

Development Application: 87 Lower Fort Street, Millers Point - D/2024/179

File No.: D/2024/179

Summary

Date of Submission:	14 March 2024 Amended documentation received 18 June 2024 and 24 June 2024
Applicant:	Giovanni Cirillo
Architect/Designer:	Andrew Burns Architecture and Tasman Storey Architects
Owner:	Mr Giulio Comin
Planning Consultant:	Planning Lab
Heritage Consultant:	John Oultram Heritage & Design
Cost of Works:	\$4,232,488
Zoning:	<p>The site is located within the R1 - General Residential zone.</p> <p>The proposal seeks the in-principle consent for an indicative single dwelling house use.</p> <p>This is permissible with consent in the zone under the Sydney Local Environmental Plan 2012.</p>
Proposal Summary:	<p>The application seeks consent for the in-principle consent for the demolition of the existing structures and a concept building envelope of approximately 10.6m in height (RL 32.060m) with an indicative residential use.</p> <p>The site is not identified as a heritage item of either local or state significance however, is located within the Millers Point heritage conservation area which is listed as being of state significance in the Sydney Local Environmental Plan 2012 and is also contained within two conservation areas listed in the State Heritage Register of the Heritage Act 1977 being the Millers Point & Dawes Point Village Precinct and the Millers Point Conservation Area.</p>

The application was accompanied by an approval issued by Heritage NSW in accordance with Section 60 of the Heritage Act 1979.

The site is also subject to site-specific provisions as per clause 6.47 in Division 5 of part 6 of the Sydney Local Environmental Plan 2012 relating to development within the Millers Point heritage conservation area. The site-specific provisions outline matters for consideration relating to non-heritage items including the consideration of the impact of the development on the built form and heritage significance of the heritage conservation area and surrounding heritage items. The site-specific provisions also nominate maximum height and floor space controls.

A site-specific development control plan is required for the type of development as per clause 7.19(a)(i) of the Sydney Local Environmental Plan 2012. The site is subject to site specific provisions in Division 5 of Part 6 of the Sydney Local Environmental Plan 2012 and as such, any land affected by demolition must also be subject to a site-specific development control plan.

In accordance with clause 4.23 of the Environmental Planning and Assessment Act 1979, if an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, that obligation may be satisfied by the making and approval of a concept development application in respect of that land. The subject concept development application seeks to satisfy this requirement.

The application is referred to the Local Planning Panel for determination as the proposal presents a departure from the height development standard by more than 25% and involves an indicative single dwelling. The proposed envelope indicates a height variation of 152% to the height development standard as required in clause 6.47(5) of the Sydney Local Environmental Plan 2012.

A written request to vary the height of buildings development standard has been submitted with the application in accordance with clause 4.6 of the Sydney Local Environmental Plan 2012.

The statement demonstrates that compliance with the standard is unreasonable and unnecessary in the specific circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the standard. The reasons contained with the clause 4.6 variation request are acceptable and the variation is supported.

The application was placed on public exhibition for a period of 30 days from 2 April 2024 to 1 May 2024 to properties within a 75-metre radius of the subject site. 12 public submissions were received. Of the public submissions, two were in objection to the development and 10 were in support.

Submissions of support noted:

- the positive contribution of the development to the heritage streetscape;
- the facilitation of the demolition of a detracting building that is currently derelict;
- the proposed development is of a height commensurate to the surrounding developments;
- indicative plans demonstrate a sympathetic design that is appropriate in form, with suitable reference to Georgian architecture.

Objections received raised issue with the following areas:

- Excessive building height/envelope;
- Impacts on existing easements;
- Setbacks to other heritage items;
- Acoustic impacts from turntable and plant room;
- Issues with detailed development application;
- Streetscape and public domain facility impacts;
- Lack of consideration of impacts on neighbour amenity, sustainability and heritage;
- Heritage and structural impacts on existing heritage retaining wall.

On 24 May 2024, the Applicant filed an appeal against the deemed refusal of the application. This matter is ongoing in the Land and Environment Court.

On 18 June 2024, the applicant submitted an amended submission that separates the proposed envelope plans from detailed drawings and updated the detailed drawings to confirm they were indicative only. The amended package also provided details regarding the location and area of deep soil that is to be provided in any future development.

The proposal presents an improved outcome and comprises an acceptable response to the conditions of the site and locality. The proposed building envelope provides a form and scale sympathetic to the heritage context of the site and locality and is in keeping with the desired future character of the area. Overall, the proposal is generally compliant with the relevant planning controls the proposal is capable of providing appropriate amenity to future residents and maintains the amenity of surrounding development. Subject to conditions, the proposal is considered acceptable.

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

Development Controls:

- (i) Environmental Planning and Assessment Act 1979
- (ii) Heritage Act 1977
- (iii) State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP)
- (iv) State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP)
- (v) State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)
- (vi) Sydney Local Environmental Plan 2012
- (vii) Sydney Development Control Plan 2012
- (viii) City of Sydney Guidelines for Waste Management in New Developments (Waste Guidelines)
- (ix) Community Engagement Strategy and Community Participation Plan 2023
- (x) Central Sydney Development Contributions Plan 2020

Attachments:

- A. Recommended Conditions of Consent
- B. Envelope Drawings
- C. Indicative Reference Scheme Drawings
- D. Clause 4.6 Variation Request - Height
- E. Submissions

Recommendation

It is resolved that:

- (A) the variation requested to clause 6.47(5) relating to the height of buildings in the Millers Point heritage conservation area 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 Number D/2024/179 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 proposal satisfies the objectives of the Environmental Planning and Assessment Act 1979 in that, subject to the imposition of appropriate conditions as recommended, it achieves the objectives of the planning controls for the site for the reasons outlined in the report to the Local Planning Panel.
- (B) Based upon the material available to the Panel at the time of determining this application, the Panel is satisfied that 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 height development standard is unreasonable or unnecessary and that there are sufficient planning grounds to justify contravening clause 6.47(5) of the Sydney Local Environmental Plan 2012.
- (C) The proposal generally satisfies the objectives and provisions of the Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012.
- (D) The proposal is consistent with the objectives of the R1 - General Residential zone.
- (E) The indicative concept design scheme accompanying the application demonstrate the envelope can accommodate a building which complies with the maximum floor space ratio development standard in clause 6.47(4)(b)(ii) of the Sydney Local Environmental Plan 2012.
- (F) The proposed development is of a form that is sympathetic to the heritage significance of the Millers Point heritage conservation area in accordance with Clause 5.10 and 6.47(4)(a) of the Sydney Local Environmental Plan 2012, including the provision of appropriate setbacks from the curtilage of the heritage item.
- (G) The proposed development has a height and form suitable for the site and its context, satisfactorily addresses the heights and setbacks of neighbouring developments, is appropriate in the streetscape context and broader locality. The proposed building envelope can accommodate the proposed uses and does not result in any significant adverse environmental or amenity impacts on surrounding properties, the public domain and the broader Millers Point locality, subject to conditions on the subsequent detailed design development application.

- (H) The public interest is served by the approval of the proposal, as amendments to the development application have addressed the matters raised by the City and the community, subject to recommended conditions imposed relating to heritage conservation, setbacks, views and privacy.

Background

The Site and Surrounding Development

1. The site has a legal description of Lot 26 DP 1221024 and street address of 87 Lower Fort Street, Millers Point. The site is irregular in shape, with a total area of approximately 651m².
2. The site is located at the northwestern junction of Lower Fort Street, Argyle Place and Argyle Street.
3. The site contains a single storey brick building with metal roof. The building is currently vacant, most recently used as a men's shed. Internally, the building consists of two large central rooms separated by a folding concertina door, office, storeroom, bathroom and kitchenette. The remainder of the site contains landscaping. The western boundary of the site has a private laneway leading from Argyle Street. An easement for access affects the laneway, providing access to adjacent residential terraces located along Argyle Place.
4. The site is not in itself an individually listed heritage item under the Sydney Local Environmental Plan 2012 or the Heritage Act 1977. The site is, however, located within the State significant Millers Point heritage conservation area listed in the Sydney Local Environmental Plan 2012 (area C35) and two conservation areas listed in the State Heritage Register of the Heritage Act 1977 being the Millers Point & Dawes Point Village Precinct (SHR 01682) and the Millers Point Conservation Area (SHR 00884).
5. The building was originally constructed in 1952 as a baby health centre. Historically, the site was used for residential purposes associated with the adjacent site at 85 Lower Fort Street.
6. The site is located centrally within the Millers Point/Dawes Point precinct, located to the north of the Sydney CBD, and the surrounding area is characterised by a mixture of land uses, primarily being residential. The Hero of Waterloo pub is located further north of the site and the Garrison Church is located to the south-east of the site. Observatory Hill is located further south of the site.
7. A site visit was carried out on 5 February 2024. Photos of the site and surrounds are provided below.

