floor to ceiling heights and floor to floor heights	Yes	The proposed development achieves the minimum floor to ceiling height.
4.2.2 Building setbacks	Yes	<p>The 'Building setback and alignment map' does not provide a specific setback for the subject site. Accordingly, the setbacks must be consistent with adjoining buildings.</p> <p>The adjoining building immediately north of the site (no. 186 -188) provides a 0.8 metre setback at the upper level.</p> <p>The adjoining building immediately south of the site (no.194-196) provides a 1.8 metre setback to the front facade.</p> <p>The proposal includes a setback of 1.63 metres at the seventh storey.</p>

Provision	Compliance	Comment
		See further details under the sub-heading Building Setbacks in the 'Discussion' section below.
4.2.3 Amenity		
4.2.3.1 Solar access	Yes	<p>The proposed will not result in additional shadow to the neighbouring properties habitable rooms or private open space.</p> <p>The proposal will create additional shadow to the subject unit's private open space. However, the overshadowing is acceptable as the unit will continue to achieve in excess of 2 hours of direct solar access to more than 5 square metres of its private open space in accordance with the control.</p>
4.2.3.3 Internal common areas	Yes	No changes are proposed to the existing internal common areas, corridors or lift lobbies.
4.2.3.4 Design features to manage solar access	Yes	The proposed sliding sun screen, attached to the building facade will protect the new west facing windows.
4.2.3.7 Private open space and balconies	Yes	<p>The existing private open space will continue to be directly accessible from the proposed living/dining area of the dwelling.</p> <p>The private open space is approximately 35 square metres exceeding the requirements of the DCP.</p>
4.2.3.8 Common open space	Yes	No changes are proposed to the existing common open space areas.
4.2.3.9 Ventilation	Yes	<p>The existing unit is currently a single facing apartment at both upper and lower levels.</p> <p>The proposal results in an addition with multiple external faces at the upper level facilitating improved natural ventilation.</p>

Provision	Compliance	Comment
4.2.3.10 Outlook	Yes	The proposed alterations and additions will retain the existing outlook from the apartment.
4.2.3.11 Acoustic privacy	Yes	The proposed addition is located directly above the lower level of the subject unit. The acoustic amenity of the apartment immediately below and the surrounding properties will not be unreasonably impacted by the proposed works.
4.2.6 Waste and recycling Management	Yes	<p>The existing waste and recycling system is to be retained and remains adequate as there is no proposed increase to the number of dwellings.</p> <p>A standard condition is recommended to ensure the proposed development complies with the relevant provisions of the City of Sydney Guidelines for Waste Management.</p>

Discussion

Clause 4.6 Request to Vary a Development Standard

Height of Building

28. The site is subject to a maximum height of buildings control of 12 metres.
29. The proposal does not seek to increase the height of the existing building.
30. The existing building has a height of 21.72 metres, which equates to an existing 81 per cent exceedance of the height of buildings control.
31. The proposed addition at the rooftop terrace occurs at a height of 20.25 metres, which equates to a 68.8 per cent exceedance of the height of buildings control.
32. A written request has been submitted to Council in accordance with Clause 4.6(3)(a) and (b) of the Sydney LEP 2012 seeking 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;
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard;

- (c) The proposed development will be consistent with the objectives of the zone;
and
- (d) The proposed development will be consistent with the objectives of the standard.

Applicant's Written Request - Clause 4.6(3)(a) and (b)

33. The applicant seeks to justify the contravention of the height of building development standard on the following basis:

- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case:
 - (i) The applicant's statement refers to the five tests established in *Wehbe v Pittwater Council* [2007] NSW LEC 827 to demonstrate that compliance with the numerical standard is unreasonable or unnecessary. The report relies on Test 1, which is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The applicant's justification against the objectives of the height of building development standard is provided in (d) below.
- (b) That there are sufficient environmental planning grounds to justify contravening the standard:
 - (i) The aspect of the development which contravenes the development standard is the roof top addition. The addition is contained well-below the height of the existing building to minimise the visual impact to adjoining properties and the streetscape along Victoria Street.
 - (ii) The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - The proposal promotes the orderly and economic use and development of land through the efficient use of the existing infrastructure to meet the housing needs of the community (1.3(c)).
 - The proposed development will maintain the general bulk and scale of the existing surrounding built environment and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
 - Similarly, the proposed works will provide for excellent residential amenity within a built form which is compatible with the streetscape of Victoria Street and will not alter the streetscape appearance to Victoria Street, which also promotes the orderly and economic use of the land (cl 1.3(c)).
 - The proposed development is considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g).
 - The proposed new works and in particular the inclusion of a low-profile roof form and setback to Victoria Street demonstrates good design and improves the amenity of the built environment by creating and improved and functional living area and also suitably maintains the views and solar access enjoyed by neighbouring properties (1.3(g)).

- (iii) The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst minimising the impacts of bulk as viewed from the public domain. These are not simply benefits of the development as a whole but are benefits emanating from the breach of the maximum building height control.
- (c) The proposed development will be consistent with the objectives of the zone;
- (d) Each of the objectives of the MU1 Mixed Use and the reasons why the proposed development is consistent with each objective is set out below:
- (i) ***To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.***
- The proposal retains the existing retail uses at the ground level, continuing to provide a diversity of land uses that generate employment opportunities.
- (ii) ***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.***
- The proposed works located at level 6 will not have any adverse impact on the existing street frontage with the works being largely imperceptible from the Victoria Street streetscape. The proposal will continue to provide for a diverse and active street frontage, providing for high-quality pedestrian amenity, while continuing to provide for a vibrant, diverse and functional street.
- (iii) ***To minimise conflict between land uses within this zone and land uses within adjoining zones.***
- The site and development are well-removed from nearby zones with a consistency of land uses in the surrounding area. The proposed works and resulting building height encroachment will not generate unwanted conflict between land uses within the zone and other land uses within adjoining zones.
- (iv) ***To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.***
- The proposed development will not alter the existing retail, business and other non-residential land uses on the ground floor of surrounding buildings with the existing retail uses on the subject site being unaffected.
- (v) ***To ensure land uses support the viability of nearby centres.***
- The existing land uses will not be altered and will continue to support viability of Potts Point and surrounding areas.
- (vi) ***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 proposal will continue to provide for a suitable use of land uses, namely residential and retail uses within an accessible location located nearby to public transport. The proposal will encourage public transport patronage and encourage walking and cycling.

(e) The proposed development will be consistent with the objectives of the standard:

(i) ***(a) to ensure the height of development is appropriate to the condition of the site and its context***

The Objective of Clause 4.3(1)(a) seeks to ensure buildings are compatible with the height and scale of surrounding and nearby development.

The surrounding area is predominantly characterised by a range of land uses, including building heights, many of which exceed the height control.

The proposal seeks to utilise an existing rooftop terrace by providing additional living space and amenity for the occupants. The proposed works remain well-below the existing, non-compliant building height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing for a setback from the front building edge to minimise the perceived visual bulk and additional height, as viewed from within the Victoria Street streetscape.

The proposed external colour and materials palette utilises recessive finishes and is intended to ensure that the building's visual height and scale is further minimised.

(ii) ***(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,***

The subject development maintains consistency with the existing surrounding development within the Potts Point Conservation Area and will not detract from the significance of any nearby heritage items.

(iii) ***(c) to promote the sharing of views outside Central Sydney***

The proposal will not see any change to the existing overall building height of the development and will therefore not result in any loss of views for neighbouring properties.

Consideration of Applicant's Written Request - Clause 4.6(4) (a) (i) and (ii)

34. Development consent must not be granted unless the consent authority is satisfied that:

(a) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 3 of Clause 4.6 being that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the standard; and

- (b) 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.

Does the written request adequately address those issues at Clause 4.6(3)(a)?

- 35. The applicant has referred to the five tests established by Preston CJ in *Wehbe v Pittwater* to demonstrate that compliance with the standard is unreasonable or unnecessary in the circumstances of the case. The applicant's statement has correctly considered Test 1 and has demonstrated that the development meets the objectives of clause 4.3, notwithstanding non-compliance with the numerical standard.
- 36. The proposal aims to repurpose an existing rooftop terrace to create additional living space and amenities for the occupants. It is noted that many buildings in the surrounding area already exceed the height standard. Importantly, the proposed modifications will not surpass the current height of the existing building, ensuring perceived bulk and scale of the addition from Victoria Street is minimised.
- 37. The overall building height respects the surrounding character of the area and the design seeks to minimise the perception of the additional height by providing for front and side setbacks at the upper level to minimise the perceived visual bulk and additional height, as viewed from within the Victoria Street streetscape and surrounding heritage conservation area.

Does the written request adequately address those issues at clause 4.6(3)(b)?

