

# **Attachment C**

<p><b>Clause 4.6 Variation Request – Height of Buildings</b></p>
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# **SYDNEY LEP 2012**

## **Clause 4.6 Exceptions to Development Standards – Height of Buildings**

Demolition of Existing Building and Construction of a New  
Residential Flat Building at

**No. 355-357 Liverpool  
Street, Darlinghurst**

Prepared for:

**Gumble Pty Ltd**

Prepared by:

**GSA PLANNING**

Urban Design, Environmental & Traffic Planners

(A.B.N 89 643 660 628)

95 Paddington Street, Paddington NSW 2021

p: 02 9362 3364

e: [info@gsaplanning.com.au](mailto:info@gsaplanning.com.au)

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**SYDNEY LOCAL ENVIRONMENTAL PLAN (LEP) 2012  
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS**

**APPLICANT'S NAME:** Gumble Pty Ltd

**SITE ADDRESS:** No. 355-357 Liverpool Street, Darlinghurst

**PROPOSAL:** Demolition of Existing Building and Construction of a New Residential Flat Building

1.

**(i) Name of the applicable planning instrument which specifies the development standard:**

Sydney Local Environmental Plan (LEP) 2012

**(ii) The land is zoned:**

R1 General Residential. The objectives of the R1 General Residential Zone are as stated:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maintain the existing land use pattern of predominantly residential uses.

**(iii) The number of the relevant clause therein:**

Clause 4.3 – Height of Buildings which is stated as follows:

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

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

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

**Note—**

*No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.*

*(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.*

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

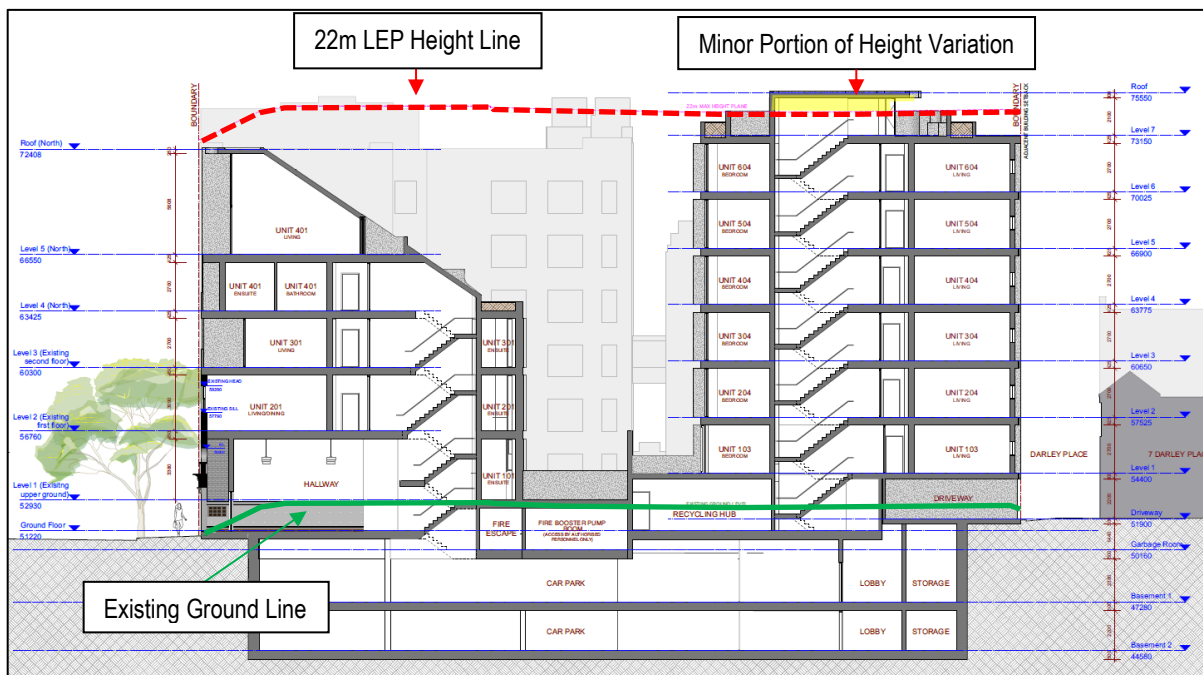
## 2. Overview

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law. In our opinion, the variation achieves the objectives of the zone and development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