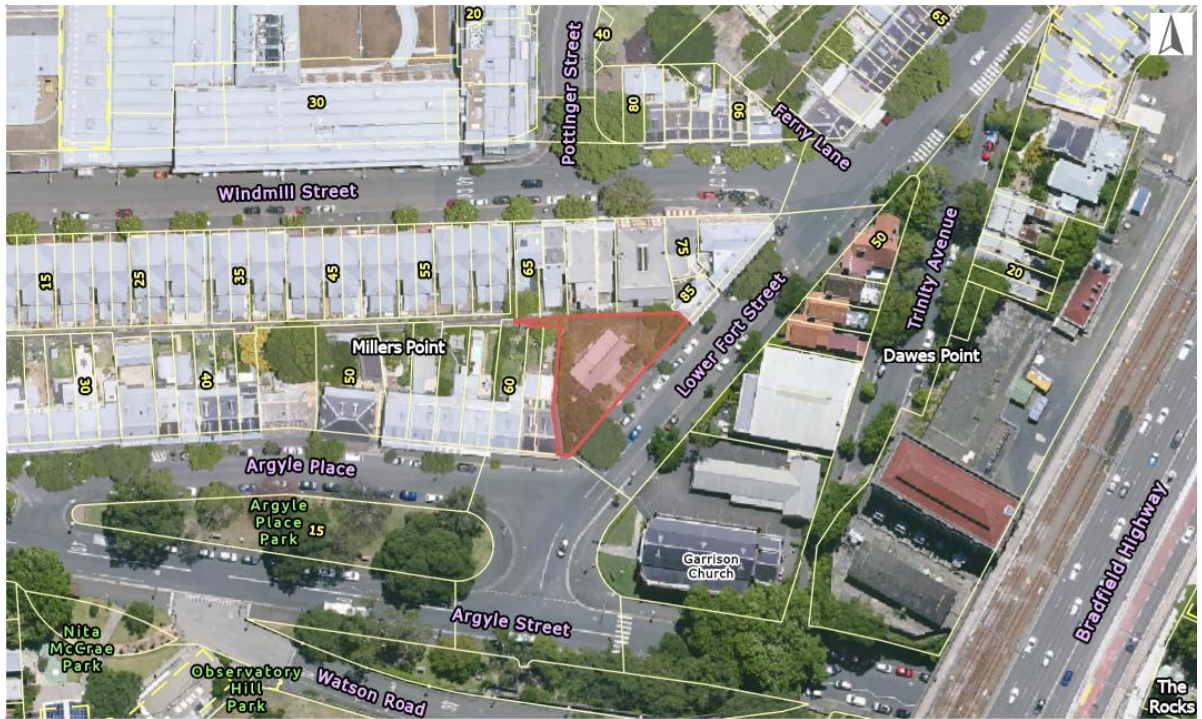


Figure 1: Aerial image of the Site (outlined in red) and the surrounding area



Figure 2: Site viewed from Lower Fort Street



Figure 3: Site viewed from Lower Fort Street



Figure 4: Existing private laneway located within the site adjacent to residential terraces along Argyle Place

History Relevant to the Development Application

Development Applications

8. Development Application D/2023/1036 is currently under assessment for the detailed development of the site. The application seeks consent for the demolition of the existing structures and the construction of a new single dwelling.
9. The proposed development will comprise:
 - (a) demolition of existing structures, including the dismantling of the existing retaining wall along the western private laneway;
 - (b) site excavation and remediation;
 - (c) construction of a three-storey, five bedroom dwelling with habitable attic spaces, presenting from the street as a two-storey dwelling with attic and an additional basement level;
 - (d) construction of a new vehicle crossover from Lower Fort Street to a two-car garage;
 - (e) private open space located on the lower ground floor with soft landscaping, hardstand spaces and a new pool;
 - (f) site landscaping at the street level;
 - (g) the reconstruction of the retaining wall along the adjoining private pedestrian laneway.
10. The approval of the detailed development of the site is subject to the granting of consent of a concept application to satisfy clause 7.19(a)(i) of the Sydney Local Environmental Plan 2012.

Amendments

11. As part of legal proceedings, Council officers requested amendments to the concept application. Proposed amendments included the separation of envelope drawings from the detailed indicative reference scheme drawings and for the addition of deep soil areas on a concept plan. Updated plans were submitted on 18 June 2024.
12. Further, an updated Clause 4.6 written request was submitted for consideration on 24 June 2024.

Proposed Development

13. The application seeks approval for the in-principle consent for the demolition of the existing structures and a concept building envelope of approximately 10.6m in height (RL 32.060m) with an indicative residential use.
14. Plans and elevations of the proposed development are provided below.

