

**Request for Variation to the Development Standard for Height of Buildings, pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP)
75 The Corso, 41 & 42 North Steyne**

This Request to vary a development standard for the height of buildings is lodged in accordance with cl. 4.6 of the MLEP 2013, which allows for a development standard to be varied. The DA seeks to vary the development standard for the height of buildings, contained at cl. 4.3 of the MLEP for Height of Buildings.

Existing and Proposed Building Height

The height of the existing building in its predominant form, is between RL 18.5 and RL 19.96, being 13.5m – 14.96m; the maximum existing services height tops out at RL 21.060, being 16.060m. However, there is an existing vent at RL 22.63, being 17.63m.

The proposed building height, including all building services, is 15.15m.

For that part of the site where the 10m building height applies, the maximum building height is generally 12m, but for a higher section, which is set back from the front boundary of the site by 5m and reaches a maximum height of 15.15m; the remainder of the site, where the 12m height limit applies, the maximum building height is 15.15m.

The purpose of this Report is to provide sufficient justification to vary the development standard for height of buildings.

The Site

The site is located at 75 The Corso, 41 and 42 North Steyne. There is no change to the height of 75 The Corso. The site has a total area of 2,073.7m².

The Development Application

The development application is as set out in the Statement of Environmental Effects.

The Development Standard

Height of Buildings (clause 4.3)

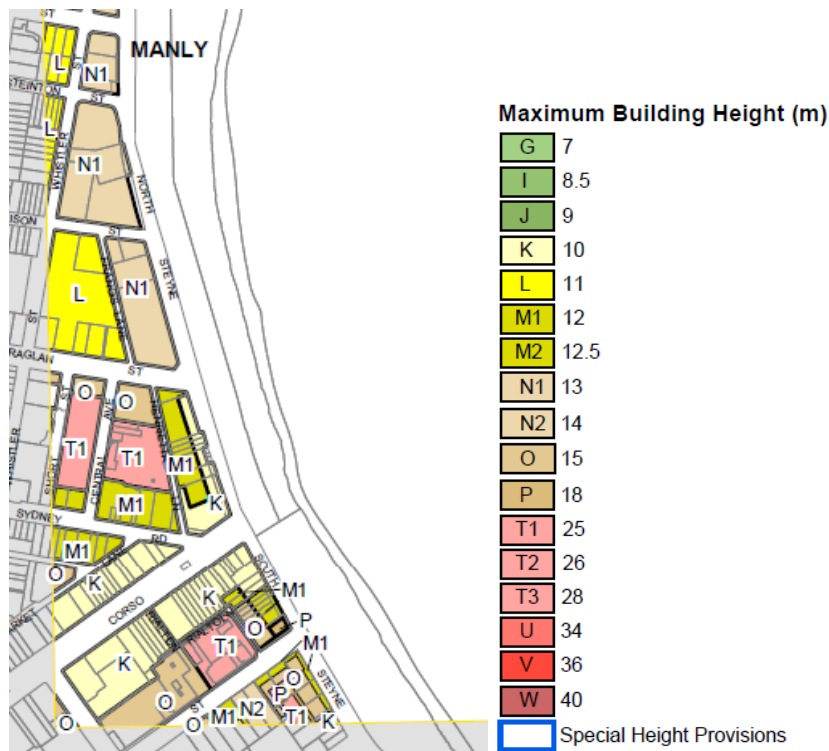
Clause 4.3 of the MLEP states:

- (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](#).*

The height of buildings map stipulates two height limits, being 10m and 12m.



Figure 1: Height of Building Map



Definitions

The Dictionary to the WLEP provides the following in relation to building height:

building height (or height of building) means:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing)ⁱ to the highest point of the building, or*
- (b) *In relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