## 3. Specify the nature of Development Standard sought to be varied and details of variation:

The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This Clause operates in conjunction with the height map which indicates a maximum 22m applies to the subject site. Clause 4.3 is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

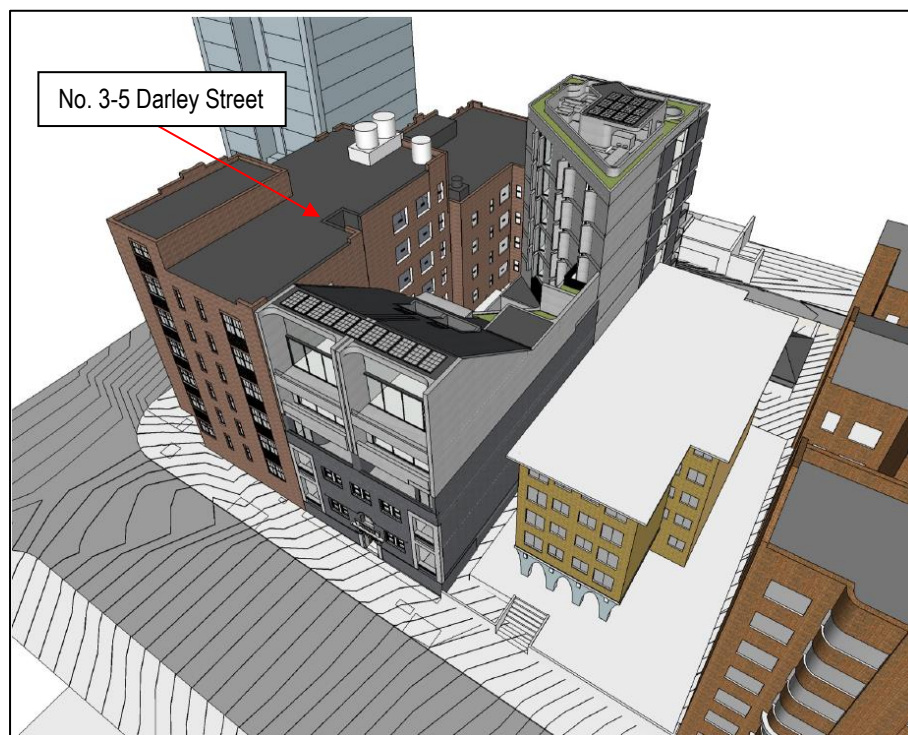
The proposal consists of demolition of the existing building and construction of a new part five and part eight storey residential flat building located above two basement levels. The building is split up into two built forms. The street frontage building is five storeys and has a maximum height of 21.29m, measured from RL 72.408 AHD to the existing ground level immediately below, and complies with the height development standard. The rear built form is eight storeys and has a maximum height of 23.76m, measured from RL 75.55 AHD to the existing ground level immediately below, exceeding the development standard by 1.76m, being a 8% breach (see **Figure 1**). The height breach of the rear built form is restricted to the upper most portion of the stair enclosure that provides access to the roof top communal open space area.