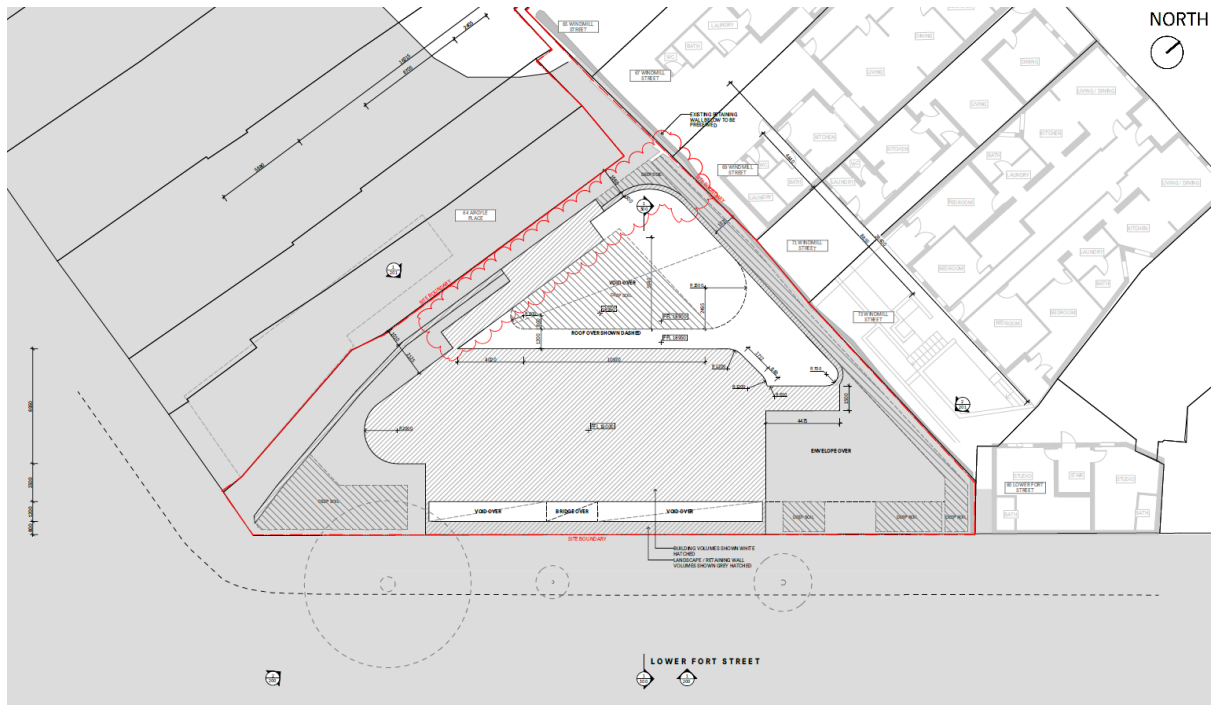


Figure 5: Proposed lower ground level

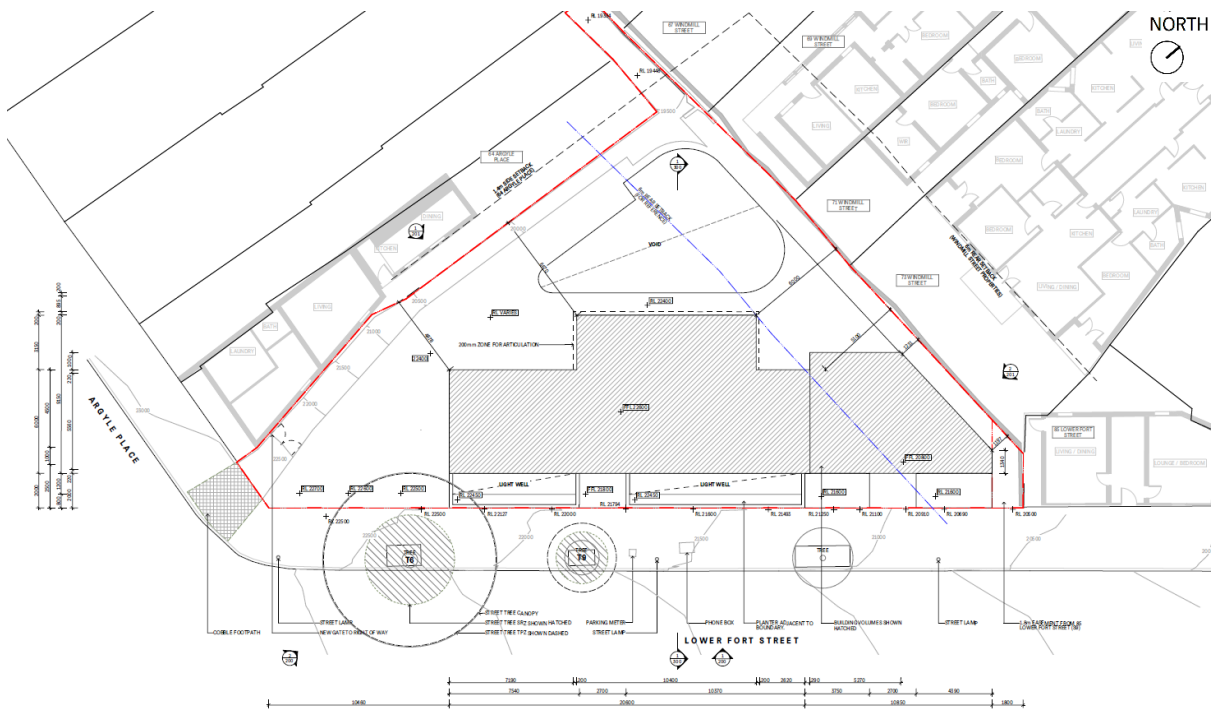


Figure 6: Proposed ground level

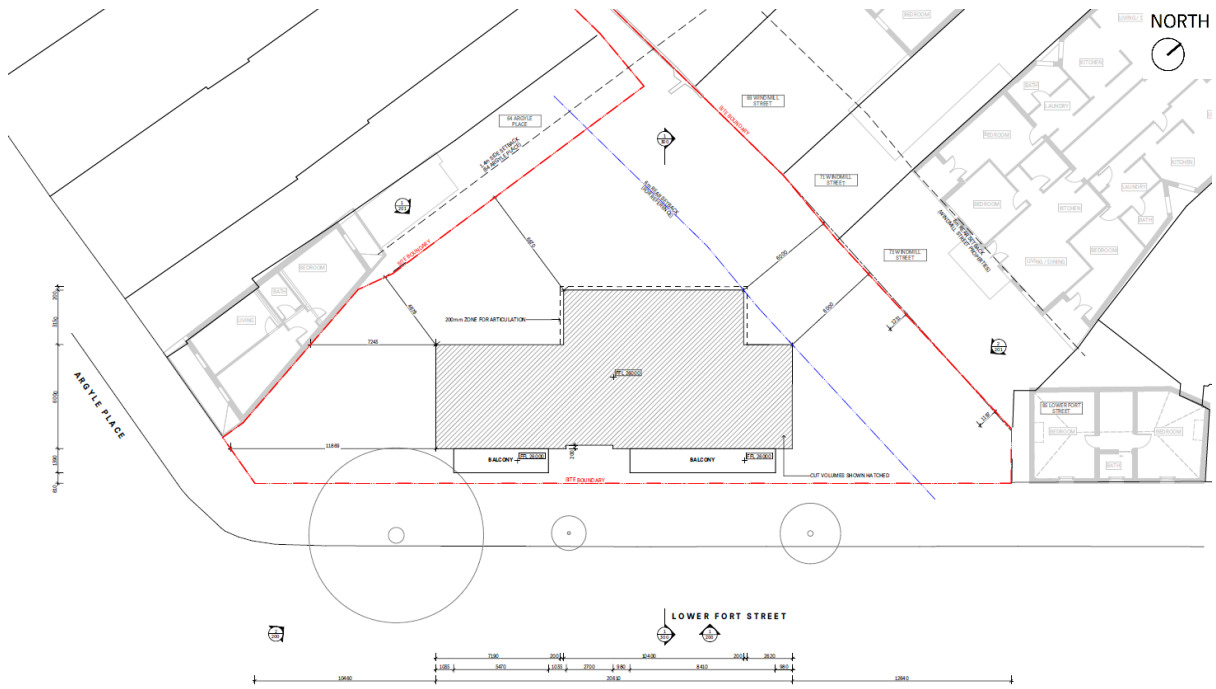


Figure 7: Proposed first floor level

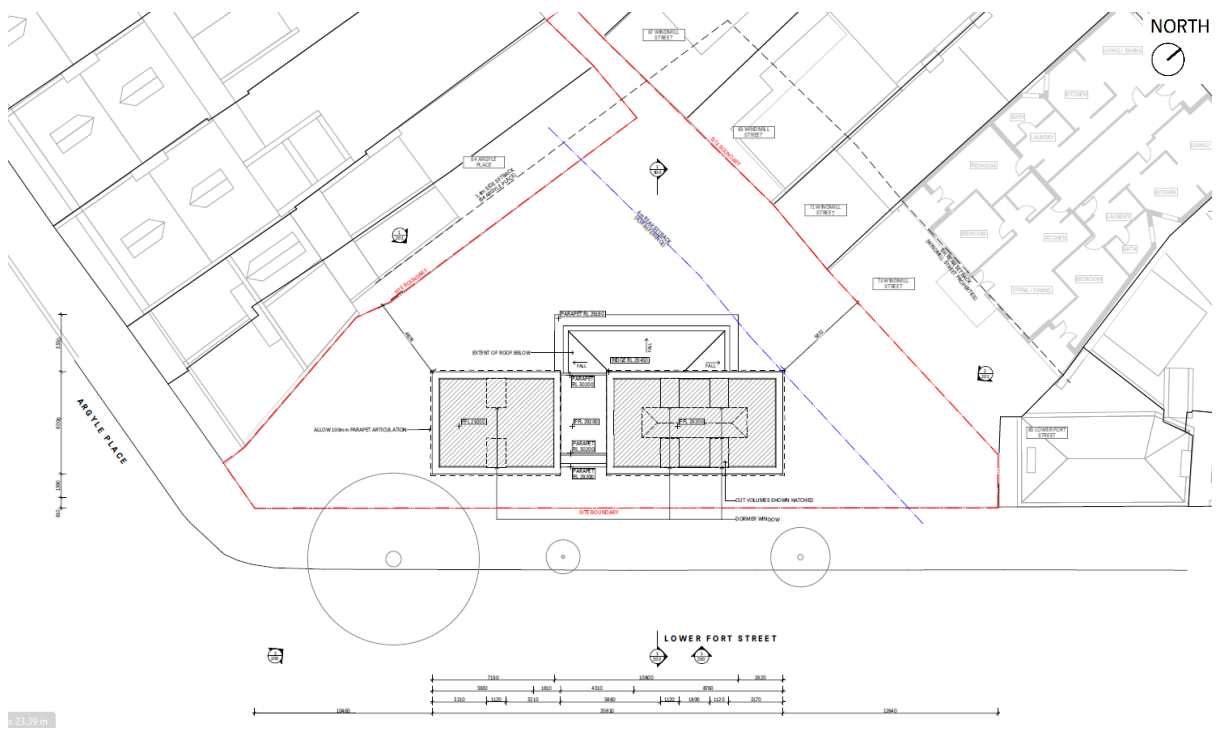


Figure 8: Proposed attic/roof terrace level

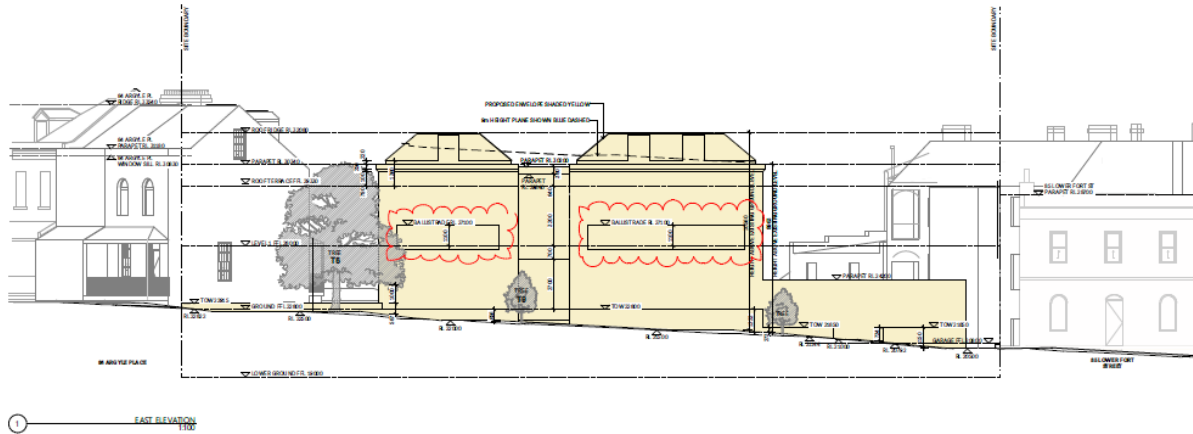


Figure 9: Proposed east elevation

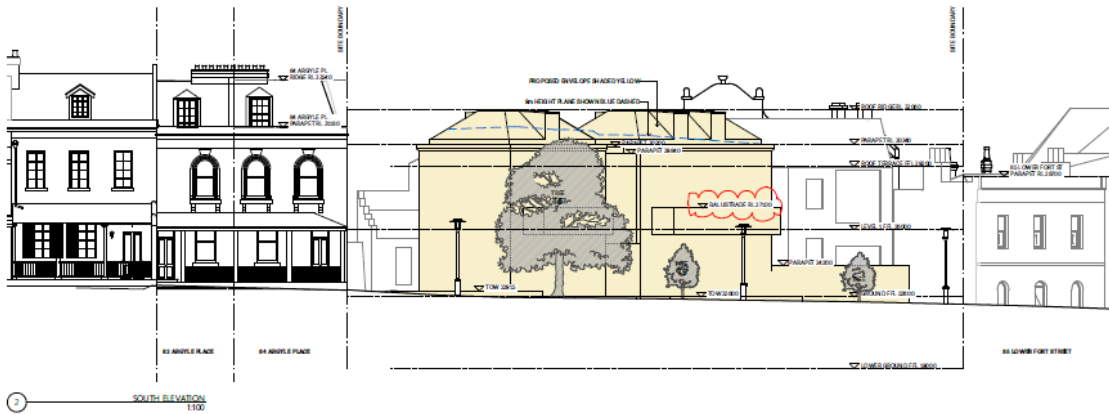


Figure 10: Proposed south elevation

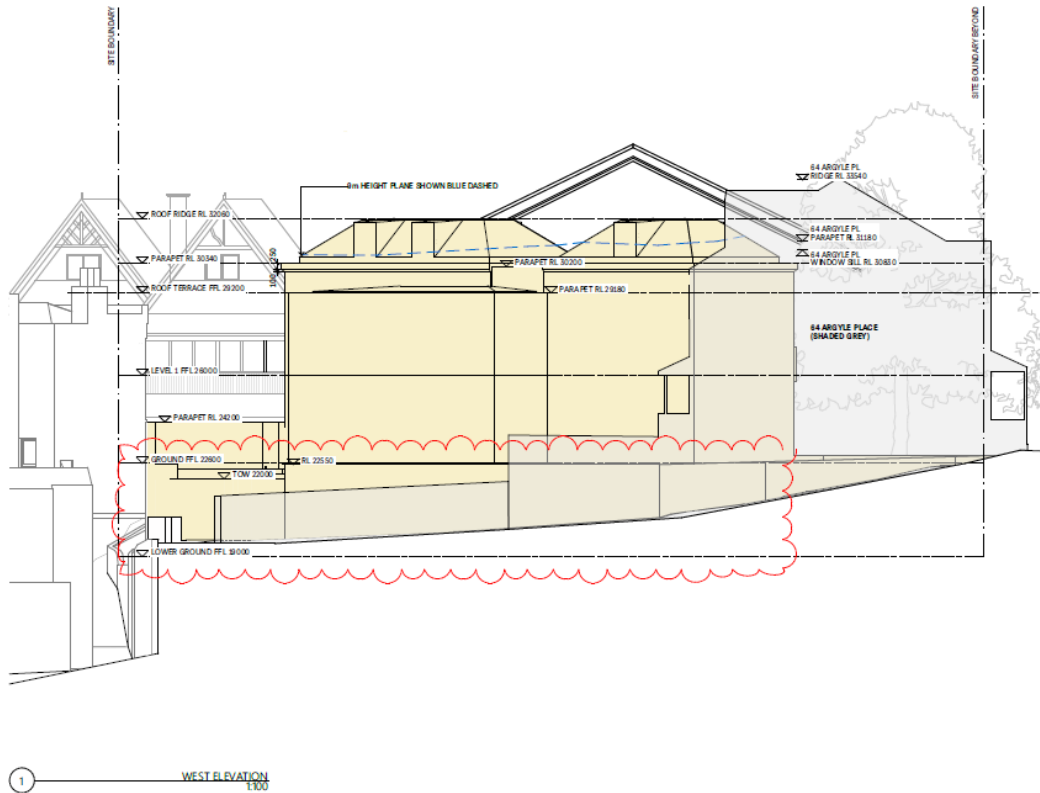


Figure 11: Proposed west elevation

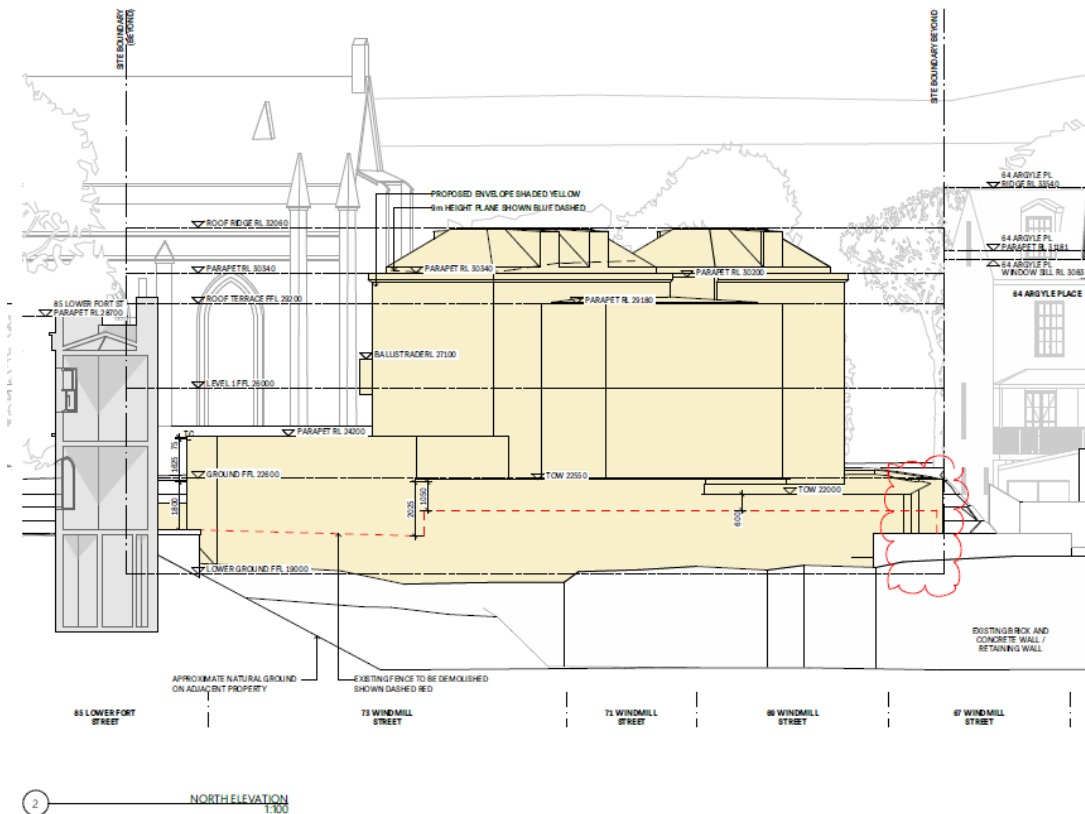


Figure 12: Proposed north elevation



Figure 13: Proposed photomontage of indicative reference scheme looking north from the corner of Lower Fort Street and Argyle Street



Figure 14: Proposed photomontage of indicative reference scheme looking south west across Lower Fort Street

Assessment

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

Heritage Act 1977

16. The subject site is located within two heritage conservation areas that are listed on the State Heritage Register under the Heritage Act 1977, being the Millers Point & Dawes Point Village Precinct (SHR 01682) and the Millers Point Conservation Area (SHR 00884). The site itself is not listed as an individual heritage item.
17. As the development proposes an envelope that would require the demolition of the existing building on the site and the reconfiguration of the surrounding area, the application requires general terms of approval to be sought and obtained from the NSW Heritage Council, pursuant to Section 4.46 of the Environmental Planning and Assessment Act 1979.
18. Heritage NSW granted consent to a Section 60 application pursuant to section 63 of the Heritage Act 1977 on 10 October 2023. A copy of the approval accompanies this consent. As such, the application has been granted terms of approval and thus is not required to be assessed as Integrated Development.
19. The subject concept development application is generally consistent with the existing Section 60 approval.

State Environmental Planning Policies

State Environmental Planning Policy (Resilience and Hazards) 2021 – Chapter 4

Remediation of Land

32. The aim of the Resilience and Hazards SEPP – Chapter 4 Remediation of Land is to ensure that a change of land use will not increase the risk to health, particularly in circumstances where a more sensitive land use is proposed.
33. The Council's Health Unit is satisfied that, subject to conditions, the site can be made suitable for the proposed use.

State Environmental Planning Policy (Sustainable Buildings) 2022

34. The aims of this Policy are as follows—
 - (a) to encourage the design and delivery of sustainable buildings,
 - (b) to ensure consistent assessment of the sustainability of buildings,
 - (c) to record accurate data about the sustainability of buildings, to enable improvements to be monitored,
 - (d) to monitor the embodied emissions of materials used in construction of buildings,
 - (e) to minimise the consumption of energy,
 - (f) to reduce greenhouse gas emissions,

- (g) to minimise the consumption of mains-supplied potable water,
- (h) to ensure good thermal performance of buildings.

Chapter 2 Standards for residential development - BASIX

- 35. Any subsequent detailed development application will be required to satisfy BASIX requirements.
- 36. A condition is recommended to ensure that a future detailed development application is accompanied by a valid BASIX Certificate, in accordance with the provisions of the Sustainable Buildings SEPP.

Sydney Environmental Planning Policy (Biodiversity and Conservation) 2021 – Chapter 2 (Vegetation in Non Rural Areas) 2017

- 37. The proposal indicates the future clearing of vegetation in a non-rural area and as such is subject to this SEPP.
- 38. The SEPP states that the Council must not grant consent for the removal of vegetation within heritage sites or heritage conservation areas unless Council is satisfied that the activity is minor in nature and would not impact the heritage significance of the site.
- 39. The proposed concept application indicates the removal of vegetation. The proposal also identifies areas for deep soil of approximately 17% of the site and is likely to maintain or increase the biodiversity values of trees and other vegetation in the locality.
- 40. Any future detailed development application must address the impact of the removal of vegetation on the heritage conservation area.

Sydney Environmental Planning Policy (Biodiversity and Conservation) 2021 - Chapter 6 Water catchments

- 41. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of Chapter 6 of the above SEPP. In deciding whether to grant development consent to development on land in a regulated catchment, the consent authority must consider the controls set out in Division 2.
- 42. The site is within the Sydney Harbour Catchment and eventually drains into Sydney Harbour. However, the site is not located in the Foreshores Waterways Area or adjacent to a waterway and therefore, with the exception of the control of improved water quality and quantity, the controls set out in Division 2 of the SEPP are not applicable to the proposed development.

Local Environmental Plans

Sydney Local Environmental Plan 2012

- 43. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 (LEP) 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 R1 General Residential zone. The proposed development is defined as a dwelling house 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>The site is designated on the height of buildings map as 'Area 10' and the maximum height of buildings on this site is determined by the site-specific provisions applicable to the site as per clause 6.47 of the LEP.</p> <p>Clause 6.47(5) states that the maximum height of a building on land to which this clause applied is the height of the building on the land as at the commencement of this clause.</p> <p>The proposed building envelope exceeds the height of the existing single storey building contained within the site.</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	Yes	<p>The site is designated on the floor space ratio map as 'Area 11' which refers to the site-specific provisions applicable to the site as per clause 6.47 of the LEP.</p> <p>This clause specifies the maximum floor space ratio for buildings that are not heritage items is 2:1. The submitted indicative architectural drawings demonstrates the maximum floor space ratio is able to be complied with.</p> <p>See further details in the discussion against clause 6.47 of the LEP below.</p>
4.6 Exceptions to development standards	Yes	The proposed development seeks to vary the development standard prescribed under Clause 4.3 and Cause

Provision	Compliance	Comment
		6.47(5). A Clause 4.6 variation request has been submitted with the application. 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 Millers Point heritage conservation area (area C35) and is listed in the LEP as being of state significance. The site is also located within two separate heritage conservation areas listed under the Heritage Act 1977 being the Millers Point & Dawes Point Village Precinct (SHR 01682) and the Millers Point Conservation Area (SHR 00884).</p> <p>The application was accompanied by an approval issued under Section 60 of the Heritage Act 1977 by Heritage NSW.</p> <p>While the proposed envelope will result in extensive works on site, the impacts on the heritage conservation areas are generally acceptable. The proposed envelope demonstrates a built form that is consistent with the character of the surrounding area and includes a setback from Lower Fort Street that is common in Victorian architecture and ensures the new form respects views to significant heritage items that front Lower Fort Street, including 81 and 85 Lower Fort Street.</p> <p>Subject to conditions, the proposed concept envelope is not considered to have a detrimental impact on the significance of the heritage conservation area.</p>

Part 6 Local provisions – height and floor space

Provision	Compliance	Comment
Division 4 Design excellence		
6.21C Design excellence	Yes	The proposal is for a concept building envelope which is capable of accommodating a future development which can exhibit design excellence in accordance with the objective and matters for consideration in Clause 6.21C of the Sydney LEP 2012.
Division 5 Site specific provisions		
6.47 Millers Point heritage conservation area	Partial compliance	<p>The site is located within the Millers Point heritage conservation area and is subject to site-specific provisions in the LEP.</p> <p>The proposed envelope is considered to satisfy the objectives of the clause in that it conserves the significance of the heritage conservation area and respects the significance of surrounding heritage items.</p> <p>The Heritage Council no longer endorses conservation management plans (CMP) however, the application has been accompanied by a heritage impact statement that suitably assesses the potential impacts of the proposed development on the significance of the conservation area and surrounding heritage items. The application was also accompanied by a Section 60 approval issued by Heritage NSW who has assessed the application on its potential heritage impacts and considered the impact acceptable.</p> <p>The application has also been accompanied by indicative architectural drawings that demonstrate the maximum floor space ratio of 2:1 as required by subclause (4)(b)(ii) can be complied with.</p>

Provision	Compliance	Comment
		The envelope, however, proposes a height that exceeds the existing height of the building on the land and does not comply with subclause (5). The application has been accompanied by a Clause 4.6 variation request seeking to vary the height of buildings development standard. See further details in the 'Discussion' section below.

Part 7 Local provisions – general

Provision	Compliance	Comment
Division 1 Car parking ancillary to other development		
7.4 Dwelling houses, attached dwellings and semi-detached dwellings	Able to comply	<p>A maximum of 2 car parking spaces are permitted.</p> <p>The indicative reference scheme proposes 2 car parking spaces within the site.</p> <p>The subject application is not determining a set number of parking spaces on site and is subject to separate approval in a detailed design development application.</p>
Division 4 Miscellaneous		
7.14 Acid Sulfate Soils	Able to comply	<p>The site is located on land with class 5 Acid Sulfate Soils.</p> <p>It will be determined at the detailed design development application stage is an Acid Sulfate Soils Management Plan is required for any works under natural ground level.</p>
7.19 Demolition must not result in long term adverse visual impact	Yes	In accordance with Clause 7.19(a)(i), as the site is subject to site-specific provisions in the LEP (Clause 6.47 - Millers Point heritage conservation area), consent must not be granted for development involving the demolition of a building unless it is subject to a site-specific development control plan.

Provision	Compliance	Comment
		<p>Section 4.23 of the Environmental Planning and Assessment Act 1979 allows a concept development application to be lodged in lieu of preparing a development control plan.</p> <p>The subject concept application has been submitted to facilitate the future demolition of the existing building on site.</p>
7.20 Development requiring preparation of a development control plan	N/A	The site is located outside Central Sydney and has a site area less than 5,000sqm. Further, the proposed development will not result in a building greater than 25m and as such, does not trigger the requirement for the preparation of a development control plan under this clause.

Development Control Plans

Sydney Development Control Plan 2012

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

Section 2 – Locality Statements

45. The site is located within the Millers Point locality. The proposed development is in keeping with the unique character and the design principles, in that the envelope is consistent with the built character of surrounding residential development in regard to height, setbacks, siting and scale.
46. The site is located in a prominent location, close to the junction of Argyle Place, Argyle Street and Lower Fort Street. The proposed envelope, however, is not considered to result in a development that will detract from the historic significance of surrounding heritage items. The proposed height is generally consistent with surrounding residential dwellings and the site allows for generous setbacks to the east, north and west to provide for adequate separation to allow views to existing heritage buildings. The setbacks also allow for a future development to maintain appropriate separation to adjoining residences for visual privacy.

Section 3 – General Provisions

Provision	Compliance	Comment
3.2. Defining the Public Domain	Yes	The proposed envelope and future development will make a positive contribution to the public domain and will

Provision	Compliance	Comment
		not have an adverse impact on views from the public domain to other public spaces, significant view lines or views to significant heritage items.
3.5 Urban Ecology	Yes	The proposed concept drawings have identified the location of deep soil landscaping and is capable of providing landscaping and urban canopy to support urban ecology and biodiversity in the area.
3.6 Ecologically Sustainable Development	Able to comply	A condition of consent is recommended requiring a detailed development to be accompanied by a BASIX certificate that meets relevant sustainability requirements.
3.9 Heritage	Yes	<p>The site contains a building that is identified as a detracting building within the state significant Millers Point heritage conservation area.</p> <p>The proposal has been accompanied by a Section 60 approval granted by Heritage NSW and is considered to have an acceptable heritage impact.</p> <p>The proposed envelope is not considered to have an adverse impact on the significance of the surrounding heritage setting and is considered appropriate in regard to bulk, scale and siting.</p>
3.11 Transport and Parking	Able to comply	Appropriate conditions of consent are recommended to ensure that any future parking provided within the site is consistent with the requirements of this provision.
3.14 Waste	Able to comply	A condition are recommended to ensure the proposed development complies with the relevant provisions of the City of Sydney Guidelines for Waste Management in New Development.

Section 4 – Development Types

4.1 Single Dwellings, Terraces and Dual Occupancies

Provision	Compliance	Comment
4.1.1 Building height	Yes	<p>The site is located in an area in which a maximum height in storeys is not provided.</p> <p>The proposed height of the envelope and accompanying indicative reference drawings provide a single dwelling that is viewed as a 2-storey structure from the street with an addition lower ground storey and attic space.</p> <p>The proposed form of the development is consistent with the objectives of this provision as it reinforces the existing built character of the area and relates appropriately to the heritage streetscape. The proposed form is not considered to detract from existing development.</p>
4.1.2 Building setbacks	Yes	<p>The proposal provides a 2m setback at the ground floor to Lower Fort Street. Additionally, a minimum 1.1m setback is provided to the northern boundary with an increased setback of 1.8m provided to the adjoining residential development at 85 Lower Fort Street, and a minimum 4.8m setback provided to the western boundary adjoining 64 Argyle Place.</p> <p>The proposed development relates to the existing setback patterns along the street and respects the predominant street alignment. The proposed setbacks to Lower Fort Street and to the western boundary allow for increased views to neighbouring heritage items and is appropriate in this setting.</p>
<p>4.1.3 Residential amenity</p> <p>As demonstrated below, the proposed development will have acceptable residential amenity and will not have unreasonable impacts on the residential amenity of neighbouring properties.</p>		
4.1.3.1 Solar access	Yes	<p>The proposed envelope demonstrates that a future development is able to provide direct solar access to private open space and habitable rooms in adjoining developments.</p>

Provision	Compliance	Comment
4.1.3.3 Landscaping	Able to comply	The submitted indicative reference scheme indicates appropriate landscaping can be accommodated on site.
4.1.3.4 Deep soil planting	Yes	The application nominated 16.6% of the site area to be dedicated for deep soil planting and is consistent with the requirements of this provision.
4.1.3.5 Private open space	Able to comply	The proposed envelope provides locations for private open space that are directly accessible from living areas and are at least 16sqm in area with a minimum dimension of 3m.
4.1.3.6 Visual privacy	Able to comply	The submitted reference scheme demonstrates a future dwelling is able to maintain visual privacy to and from surrounding residential uses.
4.1.7 Fences	Able to comply	The submitted reference scheme demonstrates a future development is able to provide perimeter fencing that maintains passive surveillance between public and private spaces.
4.1.8 Balconies, verandahs and decks	Able to comply	The submitted reference scheme indicates the location of balconies at the first floor fronting Lower Fort Street and at the attic level. The location of these balconies are not considered to have an adverse amenity impact and are unlikely to result in any unacceptable overlooking impacts. The proposal is able to comply with this provision.
4.1.9 Car parking	Able to comply	The reference scheme indicates the location and design of parking generally consistent with the requirements of this provision.

Discussion

Clause 4.6 Request to Vary a Development Standard

47. In accordance with Clause 6.47(5) of the LEP, the site is subject to a maximum height that is the height of the building of the land as at the commencement of the clause. The height of the existing building is 4.23m, and this existing building was present on site at the date of commencement of this clause. The concept envelope proposes a height of 10.67m.

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; and
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard;

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

49. The applicant seeks to justify the contravention of the height of buildings 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 first of 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 first test seeks to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The applicant has justified the non-compliance against the objectives of the height of buildings development standard and the site-specific objectives of the Millers Point heritage conservation area as provided in Clause 6.47 of the LEP.
 - (ii) The applicant has stated that strict compliance with the height of buildings development standard is unreasonable or unnecessary for the following reasons:
 - (i) The proposed building height has considered its heritage context and the recommendations of the most recent Conservation Management Plan prepared for the site. The proposal has adopted the prevailing built form of development in the vicinity of the site, and this has resulted from a height plane analysis of surrounding development.
 - (ii) The proposal ensures an appropriate height transition between existing heritage items in close proximity to the site and the new development.
 - (iii) The proposed height respects view sharing from adjacent developments and the public domain.
 - (iv) The proposal is consistent with the Section 60 consent granted by Heritage NSW. It has been comprehensively reviewed from a heritage perspective, resulting in a built form that is a sympathetic yet contemporary addition to the existing built character of the conservation area.
 - (v) The proposed height is more appropriate and commensurate to the existing built character of the heritage area than the height of the existing structure on site. It is noted that the existing structures on site are listed as having detracting qualities within the Millers Point heritage conservation area.

- (vi) Given that there is no adverse impact in relation to the proposed variation, strict compliance would not result in any benefit to the streetscape or the amenity of the adjoining properties.
- (b) That there are sufficient environmental planning grounds to justify contravention of the standard:
- (i) There is an absence of environmental harm arising from the contravention, for reasons set out in the discussion under (a) above.
 - (ii) The proposal would result in a residential dwelling that is of a compatible scale with the existing two/three-storey height pattern of adjoining and surrounding residential developments.
 - (iii) The proposed height has been identified as a result of a comprehensive urban design and height plane analysis. This analysis confirmed that a maximum height between 9m-12m is compatible with the existing characteristics of parapet and roof designs in the area. Excerpts from the height plane analysis are provided in Figure 15 below.
 - (iv) The proposal is aligned with the site's Conservation Management Plan guidelines. This states that a new building which adopts the prevailing built form of development in the vicinity of the site and incorporates qualities of the surrounding locality, would provide a more desirable and appropriate outcome from an urban design perspective and heritage conservation objectives.
 - (v) The Conservation Management Plan applicable to the site allows for the replacement of the existing building noting its detracting contribution to the heritage conservation area.
 - (vi) The departure from the existing height will not create an undesirable precedent for other similar residential development in the locality or diminish the overall effect of the development standard.

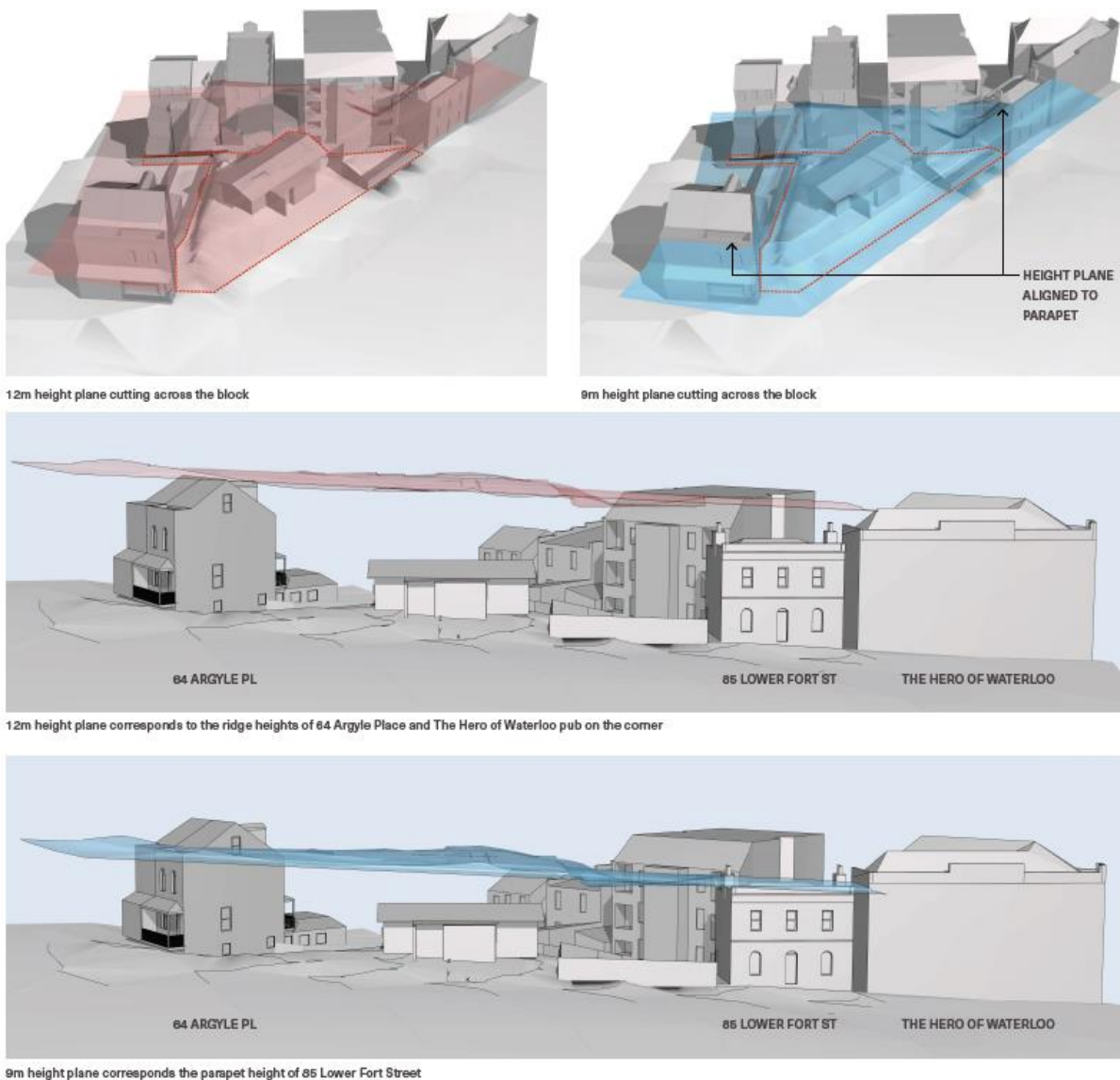


Figure 15: Excerpt of the submitted height plane analysis

Consideration of Applicant's Written Request - Clause 4.6 (3)

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

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

51. The applicant has correctly referred to the test 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. Specifically, the applicant has addressed the first part of the test by demonstrating that the development meets the objectives of both Clause 4.3 and Clause 6.47(5), notwithstanding non-compliance with the numerical standard.

52. The applicant has identified the existing character of the area by undertaking a height plane analysis and determining the most appropriate and sympathetic height to respond to the heritage context as shown above in Figure 15. It should be noted that whilst the numeric variation is significant, this is a result from the unique height control standard that applies to Millers Point. The control was formulated to map the height of existing buildings, noting that the majority of buildings within this precinct are state and locally listed heritage items and are generally two to four storeys in height. The subject site is somewhat of an anomaly in Millers Point where the detracting building height would not result in an appropriate built form for new development on the site. In this unique set of circumstances, a variation of the height control of this extent would not set an undesirable precedent.
53. The applicant has also relied on an urban design analysis and notes that view sharing is respected in regard to visual privacy to and from residential uses and views from the public domain to significant heritage fabric and the greater skyline are retained.
54. The height of buildings in the Millers Point heritage conservation area is generally governed by heritage considerations. The applicant has noted that while the site-specific provisions applicable to the height limit the maximum height to the existing height of the building, the DCP identifies the existing building as detracting to the heritage conservation area. Further, the applicant notes the Conservation Management Plan also acknowledges the existing building as a detracting element in the conservation area and supports the demolition and replacement with a more sympathetic infill development.

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 building height development standard. The applicant references the *Initial Action Pty Ltd v Woollahra Municipal Council* case to justify contravening the standard as the development achieves a better outcome by allowing flexibility in particular circumstances.
56. The applicant's statement heavily relies on the argument of compatibility of the proposed building form and the resulting height with the surrounding heritage context.
57. The written request assesses that the proposed variation allows for the most appropriate built form in its heritage setting. It maximises residential amenity of the subject site and adjoining sites. The proposal provides an envelope that is capable of delivering a future built form of architectural merit that will be compatible with the surrounding heritage context.
58. The applicant sufficiently argues that the proposed envelope is of a form that demonstrates a sensitive and respectful response to the historic and aesthetic character of the Millers Point heritage conservation area. It has been informed by a comprehensive heritage analysis aligned with the site's Conservation Management Plan, a height plane analysis and urban design analysis. This collective analysis resulted in a consent for the development being granted by Heritage NSW.

Conclusion

59. For the reasons provided above the requested variation to the height of buildings development standard is supported as the applicant's written request has adequately addressed the matters required to be addressed by Clause 4.6 of the Sydney Local Environmental Plan 2012.

Consultation

Internal Referrals

60. The application was discussed with Council's:
 - (a) Heritage and Urban Design Unit; and
 - (b) Landscape Assessment Officer.
61. The above advised that the proposal is acceptable subject to conditions. Where appropriate, these conditions are included in the Notice of Determination.

Advertising and Notification

62. In accordance with the City of Sydney Community Participation Plan 2019, the proposed development was notified for a period of 30 days between 2 April 2024 and 1 May 2024. A total of 235 owners and occupiers were notified and 12 public submissions were received. Of the public submissions, two were in objection to the development and ten were in support.
63. Submissions of support noted the following:
 - (a) The development will make a positive contribution to the heritage streetscape and the facilitation of the demolition of a detracting building that is currently derelict.
 - (b) The proposed development is of a height commensurate to the surrounding developments and indicative plans demonstrate a sympathetic design that is appropriate in form, with suitable reference to Georgian architecture.
64. These submissions of support are noted and are discussed in support of the proposal in the body of this report.
65. The objections received raised the following issues:
 - (a) **Issue:** The proposed envelope represents an overdevelopment of the site and will dominate the heritage conservation area of Millers Point.
Response: The application has been accompanied by a clause 4.6 request to vary the height standard applicable to the site and this request to vary the development standard has been deemed acceptable in the circumstances of the case. An assessment against the provisions of clause 4.6 and the consideration against the heritage value of the area have been discussed above.
 - (b) **Issue:** The envelope does not provide a great enough side setback to provide acoustic amenity to the adjacent property, to respect its heritage value and to maintain an appropriate distance from the easement to the northern boundary for fencing.
Response: The proposed envelope is set back 2m from the Lower Fort Street boundary and a range between 1.2m to 1.8m from the northern boundary to the site at 85 Lower Fort Street. The proposed street frontage and northern setbacks

are considered appropriate in allowing acceptable view lines to the southern elevation of the adjoining heritage item whilst not being visually dominating. Further, the proposal does not include any building envelope within any easements that burden the site. The detailed design of fencing and acoustic treatment will be addressed in a detailed development application.

- (c) **Issue:** It's unclear how the northern easement will be adequately protected from the public while allowing access by those that benefit from the easement.

Response: The detailed design of how any easement affecting the site will be treated and managed is assessed separately in a detailed development application.

- (d) **Issue:** The impact of the proposed development on the streetscape and public domain facilities has not been appropriately assessed.

Response: The application has adequately addressed the impact of the proposed development on the heritage streetscape. The proposal is not considered to have a significant impact on the existing public domain in regard to the increase in capacity of users of the public domain as a result of the proposed concept use. Any changes to the public domain must be addressed in a detailed development application.

- (e) **Issue:** The application does not address impacts on amenity of adjoining neighbours, sustainability or heritage.

Response: The application has been accompanied by a heritage impact statement assessing the significance of the site and the potential impacts the proposed development may have on the heritage conservation area and surrounding heritage items. The application was also accompanied by a Section 60 approval granted by Heritage NSW deeming the proposed development acceptable on heritage grounds. Further, the application has been assessed against the heritage controls of the LEP and DCP and considers the proposed envelope to be sympathetic to its heritage context, providing a height, scale, bulk and setbacks consistent with surrounding development.

Further, the proposed setbacks to neighbouring properties provides a future development to maintain appropriate residential amenity by way of overshadowing.

The concept application allows the facilitation of a future development to provide appropriate residential amenity to neighbouring developments and to meet the relevant sustainability requirements for residential developments.

- (f) **Issue:** The application has not satisfactorily addressed the heritage or structural impacts of the development on the adjoining retaining walls.

Response: The subject application is for a concept envelope and does not propose any physical works. The impact of any future excavation and building work on existing retaining walls is to be considered in a separate detailed application.

- (g) **Issue:** The proposal does not address overlooking impacts from all floors to surrounding residential properties.

Response: The subject application is for a concept envelope and the final location and design of the dwelling is subject to a separate detailed application.

The concept application was accompanied by indicative reference drawings which include appropriate measures to address potential overlooking. This includes locating private open space on the ground and lower ground floors, providing external fixed louvres to windows to the ground and first floors at the rear of the dwelling to offset views and locating bedrooms, bathrooms and wardrobes to the rear of the dwelling which are generally self-reliant on privacy measures. Further, the indicative scheme provides a rooftop outdoor terrace. The location of this terrace is set back far enough away from adjoining developments and is at a height that the impact of overlooking to neighbouring houses is considered minor and acceptable.

The indicative reference scheme demonstrates that the proposed envelope is capable of providing a dwelling that achieves appropriate residential amenity by way of overlooking.

- (h) **Issue:** The application has not considered the potential glare that the development will generate and lead to heat gain in surrounding developments.

Response: The subject application is for a concept envelope and does not propose any physical works. The impact of materials and finishes from the detailed design is to be considered in a separate detailed application.

Financial Contributions

Levy under Section 7.12 of the Environmental Planning and Assessment Regulation 2000

66. The Central Sydney Development Contributions Plan 2020 applies to the site. The assessment of the future detailed design application will consider whether a contribution under Section 7.12 of the Environmental Planning and Assessment Regulation 2000 is required.

Contribution under Section 7.13 of the Sydney Local Environmental Plan 2012

67. The assessment of a future detailed design application will consider whether an affordable housing contribution under Section 7.13 of the Sydney Local Environmental Plan 2012 is required.

Relevant Legislation

68. Environmental Planning and Assessment Act 1979.
69. Heritage Act 1977.

Conclusion

70. The proposed concept development is appropriate in its setting and with the exception of the height development standard, is generally compliant with the relevant planning controls in the Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012.
71. The application has been accompanied by a Section 60 approval granted by Heritage NSW and satisfies the relevant provisions of the Heritage Act 1977. Further, the application has been accompanied by a detailed Heritage Impact Statement which has assessed the potential impacts of the proposed envelope and a future detailed design development sufficiently.
72. The proposal exceeds the height limit applicable to the site as required by Clause 6.47(5) of the Sydney Local Environmental Plan, being the height of the single storey building that existed on site at the commencement of the clause. The application proposes a building envelope approximately 10.67m in height, an envelope commensurate to similar residential developments located in close proximity to the site.
73. A written justification for the proposed variation to the building height development standard has been submitted in accordance with Clause 4.6 of the Sydney Local Environmental Plan 2012. The statement demonstrates that compliance with the standard is unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify the contravention of the standard. The justification notes the compatibility of the proposed envelope with the existing heritage streetscape and the improvement the proposed future development will make to the heritage conservation area, replacing a detracting structure.
74. Where the assessment of the subject proposal has identified potential issues for a future detailed design development application, such as heritage conservation and vehicle access and servicing, these matters are identified in the recommended conditions of consent as requiring further consideration.
75. Subject to the recommendations in this report, and the imposition of the recommended conditions, the proposal is capable of accommodating a future detailed design that responds to the constraints of the site and contributes to the existing and desired character of the locality.

ANDREW THOMAS

Executive Manager Planning and Development

Marie Burge, Senior Planner