

Clause 4.6

Request to vary a Development Standard

Dee Why RSL DA
932 Pittwater Road, Why



Submitted to Northern Beaches Council
on behalf of Dee Why RSL

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1. Introduction

This is a written request (the Request) to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *Warringah Local Environmental Plan 2011* (WLEP 2011).

This Request relates to the Clause 4.3 'Height of buildings' development standard of the WLEP 2011.

This Request has considered the detailed guidance within the NSW Department of Planning and Environment (DPE) guideline *Varying Development Standards: A Guide, August 2011* (DPE Guide) and planning system circular PS 20-002 *Varying Development Standards, May 2020*, and addresses the findings and established principles (as relevant) in the following judgements of the NSW Land and Environment Court (the Court):

- *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070
- *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189
- *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131

The following sections of this Request critically analyse the proposed variation to the maximum 12m height of building standard applying to the site, its impact and reasonableness.

This analysis demonstrates that an exception to the height of buildings development standard is warranted in this instance.

It is important to note that this Clause 4.6 request has been prepared in accordance with the position adopted in the Court Case *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 (Merman) in regard to the calculation of building height. Further information is provided at Section 3.1 of this report.

2. Planning Overview

The *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) includes various development standards as a means of achieving environmental planning objectives.

Clause 4.6 of the Standard Instrument allows a consent authority to consider and grant consent to a development even in the circumstance where that development would contravene a development standard.

The DPHI Guide recommends that any request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment. Table 1 below provides a summary of the relevant planning context and provides an overview of the proposed variation.

Information Requirement	Comment
Relevant Applicable Planning Instrument	Warringah Local Environmental Plan 2011
Zoning of the Land	R3 Medium Density Residential
Objectives of the Zone	<p>The objectives of the R3 zone are:</p> <ul style="list-style-type: none"> <i>To provide for the housing needs of the community within a medium density residential environment.</i> <i>To provide a variety of housing types within a medium density residential environment.</i> <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> <i>To ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.</i> <i>To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.</i>
Development Standard to be Varied	Height of buildings
Nature of the Development Standard	A numerical height control (12m)
Relevant Development Standard Clause	Clause 4.3 of the WLEP 2011.
Objectives of the Development standard	<p>The objectives of Clause 4.3 are:</p> <ul style="list-style-type: none"> <i>(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,</i> <i>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i> <i>(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i> <i>(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>

Information Requirement	Comment
Development Standard Numeric Control for the Site	12m (refer to Figure 1)
Proposed Numeric Control	17.05m
Percentage Variation Between the Proposal and the Planning Instrument	When calculated from natural ground level the maximum height exceedance is 4m. When calculated using the merman principles (from existing ground level – i.e. basement level) the maximum height exceedance is 5.05m (42%).