Source: X.PACE

**Figure 1: Long Section Demonstrating Proposed Building Height**

The site is constrained by several single aspect units at No. 3-5 Darley Place which are orientated toward the subject site and rely on the subject site for 'borrowed amenity'. Therefore, the proposal has been cleverly and sympathetically designed to provide two built forms with a splayed eastern facade to maintain solar penetration, outlook and ventilation to the single aspect units at No. 3-5 Darley Street (see **Figure 2**). The siting of the proposal to maintain solar penetration and ventilation to No. 3-5 Darley Street reduces the area of the site that can be constructed on. While the proposal does result in a breach of the height development standard to the upper most portion of the rear built form, the height breach is considered a better planning outcome than providing a typical built form constructed to the eastern boundary that would obliterate solar penetration, outlook and ventilation for the single aspect dwellings at No. 3-5 Darley Place.

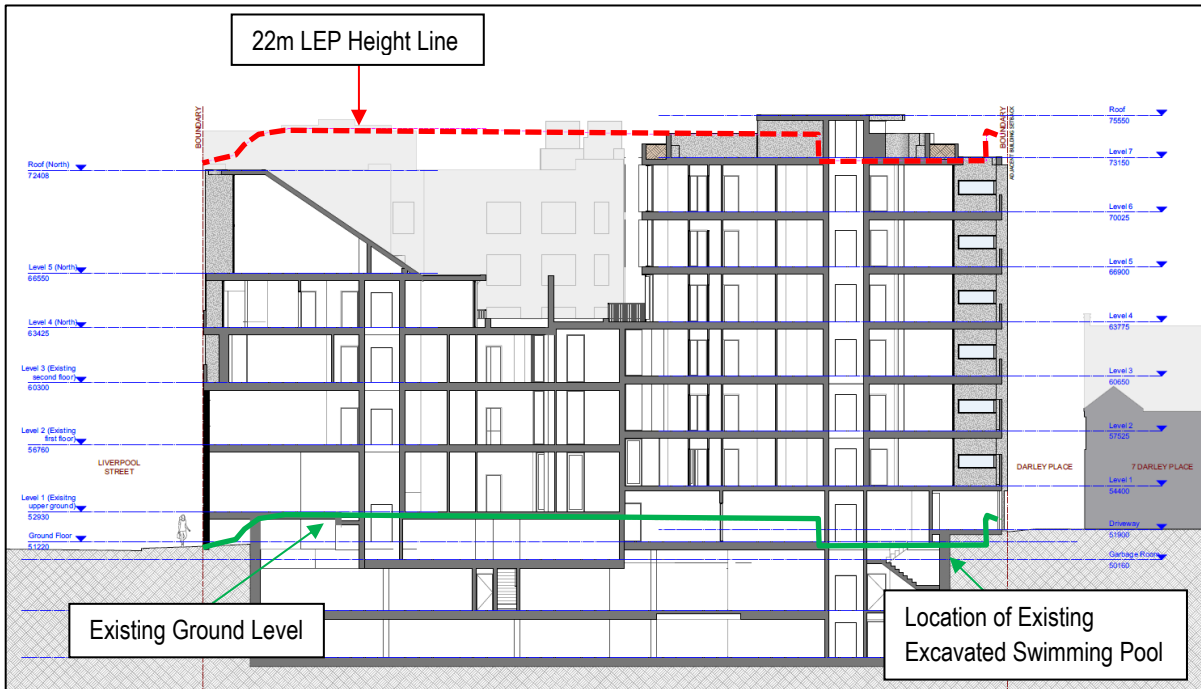


Source: Atlas Urban

**Figure 2:** 3D View of Proposed Built Form

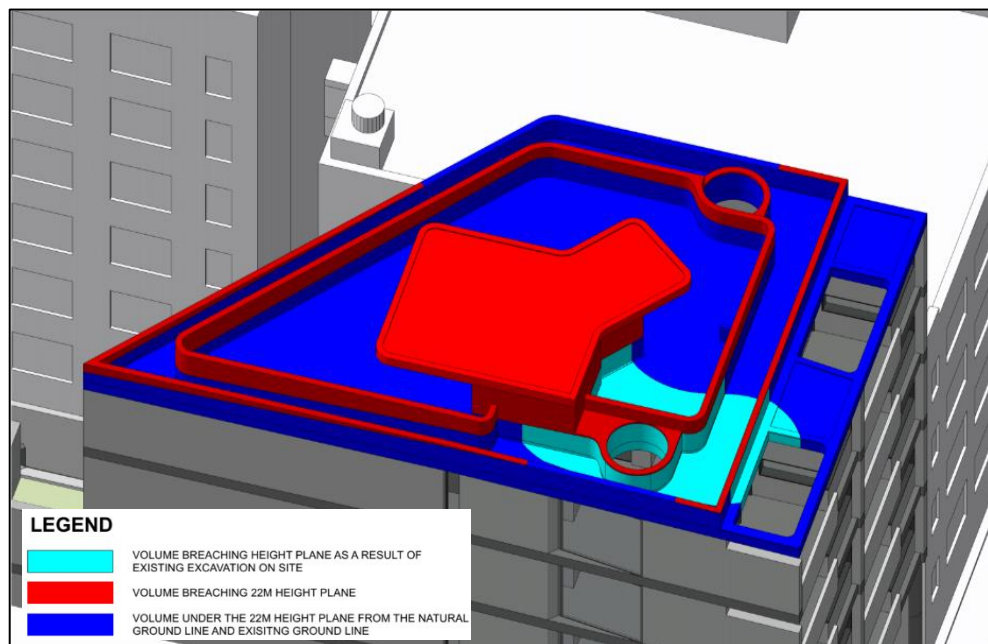
The height variation is a result of the proposal providing access to a roof top communal open space that meets the solar access requirements of the ADG. It must be noted that the height non-compliant portion of the development is well set back from Liverpool Street and is also set back from Darley Place and neighbouring development. The variation is centrally located on the rear roof and does not dominate the streetscape.

It must also be noted that a portion of the height breach is considered a technical height variation as it is a function of previous excavation for a swimming pool on site (see **Figures 3 and 4** on the following page). The proposed height variation is reduced when the height is measured from what would be considered the natural ground line. This is discussed in light of *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (*Bettar*) (see below). This is also consistent with the Court's recent decision in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 (*Merman*).



Source: X.PACE

**Figure 3: Long Section Cutting Through Existing Swimming Pool at Rear**



Source: X.PACE

