

Attachment C

**Clause 4.6 variation request – height of
buildings**

HAMPTONS

Ms. Rebecca Gordon
Specialist Planner
City of Sydney
456 Kent Street,
SYDNEY NSW 2000

Dear Rebecca,

D/2023/71 – 28-38 BAYSWATER ROAD, POTTS POINT: VARIATION TO DEVELOPMENT STANDARD

This written request to vary a development standard in accordance with clause 4.6 of the Sydney Local Environmental Plan 2012 (*LEP*) is to be considered having regard to the amended development application lodged for the site known as 28-38 Bayswater Road, Potts Point.

This written request is made against clause 4.3 of the LEP which restricts the height of buildings to 15m.

THE SITE

The site is located at 28-38 Bayswater Road, Potts Point and is legally described as Lot B, Deposited Plan 71866, Lot 3, Deposited Plan 785695 and Lot 24, Deposited Plan 192179.

AMENDED DEVELOPMENT APPLICATION

This amended DA seeks approval for:

- Demolition of existing buildings and structures
- Site remediation
- Construction of a mixed-use project comprising 22 dwellings in conjunction with commercial premises at the sub-ground, lower ground floor and ground floor, totaling 3,370.5m² in total gross floor area
- construction of 12 off-street car parking spaces (previously proposed for 15 spaces) for residential use, one car share space, one service space, 46 bicycle spaces

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- new building services, including a fire booster pump fronting Ward Avenue and a substation facing Mansion Lane, and
- site landscaping works to the communal and rooftop areas.

The proposal comprises a *mixed-use* development, incorporating retail and residential uses that constitute shop top housing. As demonstrated on the plans, the proposal is intended to incorporate a bar on the sub-ground level, retail space on the lower ground level, fronting Ward Avenue, and the ground floor level fronting Bayswater Road, and residential dwellings above.

THE DEVELOPMENT STANDARD

Clause 4.3 of the LEP states that:

- (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.*

Building height (or height of buildings) is defined in the Dictionary to the LEP as:

- (a) *in relation to the height of a building in metres – the vertical distance from ground level (existing) to the highest point of the building, ... including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

THE PROPOSED BUILDING HEIGHT

The amended building height is at RL 56.840 (+4.8m) to the highest point of the parapet, facing Ward Avenue and RL 57.590 (+5.055m) to the top of the lift overrun. The building is 20.055m at its highest point (lift overrun).