Table 1: DPHI Guide recommended planning information and numeric overview

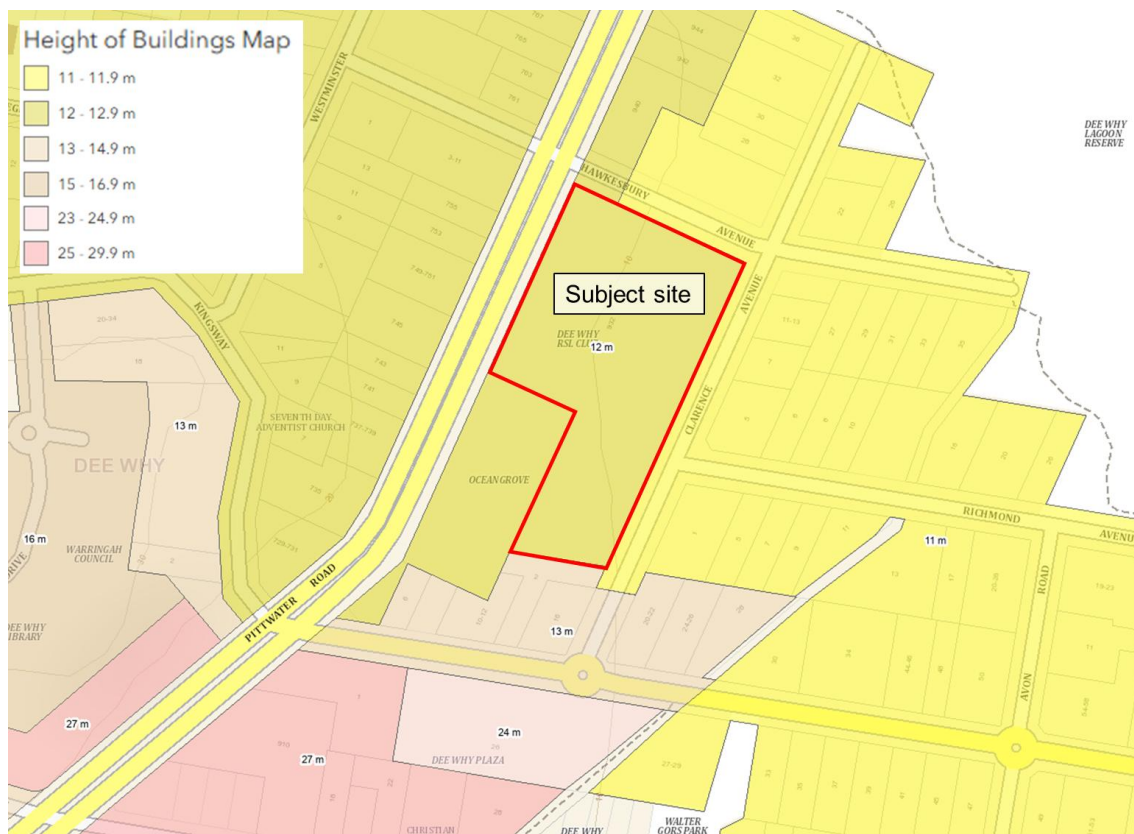


Figure 1: Height map (Base source: Eplanning spatial viewer)

3. Proposed Development

This Request supports a DA for alterations and additions to facilitate the refurbishment of the Dee Why RSL Club at 932 Pittwater Road, Dee Why. The subject site has an area of 14,830m². The site location is shown in the figure below.



Figure 2: Site locality plan (Source: Nearmaps)

The proposed development comprises internal and external alterations and additions as described below:

- external additions:
 - new stairs and ramps to facilitate access along Hawkesbury Avenue
 - new awnings
- external alterations
 - relocation of the entry on Pittwater Road further east to improve accessibility
 - new roof and roof skylight/glazing
 - landscaping
 - façade upgrade
 - new plant
- internal alterations within levels 1, 2, 3 and 5:
 - extending the northern part of the building on Level 2 to enclose the existing outdoor area
 - modifying the layout of level 2 to facilitate a new café, consolidation of gaming areas and expansion of a restaurant area
 - plant and mechanical works



3.1. Proposed variation

This Clause 4.6 request has been prepared in accordance with the position adopted by the Court in *Merman* in relation to measuring building height.

In *Merman*, the Court determined that the existing ground level at the site was the excavated ground level (or existing basement) below the existing building. The building height was then calculated from the bottom of this existing basement.

This approach differs from a conventional merit-based approach to measuring building height, which is based on the existing topography of the site and ground floor of an existing building.

The conventional approach is traditionally adopted by consent authorities, including (in the past) the Court. In *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (Bettar) and *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (Stamford), the Court found that existing ground level should not be taken literally and that a building should be considered in its context. In *Bettar*, the level of the footpath at the boundary of the site was taken as the existing ground level, and in *Stamford*, the Court took an average between the ground level of the public domain and the level of the excavated portion of the site.

Notwithstanding the above, the more recent jurisprudence of the Court is consistent with *Merman: Triple Blue Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1065 (at [47]); *Stokes v Waverley Council (No 3)* [2020] NSWLEC 1224 at [59].

The Architectural Plans prepared by Altis Architecture provided at Appendix 1 include height planes which demonstrate the proposed height variations based on natural ground level and the merman principles. The plans form part of this Clause 4.6 request.

Accordingly, this Clause 4.6 request addresses the height variation in regard to the Merman principle although it is noted that strict adherence to a height plane measured for the technical existing ground levels results in an illogical building height that follows the subsurface levels, of the existing basement, which should have no bearing on the ultimate height of development on the site and which does not reflect the natural topography and future character of the area.

This Clause 4.6 Request demonstrates that compliance with the height of buildings development standard, as measured in accordance with *Merman*, is unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify this contravention.