**Figure 4: 3D View Demonstrating Height Breach**

As noted, the proposal includes demolition of the existing building and construction of a new residential flat building. The interpretation of building height has been considered by the Court in *Bettar*. In *Bettar*, the Court dealt with a site with similar characteristics to the subject site, in that an excavated area was existing. The Court took the approach of measuring height with the intent, in part, of relating the development proposal to its context. The following pertinent comments were made:

*It is relevant to consider the objectives of the building height development standard in considering how best to*

determine the maximum height of the building using the dictionary definitions in LEP 2012. As one of the purposes of the development standard is to relate the proposal to its context, it follows that **the determination of the existing ground level should bear some relationship to the overall topography** that includes the site...

The definition of basement in LEP 2012 is the space of a building where the floor level of that space is predominantly below existing ground level and where the floor level of the storey immediately above is less than 1 metre above existing ground level. From this definition, it does **not follow that existing ground level becomes the level of the basement floor or the soil beneath the basement following the construction of a basement. A basement is, by definition, below ground level and so the level of the basement floor cannot be taken to be existing ground level.**

For these reasons, I **do not accept [the] approach of defining existing ground level as the ground floor level of the existing building and then dropping it down to the basement level** in the north-eastern corner of the site where the existing basement is located. This...relates only to a building that is to be demolished and has no relationship to the context of the site...

I prefer [the alternate] approach to determining the existing ground level because **the level of the footpath at the boundary bears a relationship to the context and the overall topography** that includes the site and remains relevant once the existing building is demolished.' (emphasis added).