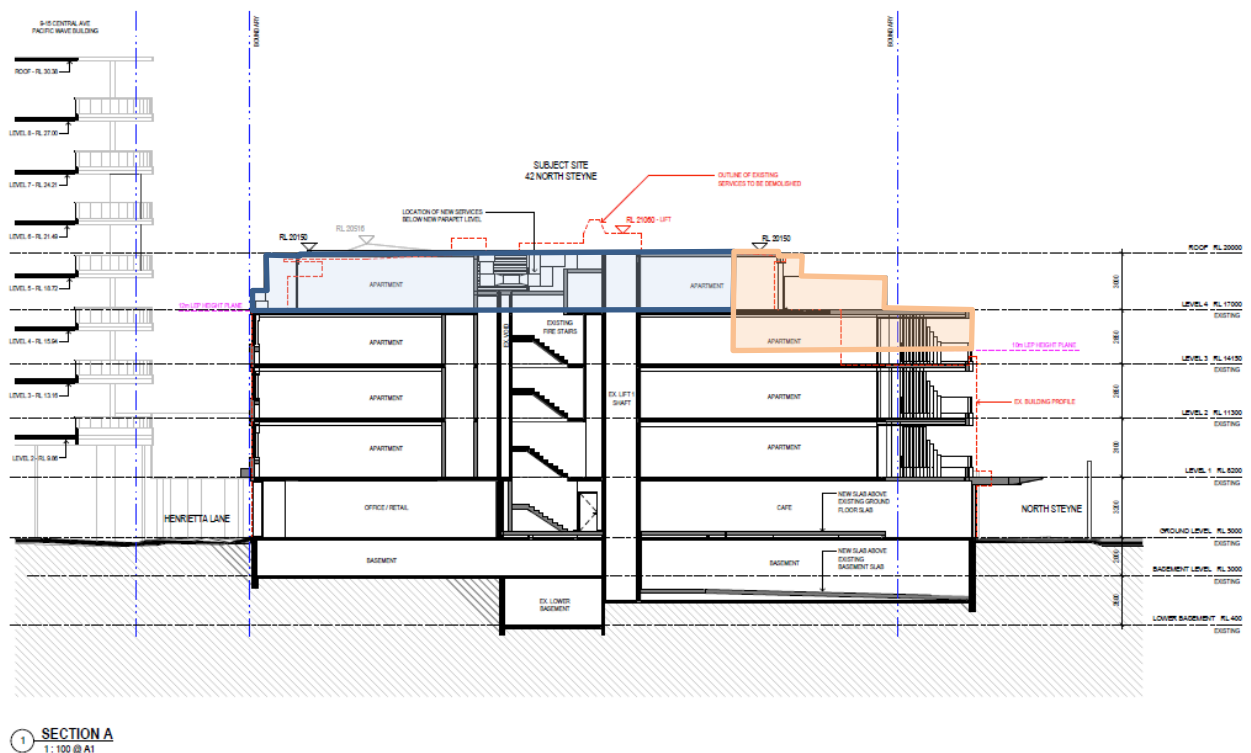
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Non-Compliant Section of the Development

The section below demonstrates that section of the building that is non-compliant with the development standard.



Figure 2: Section of the proposed development, in blue demonstrating that section of the building above the 12m Height of Buildings Development Standard and in orange, above the 10m Standard



Is Clause 4.3 a Development Standard?

Clause 4.6 can only be used to vary a development standard. Development standards are relevantly defined in s 1.4 of the *Environmental Planning & Assessment Act 1979 (EP & A Act)* *inter alia* as follows:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Being a provision of the MLEP in relation to the carrying out of development, under which a requirement is fixed in respect to height of buildings in the relevant zone, clause 4.3(2) of the MLEP is a development standard. Accordingly, clause 4.6 can be used to approve a variation to the standard.

As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development would contravene a development standard set by an environmental planning instrument.

The Proposal's Non-Compliance with the Development Standards

The non-compliant height of the building ranges between 3m and 5.15m.



While not necessarily determinative, this compares with the existing building height which is non-compliant in the order of between 3.5m and 2.96m; however, when the existing services are taken into account above the predominant roof form, the non-compliance increases to between 4.06m and 5.63m.

At its lowest non-compliance, this is 25-55% non-compliant and at its greatest point is 51.5%.

Variation to the Development Standards

Clause 4.6(3) of the MLEP states:

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

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

The objective for height of buildings is addressed below, as it relates to the noncompliant parts of the building.

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

The desired future character of the neighbourhood is determined by reference to the existing character of buildings, as well as the suite of planning controls applying to the locality, not only those encapsulated within the zone objectives, but inclusive of provisions relating to the foreshore scenic protection area and design excellence, as well as the Manly Town Centre provisions contained in the Manly DCP, but also having regard to the provisions of State Environmental Planning Policies (*Big Property Group Ltd v Randwick City Council* [2021] NSWLEC 1161 (**Big Property**)).