4. Legislative Context

4.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the WLEP 2011 sets out key assessment criteria which enables Council to consider and grant development consent for a development that contravenes a development standard. The overarching objectives of this clause are contained in subclause (1) as detailed below:

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

Subclauses (3) and (4) of Clause 4.6 are relevant and development consent can only be granted subject to their consideration.

4.1.1. Clause 4.6(3)

Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

4.2. Relevant Judgements - NSW Land and Environment Court

The following key Land and Environment Court (NSW LEC) judgements provide guidance on key considerations in the assessment of a Clause 4.6 variation Request. These judgements focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation Requests:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112

The key findings and established principles (as relevant) of the above judgements of the Land and Environment Court are summarised below.

4.2.1. Wehbe v Pittwater Council (2007)

This case establishes five potential grounds 'Wehbe tests' to ascertain whether strict compliance with a development standard is unreasonable or unnecessary, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

4.2.2. Initial Action Pty Ltd v Woollahra Municipal Council (2018)

Initial Action Pty Ltd v Woollahra Municipal Council [2018] (Initial Action) further clarifies the correct approach for the consideration of clause 4.6 requests. Clause 4.6 does not require that a development that contravenes a development standard to have a *neutral or better* environmental planning outcome than a fully compliant development.

A legal consequence of the decision in *Initial Action* is that Clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

In *Initial Action*, the Court also confirmed that the five common ways of establishing that compliance with a development standard is unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) continue to apply.

4.2.3. Linfield Developments Pty Ltd v Cumberland Council (2019)

The 'third' Wehbe test is concerned with the underlying object or purpose of the development standard and that it would be defeated, thwarted or undermined if strict compliance was required. The reference to 'undermined' is an extension of Wehbe which was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]) (Linfield). In Linfield, the court found that:

"...requiring compliance would thwart or undermine at least one of the objectives of the height control development standard..."

4.2.4. SJD DB2 Pty Ltd v Woollahra Council (2020)

The *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (SJD) established greater flexibility in applying clause 4.6 to vary development standards where a better outcome would be achieved in the context of the site. This case concluded that the numerical controls and objectives associated with development standards should not be used to strictly define desired future character. One relevant outcome of the case was that other provisions of the local environmental plan as well as development in the area that contravenes the development standard can indicate the desired future character of an area.

5. Assessment of the Variation to Height of Buildings development standard

The WLEP 2011 sets a standard height of building development control of 12m for the entire site.

The proposal seeks to increase the maximum height of building development control by 5.05m (42%) to accommodate a built form that is appropriate for the conditions of the site and its context.

Importantly, the proposed height exceedances is limited to minor projecting elements of the building.

The following assessment comprehensively considers the provisions of Clause 4.6 with regard to the relevant case law.

5.1. Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

Wehbe establishes at least five potential alternative grounds to ascertain whether strict compliance with a development standard is unreasonable or unnecessary. An assessment against the relevant tests are provided below to outline how compliance with the height of building development standard is unreasonable and unnecessary.

5.1.1. Wehbe Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the height of building development standard will be achieved notwithstanding the non-compliance with the standard as outlined at Table 2.

Clause 4.3 Height of Building Development Standard	
Objectives	Achievement of Objectives
(a) <i>to ensure that buildings are compatible with the height and scale of surrounding and nearby development</i>	<ul style="list-style-type: none">• The proposed height exceedances range from 0.2 to 5.05m (using the merman methodology.• These exceedances are consistent with the bulk and scale of the surrounding area and development as outlined below:<ul style="list-style-type: none">○ The Dee Why Town Centre is located 180m to the south, and the closest site (corner Dee Why Parade & Pittwater Road) has a height control of 27m.○ Medium density RFBs are located to north, east and west, ranging from 3 to 8 storeys (approx. 10m – 26m).○ The proposed height is appropriate for the site as it has a direct interface with Pittwater Road and is located on a predominant corner that signifies the entry to the suburb of Dee Why.• The Additional Permitted Use (APU) for the site set by the WLEP 2011 envisions the site to

Clause 4.3 Height of Building Development Standard

	<p>be used for the purposes of a registered club. The proposed height increase will allow the club to make necessary improvements to provide an enhanced experience, allowing the club to cater to its members and the public through refurbished and updated interiors and facilities, improved accessibility and club operations (e.g. communications and plant) as well as a larger café and bistro. Although not all of these improvements are the direct cause of the height increase, the built form that is (e.g. lift overrun, as identified earlier) above the 12m Merman height plane has been pushed up because of these elements, and are therefore associated with the height increase.</p> <ul style="list-style-type: none"> Importantly, the Club's building envelope was approved with height exceedances. As shown within Figure 3 and Figure 4, all exceedances proposed as part of this DA are <u>below</u> the highest part of the existing built form and total 1.9% of the roof area.
(b) <i>to minimise visual impact, disruption of views, loss of privacy and loss of solar access,</i>	<ul style="list-style-type: none"> The proposed height exceedances are limited to the tower cooler, small portion of the new roof, fire egress stairs, parapet wall, plant room. These elements are generally located towards the centre of the building and will therefore unlikely to be seen when viewed from street level. These elements are relatively minor (1.9% of the roof area and: <ul style="list-style-type: none"> will not disrupt any important view lines as all proposed height exceedances are <u>below</u> the highest part of the existing built form which is being retained will not result in any privacy impacts as the proposed elements which exceed the height are not habitable areas that provide windows towards neighbouring properties and therefore no overlooking will occur will not result in loss of solar access as demonstrated within the Architectural Plans (Appendix 1)
(c) <i>to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,</i>	<ul style="list-style-type: none"> The proposed exceedances are minor in nature and range from 0.2m to 5.05m (utilising the Merman methodology). These exceedances will not result in any adverse impacts on the scenic quality of Warringah's coast or bush environments as: <ul style="list-style-type: none"> the site is not located within or adjacent to any coastal or bushland environments it is noted Dee Why Lagoon and Reserve Heritage Conservation Area (C5) is located

Clause 4.3 Height of Building Development Standard	
	<p>approximately 80m northeast, however the elements which exceed the height limit will generally not be seen given the separation distance and due to existing buildings which restrict view lines.</p> <ul style="list-style-type: none"> ○ the elements above the height limit are limited to the tower cooler, small portion of the new roof, stairs, parapet wall, plant room and duct and do not significantly change the building envelope
(d) <i>to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.</i>	<p>The site does not directly adjoin any areas of open space. As discussed above, Dee Why Lagoon and Reserve Heritage Conservation Area (C5) is located approximately 80m northeast, however the elements which exceed the height limit will generally not be seen given the separation distance and due to existing buildings which restrict view lines.</p> <p>As detailed within the isometric height plane plan prepared by Altis (Appendix 1) the elements which exceed the height limit are setback from the parapet and located towards the centre of the building and will therefore generally not be seen when viewed from the surrounding street network.</p>

Table 2: Consistency with Clause 4.3 height of buildings development standards objectives

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge said (at [34]) that:

establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary.

In this matter it has been demonstrated that the contravention does not cause any material environmental harm (of a kind that the objectives seek to avoid).

5.1.2. Wehbe Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

The underlying objective and purpose of the height development standard is considered relevant to the development. On this basis, an assessment against this test is not required.

5.1.3. Wehbe Test 3: The underlying object or purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable

Strict compliance with the height of buildings development standard would defeat, thwart and undermine the underlying object or purpose of the height of buildings development

standard. This was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]).

The objects that would be defeated, thwarted or undermined if strict compliance was required in this case are clause 4.3(1)(a) of the WLEP 2011, as detailed below.

Clause 4.3(1)(a) states:

to ensure that buildings are compatible with the height and scale of surrounding and nearby development

Objective (a) would be undermined if strict compliance was required.

The proposed height variation relates to minor elements including the tower cooler, a small portion of the new roof, stairs, parapet wall, plant room and duct. These elements do not significantly change the building envelope and importantly are all below the approved maximum height of the existing building.

Despite the proposed exceedance, the building will still remain compatible with the height and scale of surrounding development, which varies from 3 to 8 storeys.

If strict compliance with the height control were required, as a result of the height being calculated from the bottom of the existing building, it would result in a development which is unable to reflect and respond to the existing building on the site.

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

The building height development standard cannot be said to be virtually abandoned or destroyed. Notwithstanding, Council has previously granted approval at the site in recent years, which demonstrate a departure to the height of buildings development standard.

5.2. Clause 4.6(3)(b) – Environmental Planning Grounds to Justify Contravening the Development Standard

The proposed development, including the building height non-compliances, will provide for an improved local club for both members and the public.

There are sound planning grounds and significant benefits to justify contravening the height of building development standards of which are outlined in the following sections. In particular:

- the proposed built form and height increase will not significantly alter the urban design outcome for the site given its minor nature
- the proposed development is envisioned through the APU set for the site pursuant to Section 2.5, Schedule 1, Clause 9 of WLEP 2011

- the proposal promotes the orderly and economic use of the land (as per section 1.3(c) of the EP&A Act) by allowing the club to provide an enhanced experience, allowing it to better cater to its members and the public

These matters are discussed in further detail below.

5.2.1. Urban Design Outcome

The proposed height exceedances are limited to the tower cooler, small portion of the new roof, fire egress stairs, parapet wall, plant room and duct. These elements are largely located towards the centre of the building and are generally unlikely to be seen when viewed from street level.

These elements are relatively minor and:

- will not disrupt any important view lines as all proposed height exceedances are below the highest part of the existing built form which is being retained
- will not result in any privacy impacts as the proposed elements which exceed the height are not habitable areas that provide windows towards neighbouring properties and therefore no overlooking will occur
- will not result in loss of solar access as demonstrated within the Architectural Plans (Appendix 1)

5.2.2. The proposed development is consistent with the APU for the site

The use of the site as a registered club is permitted pursuant to Section 2.5, Schedule 1, Clause 9 of WLEP 2011:

9 Use of certain land at Pittwater Road, Dee Why

- (1) *This clause applies to land at Pittwater Road, Dee Why, being Lot 1, DP 706230, shown as "Area 9" on the Additional Permitted Uses Map.*
- (2) *Development for the purposes of recreation facilities (indoor) (provided that the facility operates in conjunction with a registered club) and registered clubs is permitted with consent.*

As detailed below, the proposed height exceedance enable the orderly and economic use of the land in accordance with the APU for the site.

5.2.3. Orderly and economic use of the land

Section 1.3(c) of the EP&A Act provides that it is an objective of the Act to:

to promote the orderly and economic use and development of land

On the basis of the above, the proposed non-compliant height allows the development to:

- better achieve the intent of the APU for site, by facilitating an improved registered club that better caters to its members and the public
- aligns closely with Section 1.3(c) of the EP&A Act as it allows the existing club to make improvements that facilitate more efficient operations and economic use of the land
- generate more employment opportunities at the site through increased café and bistro offerings

6. Conclusion

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstance and this Request has been shown to satisfy the provisions of 4.6(3) of the WLEP 2011.

This Clause 4.6 Request was prepared with consideration for the case of *Merman* although measuring the building height based on the existing topography of the site and ground floor of the existing building, is considered a more appropriate interpretation.

The height variation is justified for the following reasons:

- The departure from the height development standard is exacerbated by the existing excavation of the site for a basement and bowling centre.
- The areas of non-compliance (above the 12m height plane) are largely concentrated towards the centre of the existing building, therefore minimising privacy, overshadowing and visual impacts of the exceedance on surrounding residential properties.
- The proposal is consistent with the bulk and scale of the surrounding area considering RFBs are the predominant typology and the proximity of the Dee Why Town Centre.
- The proposed development is consistent with the APU for the site established by the WLEP 2011 as well as the height of buildings development standard despite the non-compliance.
- The height increase does not restrict the ability for the proposed development from providing a high quality urban design outcome that is considerate of adjoining land uses and built form as:
 - The areas of non-compliance (above the 12m height plane) are concentrated towards the centre of the building, will generally not be visible from the surrounding street and total 1.9% of the roof area.
 - The non-compliant sections have also been designed as per the appearance of the entire building, representing a materiality that is responsive consistent and aesthetic.
 - Additional landscape treatment is also proposed to soften the built form and increase visual appeal when viewed from adjoining streets (refer Figures below).
 - There are no additional privacy concerns as a result of the non-complaint height given these elements do not relate to habitable rooms and are largely plant related.
 - As detailed within the Architectural Plans the proposal will not result in loss of solar access to neighbouring properties (Appendix 1)

Overall, and for the reasons set out above, the proposed development represents a superior outcome for the site that is justified. Therefore, it is appropriate that the development standard be varied as proposed.