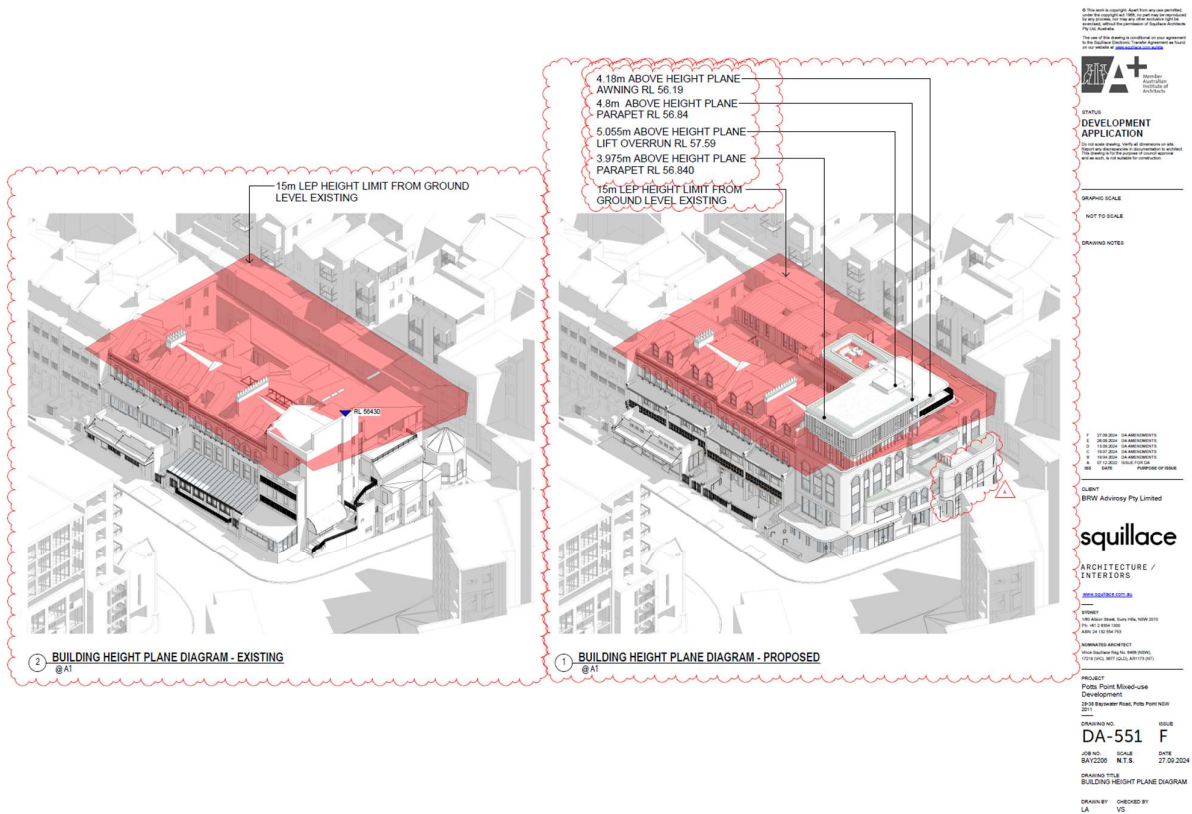
Non-compliance with the development standard relates to both the existing building and the proposed building form as shown in the Building Height Plane plan below. The exceedances may be summarized as follows:

- The configuration of the rear extension, specific to 30 Bayswater Road
- The additional building form at 38 Bayswater Road
- The common outdoor open space on the Mansion Lane frontage, recessed from the street.

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The existing building form, being retained along Bayswater Road, in part, exceeds the permitted height limit; however, is lower than that proposed.

Figure 1: Building Height Plane (Source: Squillace Architects)



VARIATION TO A DEVELOPMENT STANDARD

As the proposed development was lodged on 2 February 2023, it is subject to the previous clause 4.6 provision, which stated as follows:

Cl. 4.6(3) of the SLEP states that:

Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

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- (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.

These matters are addressed below.

(a) that compliance with the development standard is unreasonable or unnecessary

The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.

There are five alternatives set out in *Wehbe*, but only one need be satisfied as provided in the table below.

Table 1: The *Wehbe* Principles

The objective of the development standard is achieved notwithstanding non-compliance with the standard	In this case, the objective of the development standard is achieved, notwithstanding non-compliance with the standard.
The underlying objective or purpose of the development standard is not relevant	Not applicable
The underlying objective or purpose would be defeated or thwarted if compliance was required	Not applicable
The standard has been abandoned or destroyed	Not applicable
The zoning of the land was unreasonable or inappropriate such that the standards for the zoning are unreasonable or unnecessary.	Not applicable

Achievement of the objectives of the development standards

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The objectives of the height of buildings development standard are set out and addressed below as it relates to the non-compliant parts of the proposed built form, as described above.

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

The existing streetscape, where that portion of the proposal exceeds the development standards for height, is generally confined to the eastern side of the site, with limited frontage to the south (Bayswater Road). The encroachments include a minor portion of Level 3, facing Ward Avenue, and Level 4, facing both Ward Avenue and Bayswater Road, including the balcony attached to Apartment 401. In addition, the planter boxes aligning the communal open space area, along with lift and rooftop services, facing north, also exceed the height standard.