Desired future character is not solely determined by the LEP development standards, including maximum building height, that are applicable to any site, as these standards do not account for specific site characteristics, local context or any bonus provisions that may benefit a particular development. In this case, the DCP provides benefit in setting out the desired future character of the locality and in conjunction with the various relevant EPIs, including SEPP 65, the MLEP and the ADG, which cumulatively assist to establish the desired future character. There is the opportunity to consider this element of the proposed form within the existing development that forms the built context of the site and is not necessarily reflected in the desired future character statement on a site-specific basis.

In this regard, it is noted that the proposal, carefully and skilfully attributes increased height towards the centre and rear of the site, consistent with the standards themselves, to provide a transition away from the more sensitive streetscape area of North Steyne.

In terms of prevailing building height, both the streetscape survey prepared by LTS Lockley and the photographic survey contained in the Urban Design Report make it abundantly clear that there is no prevailing building height in the context of North Steyne, but instead a highly diversified set of buildings with varying heights that do not result in one predominant character in that context prevailing.

Along Henrietta Lane, which has a more limited frontage when considered in its visual context, having regard to height, the proposed form, as demonstrated in DA901, provides only a minor and subtle change in building height over the non-compliant component of which could not be considered 'discernible' in its context of building height fronting the laneway.

In terms of the desired future streetscape character for the Manly Town Centre, the Townscape Principles, where relevant to the subject site, are addressed in the design scheme as follows:

- there is no change to the strongly defined corner element of Hotel Steyne
- pedestrian links are enhanced with a new link to be provided from Henrietta Lane through the Hotel Steyne to North Steyne, thus limiting the size and bulk of otherwise perceived to be large buildings
- the scale, proportion and line of the visible facades is responsive to traditional versus more contemporary facades that bookend the site. The materials, which utilise a dark brick, provide a complementary relationship with the form and vertical proportion of the Hotel Steyne for 41 North Steyne, with the large openings for windows projecting a lightweight, unobtrusive element to the façade. In contrast, the detailing of the façade of 42 provides a recessive connection with 41, before setting itself forward to regularise the alignment with 41 and providing a complementary material



pallet with darker elements picked up with screening, while the building itself takes on lighter tones to provide a subtle appearance in colour, while being bold in feature as it presents to the street. The use of curved elements is reflective of the beachside context and reflects movement associated with beachside elements that allow the built form to fold into the adjoining buildings. These features ensure that the expression of built form responds to the heritage elements of 75 The Corso, while correlating with more contemporary forms that present to North Steyne.

- by contrast is the secondary, but no less important, frontage facing Henrietta Lane, where the design provides a moderated form, with strong horizontal expression that is picked up from Hotel Steyne and transcends this frontage. The introduction of holistic landscape elements both in consolidated and fragmented forms, provides a further layer within this context, to soften the edges of the building, while taking on a lesser regimented form to create a more inviting space in what is otherwise very much apparent as a service laneway.
- in all cases, the proposed appearance to each of the streetscapes provides a highly responsive approach to the scale, proportion and lines of the visible facades as they relate to the site
- in terms of visual pattern of openings and solid to void ratios, the degree of openings to both street frontages are increased and maximised to each of the building elevations, particularly to the rear frontage of the site at the ground level. The opportunity in demolishing 41 North Steyne also allows for larger openings that are closer to the street and provides increased opportunities for casual surveillance
- the height of the proposed development is responsive to the existing floor levels that provide a continuum in visual form to the streetscape character as it fronts both streets
- the exposed wall on the southern side, that interface with Hotel Steyne compromises both a rendered brick that is a subtle contrast to the more dominant brick work that is provided on the eastern elevation, with lightweight glass balustrades at the upper building level (where the form is non-compliant with the development standard) to ensure an attractive pattern of infill elements
- the composition of roof structures, comprising plant and equipment, are recessed into the building itself to ensure that there are no obtrusive features above the building form that not only dominant the appearance of the building, but also preclude view sharing from adjoining private uses (addressed in the view sharing assessment under separate cover)