A similar approach can be taken in relation to the subject site, where the height is not consistent with the existing site conditions. A portion of the height exceedance is above the existing excavated swimming pool that forms the artificial existing ground line on site, which is inconsistent with the natural ground level. In our opinion, the natural ground level is a more suitable guide to height limits at the rear of the site where the swimming pool exists.

In *Merman*, a portion of the site was excavated for the construction of the existing building and the ground level was lowered by excavation within the footprint of the existing building. While *Merman* deals with a built form slightly different to that on the subject site, if the excavated ground level was used as the reference point for the height, there would be a dip in that plane that does not reflect in the overall topography of the site.

The Court accepted (at [74]) that there is an 'environmental planning ground' that may justify the contravention of the height standard under 'clause 4.6' when the prior excavation of the site (within the footprint of the existing building) distorts the maximum building height plane. The clause 4.6 request was upheld and development consent was granted. Again, while it is understood that *Merman* dealt with slightly different site characteristics when compared to the proposal, the assessment can still be applied.

Finally, it is noted that No. 349 Liverpool Street is currently subject to a development application (D/2022/831) being appealed in the Land and Environment Court for construction of a new residential flat building with a maximum building height of 24.2m.

This written request will discuss the minor portion of non-compliant height and will demonstrate the works are unlikely to have adverse impacts on the streetscape or neighbouring amenity.

#### 4. Consistency with Objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

*Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give*



*substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.*

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- Objective (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- Objective (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The proposal seeks flexibility in the application of the height development standard to the proposed development in the circumstances of this particular case, where the minor portion of exceedance arises as a result of a number of factors. Firstly, due to the provision of access to a roof top communal open space to satisfy the requirements of the ADG. Secondly, due to existing excavation on site for a swimming pool that creates an artificial existing ground line. If the proposal were measured from the natural ground level at the rear of the site, the extent of height breach would be reduced. Finally, the height variation is due to the provision of a unique built form comprising two separate volumes in order to maintain solar penetration, ventilation and outlook from the single aspect units at No. 3-5 Darley Street which subsequently reduces the area of the site that can be built upon. While the proposal does result in a breach of the height development standard, the height breach is considered a better planning outcome than providing a typical built form constructed to the eastern boundary as this would obliterate solar penetration and ventilation for the single aspect dwellings at No. 3-5 Darley Place.

Flexibility in this circumstance will provide a better outcome both for and from the development. Strict compliance would require removal of the stair enclosure that provides access to the roof top communal open space, which means the proposal would be unable to provide communal open space that meets the solar access requirements of the ADG. Strict compliance would also mean the volume of the building would need to be constructed closer to the single aspect apartments at No. 3-5 Darley Place which would reduce their amenity.

The proposal has been designed in accordance with the height, bulk and scale of existing and emerging surrounding development and provides a well articulated eight storey rear built form that is unlikely to result in unreasonable impacts to surrounding development or the streetscape. The minor extent of height variation will not adversely impact the appearance of the proposal. To refuse this application would prevent the orderly and economic use and development of the land.

## **5. Justification of Variation to Development Standard**

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

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

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental

planning grounds to justify the non-compliance. These matters are discussed in the following sections.

## **5.1 Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case**

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

*These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

It is our opinion that the proposal satisfies Test 1 established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant test will be considered below.

### **Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;**

Despite the proposed development's non-compliance with the applicable height development standard, the proposal achieves the desired character of the area. The proposal provides a height, bulk and scale that is generally consistent with that envisaged by Council's controls. Reasons why the proposed development achieves the objectives of the height standard are explained below.

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

The proposed height of the rear built form has been designed in accordance with the existing conditions of the site and its context. The site is nearby a number of existing higher density residential flat buildings, including No. 3-5 Darley Street a part five and seven storey building and No. 347 Liverpool Street a seven storey building. These developments form the surrounding context in the immediate vicinity of the site and confirm that the minor extent of height breach to the rear built form is appropriate for the site. When the proposal is considered in the context of existing and emerging built forms, the proposal is compatible with the context of the area and is appropriate to the condition of the site, in particular given a portion of the height breach is a result of previous excavation on site.