The amended proposal has reduced the extent of the eastern form at 38 Bayswater Road, by recessing this from the northern, eastern and southern facades of the building form below and increasing its setbacks. The increased setback distances, as the building increases in height, allows for those parts of the building compliant with the height limit, to sit proud and appropriately in the context of the dense urban form in the immediate context of the site. The amended design is more appropriately scaled with the density of existing buildings and the planning standards to the north of the site. This results in the form being pushed towards the south-eastern corner, where a greater proportion of bulk aligns with taller buildings that encompass this end of the site despite the existing building being higher than the existing terraces

The amended design also matches the parapet height of the proposed form with the existing terraces, while recessing the new upper-level form to create a visual separation and ensure that the existing terraces are the dominant element in the streetscape composition.

The amended materiality of this form to a lightweight cladding also results in the upper, non-compliant portions of the building being less visually dominant in their context.

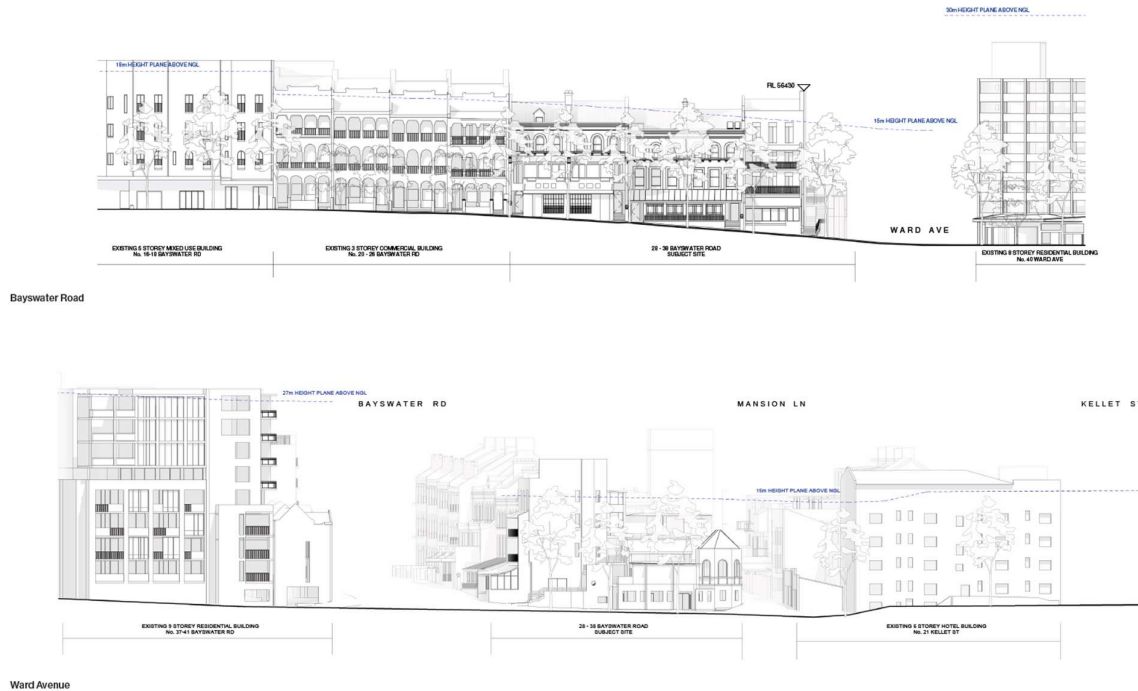
The site does sit in a complex position in relation to varying height controls and building forms, which are different along Bayswater Road, to that with Ward Avenue, providing two interfaces in which the building must interact, noting that there are taller buildings along the Ward Avenue frontage and, of which, are not necessarily consistent.

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Figure 2: Existing streetscape along Ward Avenue (Source: Design Report, Squillace Architecture + Interiors)



Figure 3: Existing built form in both Ward Avenue and Bayswater Road (Source: Design Report, Squillace Architecture & Interiors, page 10)



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The images demonstrate that the planning controls in place do not necessarily reflect the built form. While one would not argue that the standard has been abandoned or destroyed, it is the objective of the standard that is moreso relevant having regard to the context in which the development is proposed.