Further, Section 4.2.5 provides further consideration for the design of buildings within the townscape. The proposed form responds to these as follows:

- the existing pattern of building form to each of the street frontages is retained, consistent with their existing composition, such that the streetscape character is maintained, with increased proportions of recessive elements that ensure that any bulk attributable to street walls is not apparent
- existing setbacks are generally retained aside from a newer section of proposed form at Level 3 and Level 4 on the eastern side of the building which is forward of the existing building (and in turn the development standard), but reinforces both the horizontal and vertical pattern of No. 41 which is responsive to the existing conditions of Hotel Steyne
- there are no embellishments to roof forms that otherwise dominate the building height and, with the improvements proposed, will see a reduction in current unsightly elements on the rooftop of the existing buildings which will be absorbed into the building proper while maintaining a height, when viewed from the west, that is generally consistent with the current building height (outside of the existing service protrusions)
- the proposed height, while being above the development standard, seeks to improve the views available from adjoining buildings to the west, without adversely compromising views on the eastern



side of the site *to the same building envelope as existing buildings on a site in order to maintain interest and variety*, with unsightly structures being removed, such that the same building envelope is warranted, particularly at the rear of the site, acknowledging that this has an increased element facing North Steyne

The aforementioned controls make clear the principles pertaining to redevelopment in the Manly Town Centre which is to be balanced between the development standards and the retention of existing building envelopes that are responsive to the streetscape context, small allotment frontages, and responsiveness to horizontal proportions. These elements are clearly evidenced in the Urban Design Report and the proposed development demonstrates a sympathetic transition between old and new in the streetscape to those properties both immediately north and south, but also taking account of the broader context of nearby buildings, where there is a significant differentiation in form, architectural design and building scale. Despite the upper floor of the building, which is the most prevalent section of the building exceeding the development standard, this has been suitably designed to ensure that a sympathetic relationship is achieved, especially with the listed item, of the Hotel Steyne adjacent, by providing a recessive building element that is setback from the prevailing streetscape setback to ensure that the upper floor of the building, and the reduced service elements over the existing situation, reducing the scale of this upper building level when viewed from North Steyne.

At the Henrietta Lane frontage, the character of the building form at the upper, non-compliant, level continues the prevalence of horizontal form that dominates this service laneway, while providing an articulated roof element to reduce the sense of blandness that is prevalent with the existing form that is also above the development standard. Again, the setbacks and materiality are respected having regard to the appearance of both historic and contemporary forms in this laneway, while the narrow vertical expression is maintained to ensure that small allotment frontages are retained.

It is therefore evident that the objectives and controls, along with the existing conditions are taken account of in the design of the building, in conjunction with the objective of the development standard itself. While the building height intrudes the standard, the characteristics desired in the streetscape will not be absolved by the non-compliant building form and are generally consistent with the expectation of the site in its existing form, if not improved by the reduction in building services.

(b) to control the bulk and scale of buildings,

With regard to moderating the bulk and scale of the building, this is expressed in the SEPP 65 Design Principles statement prepared by Squillace, as follows:

The subject site is currently home to a four storey shop top building with basement parking and an old basement nightclub. Vehicular access is currently via a driveway ramp from Henrietta Lane to a basement car park.

The proposed development looks to largely keep the bulk of the existing 4 storey building structure on 42 North Steyne with a new structure that will replace the existing Café Steyne building.

The design takes inspiration from the proportions and materiality of the existing hotel building as well as being a transition for the more modern buildings situated to the north of the site. The proposal utilises the expression of the brown face brick, new painted rendered finishes that accentuate the new curved forms and glass detailing.



The small existing balconies have been enlarged and modified to better suit the modern lifestyle with access to natural light and enjoyment of the iconic views on offer.

The new services on the roof top have been significantly improved to sit entirely under the parapet level. It will provide a cleaner outlook for the neighbouring buildings to the west.

The design statement makes clear that the non-compliant form of the building above the development standard for height seeks to moderate this from the existing form, particularly when considered from the south, while reducing its impact in terms of bulk and scale through the composition of consolidated building services. While there is a further protrusion on the eastern side of the site, this comprises both solid and more modulated forms, as well as a recessive element at the upper floor to ensure that the bulk and scale of the building has limited appearance from the eastern side such that both the bulk and scale of the building are suitably moderated within their context.