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

The subject site is adjoining No. 3-5 Darley Street which is listed as a local heritage item pursuant to the Sydney LEP 2012. The site is also located within the Oxford Street and Victoria Street HCA. The proposal has been sympathetically designed to ensure an appropriate height transition between the subject site and the neighbouring heritage item at No. 3-5 Darley Place, in addition to surrounding buildings in the HCA. Importantly, the street frontage built form will comply with the height development standard, and the minor extent of height variation to the rear built form will not be readily visible from Liverpool Street once constructed.

Although there is a minor portion of height non-compliance to the rear built form, the portion of variation is centrally located and is unlikely to impact the curtilage of No. 3-5 Darley Street or No. 349 Liverpool Street. When viewed from the rear, the built form will have a building height that just exceeds the height of the neighbouring heritage item, however, provides a sympathetic transition in height between the existing building at No. 3-5 Darley Street. Importantly, the minor extent of height breach to the roof top stair enclosure has been supported on heritage grounds by Architectural Projects. The Heritage Impact Statement states, inter alia regarding the proposed building height:

*The proposal retains the 1930's façade and reinstates the original finish. The later one floor extension is replaced in an interpretation of the one floor extension. Above this, a new brick façade is constructed which reinforces the alignment and height of 353 Liverpool Street Darlinghurst and Mont Clair at 347 Liverpool Street and the brick finish of these buildings. The new masonry pattern is interpreted in the brick balustrade and the hood of the façade to provide a neutral component in the streetscape.*

*The new development aligns with the heights of 3-5 Darley Street and 347 Liverpool Street along the front boundary facing Liverpool Street. The development to the rear is screened by the constant alignment of the development along Liverpool Street and will not adversely impact upon the Conservation Area or Heritage items in the vicinity.*

*The subject site is not a heritage item however the new development is sympathetic to the heritage items in the vicinity and the heritage conservation area as it reinforces the existing alignment and height of the adjacent buildings.*

*Views to and from the neutral component of the heritage conservation area is minimised due to the retained face brick façade and consistent alignment of the new development. The increase in height is consistent with other developments along the streetscape and does not detract from the significance of the heritage conservation area or heritage items in the vicinity.*

In our opinion, although there is a minor portion of height variation to the rear built form, the design improvements on site are considered to more than offset the centrally located breach at the rear. Accordingly, the proposal ensures an appropriate height transition between the subject site and No. 3-5 Darley Place, in addition to surrounding buildings within the Oxford Street and Victoria Street HCA.

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

The subject site is located outside of Central Sydney. There are no iconic views across or adjacent to the site that have been identified in a site inspection or in the DCP. While district and CBD views may be available from the upper most levels of some surrounding buildings, given the proposal has a compliant FSR and a predominantly compliant building height the proposal is unlikely to affect view sharing with surrounding development, in particular given the scale of the existing building at No. 3-5 Darley Street.

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

The proposal has been designed to ensure appropriate height transitions from the larger scale developments within Central Sydney. This has been achieved through a highly articulated and mostly compliant built form on the subject site that responds to existing and emerging building heights along Liverpool Street. As it stands, the site is subject to becoming a missing tooth in the streetscape once No. 349 Liverpool Street is developed with a higher density than existing. Therefore, the proposed building height, inclusive of the minor portion of height variation (that is partly a technical variation) provides an appropriate height on the subject site which contributes to a transition in height from the higher density developments of Central Sydney and the nearby areas of Darlinghurst.

- (e) in respect of Green Square— (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

N/A. The site is not within Green Square.

Accordingly, although the proposal will exceed the height control, this is unlikely to have any significant adverse impacts as the design is generally contained within a compliant building envelope.