In determining the appropriate massing in context, the amended design provides a form whereby the lower building elements are consistent with adjoining buildings, while the upper levels are setback to reduce their prominence in the streetscape, particularly that part of the building that is non-compliant with the height development standard. This achieves a balance in terms of the site's context.

Figure 4: Streetscape elevation of proposal to Bayswater Road



Figure 5: Photomontage of proposal facing Bayswater Road (Winter)



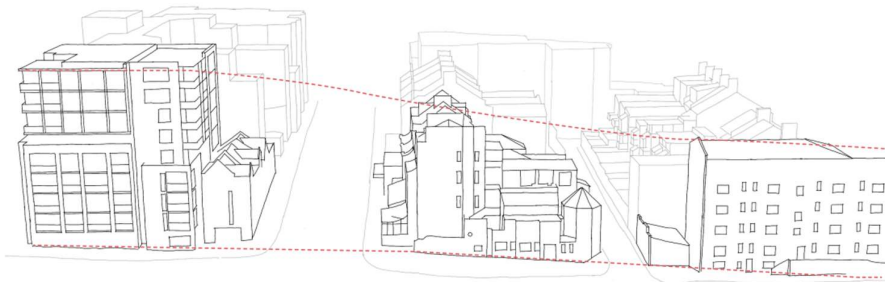
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Figure 6: Photomontage of proposal in context of both Bayswater Road and Ward Avenue



To the Ward Avenue frontage, the figure below shows an evident 'gap' in building form where the opportunity arises to create an appropriate addition to the built form that is not out of context in the streetscape.

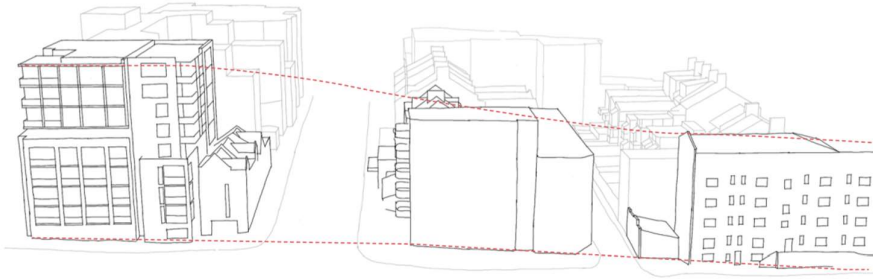
Figure 7: Opportunity to infill the missing link in the built form to Ward Avenue (Source: Design Report, Squillace Architecture + Interiors)



Existing

The Ward Avenue street frontage has two large buildings either side of the subject site. To the south of the site there is a new 8 storey apartment building and to the north there is a 6 storey residential buildings. There is also a fall in street level from south to north.

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Key Heights

Ward Avenue has two key height planes. An overall building height plane and a datum plane at 3 storeys. By stepping down at Mansion Lane, the building's bulk and scale allows the streetscape to transition appropriately north to 37-41 Bayswater Road.

By utilising this 'gap' in a form that does not dominate the streetscape, provides for an appropriate extension that fits within the context of Ward Avenue, without appearing obtrusive or out of character in the context, particularly given the setbacks that are proposed in the amended application. The expression of the terraces to the west of the site also remains visually coherent in the streetscape context due to the fall of the land and the separation provided by the upper levels of the new form at 38 Ward Avenue.

Figure 8: Built form at the corner of Ward Avenue and Mansion Lane with the taller form set back from the Mansion Lane frontage to respond to the immediately lower form on the northern side of Mansion Lane, while conversely relating to the southern side of Bayswater Road (Source: Design Report, Squillace Architecture & Interiors)



Proposed - Tree Shown



Proposed - Tree ghosted

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Overall, the various images of the proposed design in context demonstrate the juxtaposition of height of buildings in the locality such that there is no one dominant height, scale nor building alignment and the site, with three separate frontages and appearances, responds to three separate contextual elements.

In terms of the communal open space area being positioned above the permitted height, this is entirely appropriate in the context of this objective. The position allows for a high-quality space to be provided in a dense urban context, that would otherwise not achieve the same level of amenity if it were buried in the lower levels of the building as previously proposed. Its position responds to the conditions of the site and its context, facing north, to maximise natural light and amenity. The inclusion of shade structures provides a balanced external environment and the planters surrounding this area soften the visual effect of built form and provide an enhanced external communal open space area. Despite non-compliance, the objective is achieved through the use of this space in this position.

In all cases, the height of the amended proposal:

- is respectful of the form to Bayswater Road and continues the rhythm of the existing terraces, with limited visible change to the streetscape, despite the small element of non-compliance attached to 30 Bayswater Road
- proposes a building height to Bayswater Road that, while non-compliant, is recessive from the street and does not visually dominate, or take over from, the adjoining terraces that form part of the site, achieved not only through setbacks, but also materiality
- similarly returns along Ward Avenue and, while non-compliant with the development standard for height, is again recessed and subservient to that part of the building which complies with the development standard for height to ensure that it is appropriate in the context of varied building heights and is not overbearing in context
- terminates the higher built form along the northern side to ensure that this does not dominate over the buildings to the north and allows for an appearance to Mansion Lane that is respectful of this character in a laneway. The recessive form does not dominate this frontage in terms of bulk and scale.

The amended height is therefore entirely appropriate to the condition of the site and its context.

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

For similar reasons as set out above, the amended proposal provides appropriate transitions between the heritage elements of the site, those items proximate to the site and within the heritage conservation area.

The amended design ensures that the height of the replacement building does not overwhelm the contributory buildings to the immediate west creating a more consistent scale with the remaining buildings in the group, due to the recessive design of the upper, non-compliant areas of the building. While sitting one storey above the adjoining contributory buildings, the increased setback distances and adjusted materiality ensures that the form, despite non-compliance, has a satisfactory relationship with the immediately adjoining buildings.

The amended design, which has reduced non-compliance along the Ward Avenue frontage by setting the form in from the eastern edge of the building below, significantly reduces the extent of impact on the tree canopy which forms part of the streetscape. This enables a more appropriate relationship in the heritage conservation area.

These aspects are confirmed in the Heritage Response:

- *The proposed new building on the corner with Ward Avenue has been setback to reduce pruning to the street trees of Ward Avenue. This will have a positive impact on the trees and will also have a positive impact on reducing the massing of the proposed new building.*
- *The visual massing and scale of the building is reduced by setting back the upper two levels and changing the materiality of these levels to a light weight cladding that will be recessive against the brickwork of the levels below. The brickwork now rises to the same height as the parapet of No. 34 Bayswater Road. It is noted that the existing building at No. 36 Bayswater Road is higher than the adjoining terraces. Matching the parapet height with the brickwork provides a better relationship to the adjoining terraces than the existing building at this level. The detailing of the elevations has also been refined.*
- *As demonstrated by the design statement, the massing and scale of the proposal has been carefully considered against the existing intersection and character of Mansion Lane.*

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Again, the non-compliant section of the built form appropriately responds to the heritage context of the site and provides responsive transitional elements to ensure that the heritage characteristics and elements of the locality are suitably preserved.

The non-compliant portion of the proposed development therefore achieves this objective.

c) to promote the sharing of views outside Central Sydney

The Architectural Design Report nominates views from the site directed towards both Rushcutters Bay and Woolloomooloo. Having regard to the direction of the view, that section of the building that is not compliant with the height of building standard will not interfere with any potential or available view corridors in the direction of the views nominated. Therefore, the proposal has no impact in relation to this objective.