(c) to minimise disruption to the following—

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
- (iii) views between public spaces (including the harbour and foreshores),*

Matters of disruption to views are addressed in the separate view analysis.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

The proposed development has no impact on solar access to private open spaces or habitable rooms of adjacent dwellings.

The proposed development does result in a minor loss of increased shadow to the public domain along North Steyne, between 12:00pm and 3:00pm, at mid-winter and a similar minor loss over Ocean Promenade by 3:00pm. There is, however, also a material gain to North Steyne as a result of the proposed built form by 3:00pm, particularly in front of the proposed café, where outdoor seating and the public domain would be utilised, thus having a material public benefit through an increased amount of solar access at that hour.

The minor loss does not preclude *adequate sunlight* being achieved to these spaces and the limited extent of loss would not be discernible. The improvement to the public domain does, however, improve the pedestrian space and likely outdoor seating areas that will enhance useability of that space over the existing situation.

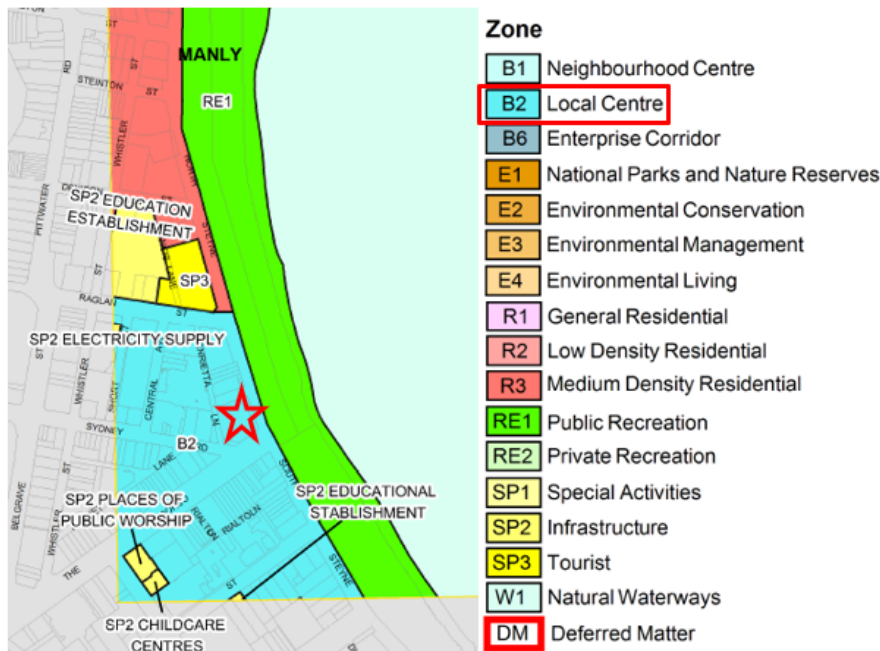
Therefore, despite non-compliance with the development standard, the height of the development achieves the objectives of the standard.

In addition to the height of buildings objectives, the zoning map, below, demonstrates that, surrounding the site, there is a desire for medium density housing in the form of shop top housing, within a B2 Local Centre zone. This zoning map, coupled with the floor space ratio map, seeks to populate the immediate locality with development balanced between residential and non-residential uses. As the proposed development is for such purpose, and the adjoining properties benefit from the same zone, there is no apparent need for a



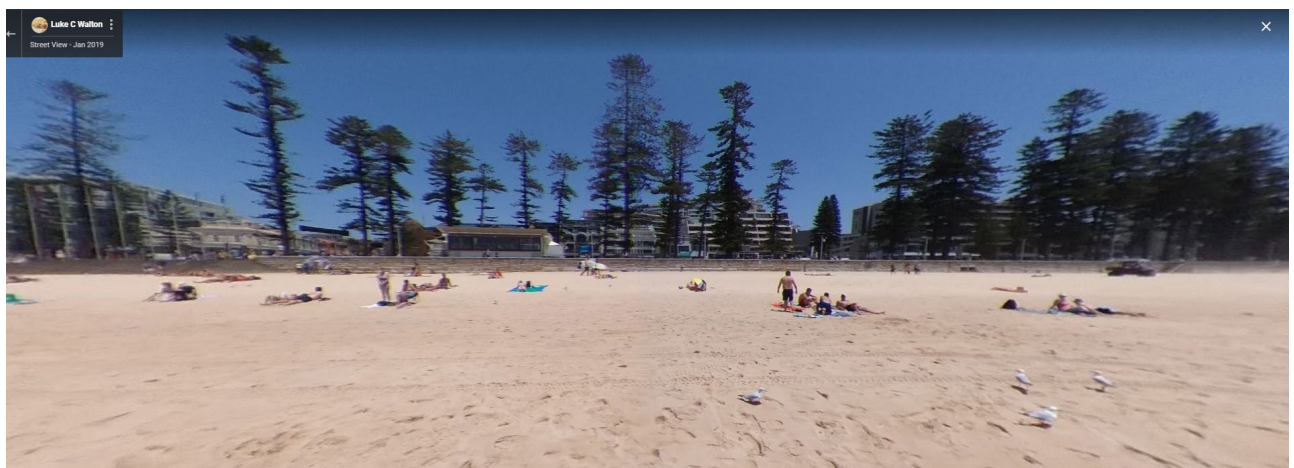
transition in scale because of a change in zone and is representative of the approach to land use planning as set out at [44] in *Big Property*.

Figure 3: Zoning Map



In terms of the height standards in the immediate locality, those in the vicinity of the subject site, generally seek for a taller built form in the centre and rear of the sites fronting North Steyne and The Corso, with an increase in height beyond the site to the west which is almost double that permitted on those building directly in front of this, being up to 25m.

Figure 4: Streetscape context of the site, which is dominated by the taller building forms to the west (Source: googlemaps)



Taking the actual context into account, aside from the technical standard, it is the as-built context immediately surrounding the site that is relevant, as demonstrated above. The form of these buildings behind the subject site is therefore what dominates the visual catchment, particularly when looking at the site in a westerly direction, from the public domain moreso than the built form that accrues along North Steyne itself. This demonstrates that the scale of the non-compliant section of built form comfortably fits within this streetscape and without appearing obtrusive.



(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

There are sufficient environmental planning grounds, despite non-compliance with the development standards for height, as proposed on part of Level 4 and Level 5 of the building as:

- There is no additional adverse solar impact on the adjoining properties as a result of the non-compliant form to the south of the subject site; it is the compliant component of the building that causes effect before the non-compliant component does, such that reducing the scale of this, provides no material benefit to adjoining properties within the private domain.
- The affected parts of the building at Levels 4 and 5 provide reasonable setbacks to the eastern and western boundaries, to ensure that the built form does not dominate either street frontage, while providing sufficient separation to other properties to ensure that adequate privacy is achieved.
- From the public domain, the non-compliant part of the building, when viewed from the eastern side of North Steyne (17m from the site boundary) at a standard eye height of 1.6m, using a 30 degree angle, it is only a modest section of the non-compliant building height that would be visible, being a minor part of the glass balustrade and the roof over this; the actual built form would not be evident to any significant extent given the setback distance and the parapet of the level below. Visibility of the upper, fifth level would not be evident, with the view line obstructed by the level below and being further recessed from the site boundary. Given the lack of visibility, this is not considered to result in adverse impact.
- In contrast, by standing in Henrietta Lane, there would be absolutely no discernible impact of the non-compliant section of the building.
- The non-compliant height does not compromise views from the public domain surrounding the site.
- The additional height does not take away from the visual presence of any landscape setting.
- Sufficient solar access is provided to all apartments within the development, with apartments achieving 100% solar access compliance for two hours or more at mid-winter, as a result of larger floorplates, all of which benefit from dual aspect and enhanced with the provision of light wells

On balance, the proposed height breach is considered to achieve a planning purpose by providing a high-quality mixed-use development in a suitable location in close proximity to services, employment and transport. These benefits are in absence of any significant additional adverse streetscape or amenity impacts.

Therefore, having regard to the above, there are sufficient environmental planning grounds to permit variation to the development standards for height and floor space ratio.

While not an expressly relevant test to the application of the height standard, the proposed development does result in a reduction to the existing building height on a proportion of the site (albeit increasing this to a minor extent over the existing situation on the eastern side). In doing so, provides a significant and material opportunity to improve the visual appearance of the development over the existing situation, while also improving its environmental performance, an outcome that would not be achieved if this redevelopment were not instigated. Therefore, while retaining non-compliance, the proposed height, for the majority is retained and/or lowered over the existing situation, such that there are further and sufficient environmental planning grounds to justify non-compliance with the development standard.



The drawing is a vertical section of a building, labeled 'SUBJECT SITE 42 NORTH STEYNE'. It shows the building's profile from the roof down to the basement. The left side of the drawing shows the existing building structure with levels from Roof to Level 2. The right side shows the proposed building structure with levels from Roof to Level 2. Key features include:

- Roof:** RL 30.38 (existing) and RL 30.38 (proposed).
- Levels 1-2:** Existing levels are RL 27.00, RL 24.21, RL 21.46, RL 18.70, RL 15.94, RL 13.16, and RL 9.86. Proposed levels are RL 27.00, RL 24.21, RL 21.46, RL 18.70, RL 15.94, RL 13.16, and RL 9.86.
- Basement:** Existing basement level is RL 8.00. Proposed basement level is RL 8.00.
- Annotations:**
 - 'LOCATION OF NEW SERVICES BELOW NEW PARAPET LEVEL' with arrows pointing to the roof area.
 - 'EXISTING FIRE STAIRS' and 'EX. LIFT SHAFT'.
 - 'NEW GLASS ABOVE EXISTING SECOND FLOOR SLAB'.
 - 'NEW GLASS ABOVE EXISTING BASEMENT SLAB'.
 - 'NEW EXIST FLOOR' and 'NEW EXIST BASE'.
 - 'OUTLINE OF EXISTING SERVICES TO BE DEMOLISHED' with a red dashed line.
 - '1.8m wide' opening in 'HENRIETTA LANE' at the basement level.

hamptons
property services

The Public Interest

Clause 4.6(4) states as follows:

(4) 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*

The next element that the Council needs to be satisfied with in order 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.

Table 2: Compliance with the zone objectives

1 Objectives of zone	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.	The proposed development will provide for a range of retail and business uses that will serve the needs of people who live in, work in and visit the local area and retain the required floor space that is desired for development within the Manly Town Centre in the B2 Local Centre zone.
To encourage employment opportunities in accessible locations.	The proposed uses will continue to provide local employment within the area.
To maximise public transport patronage and encourage walking and cycling.	The proposed parking provision is less than that required under the relevant planning controls, thus encouraging the both walking and cycling.
To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.	The proposal provides for a mixed-use development comprising of a food and drink premises on the ground floor level and residential accommodation on Level 1-4. These issues of amenity are addressed in the Acoustic Impact Assessment and the Traffic and Parking Report.

As demonstrated, the proposed development will comprehensively meet the objectives of the development standards for height of buildings and the zone objectives.



Accordingly, the Council can be satisfied that it is in the public interest to vary the standard for the purpose of this development application. The implementation of the development, despite non-compliance, will ensure that existing resources are utilized without placing undue pressure on the surrounding environment, both natural and built, while complying with the relevant objectives and producing a better outcome for the development, due to its own site constraints.

Separate to the zone objectives is also the benefit of removing unsightly building services that are located on the roof top of the existing building and are well above the permitted height, as well as the height of the proposed development. The proposal provides the opportunity to replace these services with more up-to-date equipment that is more efficient and has a significantly improved level of acoustic performance, to reduce the impact on nearby receptors in both the public and private domain. There would be no incentive to replace such equipment in absence of redevelopment while there are significant public advantages.

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.

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 f does not comply with the development standard contained at cl. 4.3 of the MLEP. However, the proposal achieves the requirements pertaining to cl.4.6 of the MLEP, which allows for development standards to be varied.

Accepting the control for height of buildings as a development standard, the component of the building that exceeds the height control provides a superior outcome for the site that is enunciated through a skilful and quality design that is consistent with the objectives of the standards and the zone objectives. The proposal is also consistent with the intended streetscape character, taking account of existing conditions which are relevant considerations (see *SJD* and *Big Property*).

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

ⁱ ground level (existing) means the existing level of a site at any point