## 5.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are sufficient environmental planning grounds to justify the building height non-compliance. The proposal is permissible in the R1 General Residential Zone, is consistent with the relevant zone objectives and satisfies an ‘unreasonable and unnecessary’ test established by the Court in *Wehbe*. The non-compliance is a result of providing stair access to roof top communal open space, is partially a result of an existing excavated area and is also a result of the provision of a highly articulated built form made up of two separate volumes to maintain ‘borrowed amenity’ for the single aspect units at No. 3-5 Darley Place.

There are sufficient environmental planning grounds to justify the building height non-compliance. They include the provision of communal open space that complies with the ADG solar access requirements; the artificial existing ground level; a better planning outcome both for and from the site; consistency in the context; and orderly and economic development. These will now be discussed.

### Communal Open Space

As discussed, the minor portion of height breach is restricted to the stair enclosure on the rear built form that provides access to a roof top communal open space area. The roof top communal open space area has been designed to ensure the residential flat building complies with the solar access requirements of the ADG. If strict compliance were required, this would mean the stair enclosure that provides access to the roof top communal open space would need to be removed, and subsequently, the roof top communal open space would be deleted from the scheme. Removal of the roof top communal open space would reduce on site amenity and would not result in a favourable planning outcome for the site.

### Artificial Existing Ground Line

The proposed height non-compliance is partially a result of measuring building height from an existing excavated area below the building. If building height were measured from the natural ground level at the location of the existing swimming pool this would reduce the extent of height non-compliance.

Therefore, the minor portion of height breach is considered partially technical, and it should be considered in light of *Bettar and Merman*, where the Court took the approach of measuring height with the intent of relating the development proposal to its context. A similar approach should be taken in relation to the subject site and the proposal, where the height is not consistent with the existing conditions of the site at the rear. In *Merman*, the Court accepted (at [74]) that there is an ‘environmental planning ground’ that may justify the contravention of the height standard under ‘clause 4.6’ when the prior excavation of the site (within the footprint of the existing building) distorts the maximum building height plane. The clause 4.6 request was upheld and development consent was granted. While it is understood that *Merman* dealt with slightly different site characteristics when compared to the proposal, the assessment can still be applied. In our opinion, the natural ground level at the area of the existing swimming pool is a more suitable guide to height limits on site.

### **Better Planning Outcome For and From the Site**

The proposal provides a better planning outcome both for and from the site.

The proposal provides a better planning outcome for the single aspect units at No. 3-5 Darley Street that are orientated toward the subject site and rely on the subject site for 'borrowed amenity'. As discussed throughout, the proposed built form has been sympathetically designed with a priority to maintain a reasonable level of amenity to the single aspect units at No. 3-5 Darley Street. This has been achieved through construction of a built form made up of two separate volumes and with a central courtyard and splayed design to maintain solar penetration, ventilation and outlook to No. 3-5 Darley Street. If strict compliance were required, this would reduce the area of the central courtyard and push the development closer to No. 3-5 Darley Street, thereby reducing the amenity of the single aspect units. As such, the minor height breach which is restricted to a stair enclosure on the rear built form is considered a better planning outcome than a height compliant development that would be constructed closer to the eastern boundary.

The proposal also provides a better planning outcome for future occupants of the subject site through a design that provides communal open space with access to sunlight as required by the ADG. If strict compliance with the height development standard were required this would result in a poor planning outcome for the site, as the roof top communal open space would need to be removed from the proposal. As such, the proposal in its current form results in the best planning outcome for the site.

### **Contextual Compatibility**

The proposal, although partially non-compliant at the rear is compatible with the context of existing and emerging development in the area. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42], inter alia:

*I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).*

This report demonstrates that the minor portion of non-compliant building height is restricted to the uppermost extent of the stair enclosure on the rear built form, which does not impact the proposal's compatibility with the existing and desired future character of the area. The block that the subject site is located on is characterised by residential flat buildings and terraces, however, in the immediate vicinity of the site there are multi storey residential flat buildings at No. 3-5 Darley Street and No. 347 Liverpool Street. As such, the proposed part five and eight storey residential flat building, inclusive of the minor portion of height variation, is compatible with the existing and emerging character of the area. As it stands, the site is subject to becoming a missing tooth in the streetscape in particular if No. 349 Liverpool Street is developed with a higher density than existing. Therefore, the proposed building height, inclusive of the minor portion of height variation (that is partially technical) provides an appropriate height on the subject site compatible with surrounding development.