- 38. The statement provides environmental planning grounds specific to the circumstances to justify the extent of non-compliance with the floor space ratio development standard.
- 39. The aspect of the development that does not meet the standard is the rooftop addition. However, this addition is kept significantly lower than the existing building's height to reduce its visual impact on neighbouring properties and the streetscape along Victoria Street
- 40. The proposal aligns with land use efficiency by utilising existing infrastructure for community housing needs. It maintains the surrounding area's bulk and scale while adhering to architectural consistency, promoting orderly land use. Additionally, the development enhances residential amenity without significantly altering the streetscape, further supporting orderly land use. Furthermore, it promotes good design, enhancing both residential amenity and the immediate area. The inclusion of low-profile roof features and setbacks to Victoria Street illustrates good design, improving the built environment's amenity and preserving neighbouring properties' views and solar access.
- 41. The applicant has therefore demonstrated that there are sufficient environmental planning grounds to support the extent of variation proposed.

Is the development in the public interest?

- 42. The objectives of the height of building development standard relevant to the proposal include:
 - (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 outside Central Sydney,
43. The proposal is consistent with the relevant objectives of the height of building development standard, as follows:
- (a) The proposed addition does not increase the height of the subject building, the proposed additions is set 1.47 metres below the top of the building.
 - (b) The overall building height respects the surrounding character and the design seeks to minimise the perceived height of the addition by providing for a setback from the front building edge to minimise the visual bulk and additional height, as viewed from within the Victoria Street streetscape.
 - (c) The proposal will not lead to any significant loss of views for neighbouring properties as it does not involve alterations above the existing overall building height.
44. Objectives of the MU1 Mixed Use zone:
- (a) To provide a mixture of compatible land uses.
 - (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.
 - (c) To ensure uses support the viability of centres.
45. The proposed development is consistent with the relevant objectives of the MU1 Mixed Use zone as follows:
- (a) The proposal does not change the existing land uses, does not impact on the ground floor commercial tenancies and does not prevent a mix of other compatible land uses from being provided in the locality.
 - (b) The site is in a highly accessible location with good access to public transport options along Victoria Road, including buses and rail. The proposal will not diminish public transport patronage, walking or cycling in the area.
 - (c) The proposal will improve the amenity of the existing residential use. The residential use of the site will continue to support the viability of the mixed-use zone.

Conclusion

46. For the reasons provided above the requested variation to the height of building development standard is supported as the applicant's written request has adequately addressed the matters required to be addressed by cl 4.6 of the Sydney Local Environmental Plan 2012 and the proposed development would be in the public interest because it is consistent with the objectives of height of buildings and the MU1 Mixed Use zone.

Floorspace Ratio

47. The site is subject to a maximum floor space ratio control of 2:1 or 546 square metres. The existing building has a floor space ratio of 3.18:1 or 869 square metres. The proposed development creates an additional 22 square metres of gross floor area and has a floor space ratio of 3.18:1 or 891 square metres.
48. A written request has been submitted to Council in accordance with Clause 4.6(3)(a) and (b) of the Sydney LEP 2012 seeking 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;
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard;
 - (c) The proposed development will be consistent with the objectives of the zone; and
 - (d) The proposed development will be consistent with the objectives of the standard.

Applicant's Written Request - Clause 4.6(3)(a) and (b)

49. The applicant seeks to justify the contravention of the floor space ratio development standard on the following basis:
- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case:
 - (i) The applicant's statement refers to the five tests established in *Wehbe v Pittwater Council* [2007] NSW LEC 827 to demonstrate that compliance with the numerical standard is unreasonable or unnecessary. The report relies on Test 1, which is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The applicant's justification against the objectives of the floor space ratio development standard is provided in (d) below.
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard:
 - (i) The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - The proposed alterations and additions to the dwelling introduce modulation and architectural relief to the building's facade, without seeing any substantial increase to the building's bulk, which promotes good design and improves the amenity of the built environment (1.3(g)).
 - The proposed addition will maintain the general bulk and scale of the existing surrounding dwellings and maintains architectural consistency with the prevailing development pattern which promotes the orderly and economic use of the land (cl 1.3(c)).

- (ii) The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst minimising the calculable gross floor area and manages the bulk and scale and maintains views over and past the building from the public and private domain.
 - (iii) The minor additional floor area at the roof level of the building will provide for a more flexible floor area arrangement to meet the work from home requirements of a modern work environment, which presents the opportunity for the owners to enjoy the existing development and support future family residential accommodation.
 - (iv) These are not simply benefits of the development as a whole but are benefits emanating from the breach of the floor space ratio control.
 - (v) It is noted that in Initial Action, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome.
 - (vi) As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.
- (c) The proposed development will be consistent with the objectives of the zone. Each of the objectives of the MU1 Mixed Use and the reasons why the proposed development is consistent with each objective is set out below:
- (i) ***To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.***

The proposal retains the existing retail uses at the ground level, continuing to provide a diversity of land uses that generate employment opportunities.
 - (ii) ***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.***

The proposed works located at level 6 will not have any adverse impact on the existing street frontage with the works being largely imperceptible from the Victoria Street streetscape. The proposal will continue to provide for a diverse and active street frontage, providing for high-quality pedestrian amenity, while continuing to provide for a vibrant, diverse and functional street.
 - (iii) ***To minimise conflict between land uses within this zone and land uses within adjoining zones.***

The site and development are well-removed from nearby zones with a consistency of land uses in the surrounding area. The proposed works and resulting building height encroachment will not generate unwanted conflict between land uses within the zone and other land uses within adjoining zones.

- (iv) ***To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.***

The proposed development will not alter the existing retail, business and other non-residential land uses on the ground floor of surrounding buildings with the existing retail uses on the subject site being unaffected.

- (v) ***To ensure land uses support the viability of nearby centres.***

The existing land uses will not be altered and will continue to support viability of Potts Point and surrounding areas.

- (vi) ***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 proposal will continue to provide for a suitable use of land uses, namely residential and retail uses within an accessible location located nearby to public transport. The proposal will encourage public transport patronage and encourage walking and cycling.

- (d) The proposed development will be consistent with the objectives of the standard:

Each objective of the floor space ratio standard and reasoning why compliance is unreasonable or unnecessary is set out below:

- (i) ***To provide sufficient floor space to meet anticipated development needs for the foreseeable future.***

The proposal seeks to provide for a modest increase in the gross floor area through the provision of a living and dining area at the roof level, which does not alter the overall existing height of building and is not prominently visible from any surrounding public spaces.

The minor increase in floor area for the subject dwelling will enhance the residential opportunity for the dwelling and meet anticipated needs of the occupants through additional flexible floor space for a range of uses, which is important in the modern work/life balance requiring work from home opportunities.

- (ii) ***To regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic.***

The proposed modest changes to the dwelling to increase the floor area will not result in any substantial change in the bulk, scale and density of the development and will not result in additional vehicle or pedestrian traffic generation.

- (iii) ***To provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure.***

The proposed additional floor area will not place further demand on public infrastructure nor result in additional traffic generation in the locality.

- (iv) ***To ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.***

The proposed additional floor area has been located at the roof level and is not prominently visible from the surrounding public places in Victoria Street.

The works will not have any direct or adverse impact on the solar access amenity or outlook for the neighbouring properties.

Consideration of Applicant's Written Request - Clause 4.6(4) (a) (i) and (ii)

50. Development consent must not be granted unless the consent authority is satisfied that:
- (a) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 3 of Clause 4.6 being that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the standard; and
 - (b) 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.

Does the written request adequately address those issues at Clause 4.6(3)(a)?

51. The applicant has referred to the five tests established by Preston CJ in *Wehbe v Pittwater* to demonstrate that compliance with the standard is unreasonable or unnecessary in the circumstances of the case. The applicant's statement has correctly considered Test 1 and has demonstrated that the development meets the objectives of clause 4.4, notwithstanding non-compliance with the numerical standard.
52. The applicant has identified that the increase to the gross floor area is modest (22 square metres), will not result in an intensification of the use of the apartment and will improve the overall amenity of the existing apartment.
53. Granted the increase to the gross floor area is modest, the applicant has adequately demonstrated that the additional floor area will not result in an increase in vehicular or pedestrian traffic and will not place any additional demands on infrastructure.
54. The overall built form will generally remain the same, ensuring that the character of the building and locality is maintained. The design and location of the addition will also ensure that there are no adverse impacts on the amenity of the locality, including in terms of overshadowing or view loss.

Does the written request adequately address those issues at clause 4.6(3)(b)?

55. The statement provides environmental planning grounds specific to the circumstances to justify the extent of non-compliance with the floor space ratio development standard.
56. The addition is integrated with the architecture of the building and will improve the functionality and amenity of the apartment, while causing no adverse overshadowing, visual or other environmental impacts.

57. The written request asserts the proposal provides sufficient floor area for future occupants whilst minimising the calculable gross floor area and manages the bulk and scale and maintains views over and past the building from the public and private domain.
58. The applicant has therefore demonstrated that there are sufficient environmental planning grounds to support the extent of variation proposed.

Is the development in the public interest?

59. The objectives of the floor space ratio development standard relevant to the proposal include:
 - (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
 - (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
 - (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
 - (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.
60. The proposal is consistent with the relevant objectives of the floor space ratio development standard as follows:
 - (a) The proposed alterations and additions to the building will result in only minor changes to the existing building envelope and will therefore continue to be compatible with the built form and density of surrounding developments.
 - (b) The proposed changes to the existing unit will not result in any substantial change in the bulk, scale and density of the development and will not result in additional vehicle or pedestrian traffic generation.
 - (c) The development proposed alterations and additions to the building fit comfortably within the existing streetscape in terms of scale and function. The proposed additions will positively complement the existing architectural character of the building and the surrounding locality.
 - (d) The proposed variation to the floor space ratio standard will not result in any adverse environmental planning impacts, including overshadowing, overlooking or view loss, and will not negatively impact on the amenity of the locality.
61. Objectives of the B4 Mixed Use zone:
 - (a) To provide a mixture of compatible land uses.
 - (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.
 - (c) To ensure uses support the viability of centres.

62. The proposed development is consistent with the relevant objectives of the MU1 Mixed Use zone as follows:
- (a) The proposal does not change the existing land uses, does not impact on the ground floor commercial tenancies and does not prevent a mix of other compatible land uses from being provided in the locality.
 - (b) The site is in a highly accessible location with good access to public transport options along Victoria Road, including buses and rail. The proposal will not diminish public transport patronage, walking or cycling in the area.
 - (c) The proposal will improve the amenity of the existing residential use. The residential use of the site will continue to support the viability of the mixed-use zone.

Conclusion

63. For the reasons provided above the requested variation to the floor space ratio development standard is supported as the applicant's written request has adequately addressed the matters required to be addressed by cl 4.6 of the Sydney Local Environmental Plan 2012 and the proposed development would be in the public interest because it is consistent with the objectives of floor space ratio development standard and the MU1 Mixed Use zone.

Height in storeys

64. The site is permitted a maximum building height of six storeys.
65. The existing building is seven storeys in height with a street frontage height of six storeys. The proposed development does not seek to add any additional storeys.
66. The existing seventh storey is not readily perceptible from the public domain. The proposal extends the front façade of the seventh storey by 5.6 metres to the west toward Victoria Street.
67. The objective of 4.2.1 Building Height is to ensure the height in storeys and street frontage height in storeys reinforces the existing or future neighbourhood character. Drawing on Principle (b) of the locality statement for Kings Cross (2.4.7) 'Development is to respond to and complement subdivision, heritage items and contributory buildings within heritage conservation areas, including streetscapes and lanes'.
68. As noted within 5.10 heritage conservation of the LEP compliance table of this report Councils Heritage Specialist advised the works will not have a detrimental impact on the heritage significance of the heritage conservation area responding to the principle and future neighbourhood character accordingly.
69. The proposed extension of the existing seventh storey results in a front setback of 1.63 metres (further discussion below under heading 'Building Setbacks'). In reviewing the updated site lines provided by the applicant the extension, whilst visible, will not be readily apparent from the public domain. The addition is not highly visible from the street and the primary 6 storey elevation to Victoria Street will remain. The proposal results in a modest addition that responds to and complements the streetscape in accordance with Principle (b), and by extension, the Building Height objective despite the existing numerical non-compliance in height in storeys.

Building Setbacks

70. The proposal includes construction of a new addition to the upper level of the subject apartment, outside of the existing building envelope, located on the existing rooftop terrace area. The existing seventh storey has a front setback of approximately 6.9 metres. The proposed setbacks of the addition at the roof terrace level retains a 2-metre setback from the northern side boundary, a 1.96 metre setback from the southern side boundary and proposes a 1.63 metre setback from the front Victoria Street (west) boundary.
71. As detailed under the 'Amendments' section of the report the applicant was requested to provide a 3-metre front setback in accordance with Section 4.2.2.2 (2) of Sydney DCP 2012. Section 4.2.2.2(1) of the Sydney DCP 2012 requires this setback to be provided where adjacent buildings include an upper level setback. The DCP 'Building setback and alignment map' does not provide a specific setback for the subject site.
72. The applicant did not amend the scheme to provide an increased setback and responded contending that the provision of a 3-metre setback would make the proposed addition unviable as the space would be too small for their intended purpose as living and dining rooms.
73. Council requested further site lines from the public domain to facilitate an assessment of the impact the proposal will have on the public domain, namely when viewed from the west side of Victoria Road.
74. Following the applicant's response a further assessment of the proposed setbacks was undertaken. The assessment found the following:
 - (a) The surrounding Victoria Street streetscape is categorised by mostly Victorian and Federation buildings with some modern infill buildings. The adjoining buildings are much lower in height and the setbacks provided are varied with no consistent setback at the street or upper levels.
 - (b) The addition is designed with setbacks to align with the current side walls, as well as a setback from the street. The height of the addition is kept lower than the existing roof structures, including a redesigned stair enclosure. The height and setbacks ensure minimal visibility from the street, preserving the buildings primary 6 storey elevation facing Victoria Street.
 - (c) The proposal was reviewed by Councils Heritage Specialist who advised the works will not have detrimental impact on the heritage significance of the heritage conservation area.
 - (d) The proposal maintains view corridors over terraces along Victoria Street towards the city skyline by maintaining the existing side setbacks currently provided at the seventh storey.
75. Overall, the proposal entails a modest addition that is not readily perceptible from the public domain and largely maintains the buildings height, bulk, and scale when viewed from the street. The proposal aligns with the objectives of the 4.2.2 Building setback provision and is acceptable.

Level 5 Windows

76. The proposal includes the reconfiguration and replacement of the fenestration to the western facade at level 5 to accommodate the proposed internal reconfiguration at level 5.
77. Concern was raised regarding the reconfiguration of the windows, as while this glazing may not be highly visible from the public domain, it may serve as a precedent for other floors, which has the potential to compromise the architectural expression of the façade.
78. As detailed under the 'Amendments' section the applicant was requested to amend the level 5 fenestration so:
 - The replacement of windows to the western elevation at level 5 be 'like for like' with the same size, proportion and makeup of windows.
 - Window frames are to be the same material, colour and frame section. The glazing colour is to match existing. The operability must match existing and be depicted on the drawings.
 - The proposed internal walls to bed 1 and bed 2 are not to meet the windows as proposed, as it results in an undesirable outcome and uncharacteristic to the building.
79. The applicant did not respond or make any submissions with regard to this aspect of Council's request. A condition of consent is recommended requiring design modifications reflective of Council's original request for amendments.

Materials and Samples

80. As detailed within the 'Amendments' section of the report the specific materials, colours and finishes are required to be provided on a materials, finishes and colours schedule, keyed to each elevation. It was also requested the dark roof be removed as it unnecessarily contributes to the urban heat island effect - a lighter colour is preferred.
81. The applicant did not respond or make any submissions with regard to this aspect of Council's request.
82. A condition of consent has been recommended requiring a detailed material, colours and finishes schedule (including visible rainwater goods and services) keyed to each building elevation must be submitted to and approved by Council's Area Planning Manager prior to a Construction Certificate being issued.

Heat Pump

The proposal includes a heat pump to the southern elevation of the seventh storey. It is located on the most sensitive side of the building and should be relocated to the northern side, away from the adjacent apartment buildings. A condition of consent is recommended requiring its relocation.

Relevant Legislation

83. Environmental Planning and Assessment Act 1979.

Conclusion

84. The application seeks approval for alterations and additions to an existing residential apartment, including internal alterations, new and replacement windows, construction of a new addition to the upper level of the apartment, outside of the existing building envelope, to accommodate a new dining/living room addition.
85. The applicant has submitted a written request pursuant to clause 4.6 of the Sydney LEP 2012 which relates to the height of buildings and floor space ratio development standards (clause 4.3 and 4.4 of the Sydney LEP 2012). The request to vary the development standard is supported.
86. Additional information was submitted during the assessment of the application to address a number of matters identified by Council staff.
87. The proposal has satisfactorily demonstrated that the proposal will not have an adverse impact in terms of noise disturbance, overshadowing or view loss.
88. The alterations and additions result in a sympathetic design solution for the 7-storey building and will not have an adverse impact on the amenity of the neighbouring properties. Subject to conditions the proposal will exhibit design excellence in accordance with the provisions of Clause 6.21C of the Sydney LEP 2012.
89. The development is in the public interest and recommended for approval.

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