(b) sufficient environmental planning grounds

There are sufficient environmental planning grounds to support non-compliance with the development standard for the height of buildings required as:

- the design of the building form, and particularly, the non-compliant section, provides a scale, form and materiality that is commensurate with the building form proximate to the site, where there are varying heights expressed in this dense urban environment
- the design of the additional building height is reflective of a classic approach to infill development, where the new form proposed is in harmony with the heritage characteristics of the site itself, while responding to the newer, more contemporary, architectural design approaches that are evident in the immediate locality, to ensure that it sits comfortably in context
- the additional building height proposed does not compromise the amenity of adjoining properties in terms of solar access, cross ventilation, view sharing, nor adverse privacy impacts
- the configuration of the building form allows for the orderly and economic use of the land, with all other development standards being complied with, noting, that the proposed floor space ratio does not achieve that permitted, with all other controls being designed acceptably such as setbacks, landscaping, private open space, communal open space and building separation
- the additional building height provides an opportunity to increase the provision of housing in a location that is highly accessible to public transport, services and facilities. While small in provision, this will assist to provide additional housing supply in a highly accessible location

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- the proposal does not lean on any other development standard or control to increase density on the site, such that there is a material benefit to the property in terms of additional habitable space, the provision of which is modest and that the overall quantum of floor space proposed is below that permitted on the land. In this case, the density controls do not align to produce a consistent outcome
- the proposal provides a significant contribution to increasing housing supply in the area, in a location that is proximate to public transport and provides a diversity of dwelling sizes to respond to various demographic conditions
- the height of the form proposed assists the overall development outcome as it relates to the conservation and adaptive reuse of the existing terraces on the site
- the proposal has been sensitively designed to ensure that there are no environmental impacts to neighbouring properties as a result of non-compliance with the development standard noting the setbacks that have been designed to the upper building levels
- the proposal has also been designed with increased side setbacks to Ward Avenue to ensure that the condition of trees within the streetscape is preserved, with the building form set back, including a the upper level, to ensure the retention of these.

There are therefore sufficient environmental planning grounds to support the additional, non-compliant section of the building height, as proposed.

THE PUBLIC INTEREST

Clause 4.6(4) states that:

Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

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(b) the concurrence of the Planning Secretary has been obtained.

The matters relating to subclause (3) are addressed above.

The next element that the Council needs to be satisfied with to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the zone objectives. Following amendments to the LEP, the site is now located in the E1 Local Centre zone. The amended proposal is considered in the context of these objectives.

Objective to zone	Compliance	Comment
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.	Yes	The design of the amended proposal has the capacity to accommodate such uses to service the needs of people who live in, work in and visit the area, as well as within the development itself.
- To encourage investment in local commercial development that generates employment opportunities and economic growth	Yes	The extent of floor area, despite being reduced, for commercial purposes ensures that employment generation will result from this proposal.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area	Yes	The proposal provides a variety of residential accommodation in terms of style and product that will contribute to this part of the local centre, by the diversity offered and create activated spaces within and around the site.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings		Retail uses are proposed on the ground floor along Bayswater Road and Ward Avenue. As agreed with Council, the amended plans have removed non-residential uses from the Mansion Lane frontage as this is a service lane, which is not desirable for active use and would otherwise result in land use conflict.

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<p>- To maximise public transport patronage and encourage walking and cycling.</p>	<p>Yes</p>	<p>As identified in the Statement of Environmental Effects, the site is in very close proximity to public transport, walking and cycling opportunities. Coupled with the provision of on-site bicycle parking for the commercial and residential components of the development, as well as the limited provision of on-site car parking will ensure that use of public transport and alternative modes are utilised.</p>
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Therefore, the proposed development will comprehensively meet the objectives of the zone.

It is also relevant to note that the proposal will not exceed the floor space ratio permitted. The additional height proposed is simply to ensure an appropriate design response in a suitable location on the site that is without adverse impact on adjoining properties, while appropriately conserving and responding to the diverse street frontages and the heritage characteristics of the locality.

This ensures that the public interest is maintained without placing undue pressure on existing urban services in the surrounding environment, both natural and built, while complying with the relevant objectives and producing a better outcome due to its own site constraints.

SECRETARY'S CONCURRENCE

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests except in the circumstances set out below:

- Lot size standards for rural dwellings
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

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The Circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

CONCLUSION

The development application does not comply with cl. 4.3(2) of the SLEP. However, the proposal achieves the requirements of cl.4.6 of the SLEP, which allows for variation.

The variation to the development standard should therefore be supported by the consent authority in the circumstances of the case.