### **Orderly and Economic Development of Land**

The site is currently underdeveloped and comprises a dilapidated boarding house that provides little amenity for current residents. The building also does not respond to the allowable building height or FSR for the site. As such, the proposal for construction of a new residential flat building that complies with the FSR development standard and predominantly complies with the height development standard will enhance the overall amenity and functionality of the land in accordance with Council's development controls. As such, the proposal complies with objective C of the EPA Act, by promoting the orderly and economic use of the land.

### Other Matters for Consideration

Finally, it should also be noted that the proposal improves the amenity of the subject site while maintaining a reasonable level of amenity for neighbouring development; is consistent with the objectives of the R1 General Residential Zone; complies with the FSR development standard and complies with a majority of the relevant DCP built form and amenity provisions. The proposal also results in an improved streetscape outcome for the site. While these factors may not strictly constitute environmental planning grounds, they should be considered in the assessment of the height breach.

Accordingly, in our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard in the circumstances of this case, as required in Clause 4.6(3)(b).

### 6. Conclusion

This written request has adequately demonstrated 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 development standard. This is summarised in the compliance matrix prepared in light of *Initial Action* (see **Table 1** on the following page).

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it achieves the objectives of the standard and the development objectives of the R1 General Residential Zone pursuant to the LEP. On that basis, the request to vary Clause 4.3 should be upheld.

Table 1: Compliance Matrix

Para (Initial Action)	Requirement	Section of this Report	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Clause 4.3: Height of Buildings	
12	What is the control	1 & 2	22m	
14	<b>First Precondition to Enlivening the Power –</b> Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	<b>1<sup>st</sup> Positive Opinion –</b> That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	<b>First Aspect is Clause 4.6(3)(a) -</b> That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal satisfies Test 1 of <i>Wehbe</i> : <ul style="list-style-type: none"> <li>The objectives of the standard are achieved notwithstanding the non-compliance with the standard.</li> </ul>	YES
23-24	<b>Second Aspect is Clause 4.6(3)(b) –</b> The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> <li>The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.</li> <li>The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.</li> </ol>	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> <li>The height breach accommodates access to a required communal open space area that has been sited to achieve compliance with the solar access requirements of the ADG;</li> <li>The height breach is partially a result of an artificial existing ground line on site. If height were measured from the natural ground level in the area of the existing swimming pool, the extent of height breach would be reduced;</li> <li>The minor height breach is a result of the sympathetic built form made up of two separate volumes sited away from the single aspect units at No. 3-5 Darley Street. This built form allows for retention of solar penetration, ventilation and outlook to the single aspect units at No. 3-5 Darley Street which is a better planning outcome for the neighbouring site when compared to a residential flat building constructed closer to the eastern boundary;</li> <li>The proposal, inclusive of the minor extent of height breach is compatible with the desired future character;</li> <li>The proposal ensures orderly and economic development on</li> </ul>	YES

			<p>the land; and</p> <ul style="list-style-type: none"> <li>The proposed height breach offers a better planning outcome both for and from the development when compared to a development that completely complies with the height.</li> </ul>	
26-27	<p><b>2<sup>nd</sup> Positive Opinion –</b> That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.</p>	6	The proposed development achieves the objectives of the height standard as addressed under Test 1 of <i>Wehbe</i> . The proposal also achieves the objectives of the R1 General Residential Zone.	YES
28-29	<p><b>Second Precondition to Enlivening the Power –</b> That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.</p>	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES