



DEVELOPMENT AND PLANNING STANDING COMMITTEE MEETING

Monday 9 October 2023

Council Chambers

126-138 Main Road Speers Point

6.30pm

Committees will be held in the following order:

Development and Planning Standing Committee
Planning for the Future Standing Committee
Organisational Services Standing Committee
Built and Natural Assets Standing Committee
Service Delivery Standing Committee
General Business Committee

T 02 4921 0333 F 02 4958 7257 E COUNCIL@LAKEMAC.NSW.GOV.AU

126-138 MAIN ROAD SPEERS POINT NSW 2284 BOX 1906 HUNTER REGION MAIL CENTRE NSW 2310



@LAKEMAC



LAKEMACCITY



LAKEMAC.COM.AU

Meetings of Lake Macquarie City Council are conducted in accordance with the Code of Meeting Practice which supports open, accessible and accountable government.

Councillors are reminded of the oath or affirmation of office taken at the start of the Council term:

- To undertake duties in the best interests of the people of Lake Macquarie City and the Lake Macquarie City Council.
- To faithfully and impartially carry out the functions, powers, authorities and discretions under the *Local Government Act 1993* or any other Act to the best of their ability and judgment.

Councillors are also required to declare and appropriately manage conflicts of interest under the Code of Conduct.

Council meetings are streamed live on Council's website at webcast.lakemac.com.au

This allows our community greater access to Council proceedings, decisions and debate.

Development and Planning Standing Committee Meeting

Agenda

Monday 9 October 2023

6.30pm

Acknowledgement of Country:

Apologies: For the non-attendance of Councillors

Declaration of Interests:

Presentations: 2023 Ministers' Awards for Women in Local Government – Woman of Distinction Award Regional/Rural – Helen Plummer

Development and Planning Standing Committee Meeting - Monday 9 October 2023 (2)4

23DP013	Outcome of an enabling approach to building single dwellings on undersized lots in the E2, E3 and RU2 zones and revision of Part 9.5: Dwelling House in Rural and Environmental Zones of the Lake Macquarie Development Control Plan 2014.....	pg 4
23DP014	Charlestown - 5 Charles Street - Residential flat building	pg 16

Recommendations to the Development and Planning Standing Committee Meeting

Monday 9 October 2023

23DP013	Outcome of an enabling approach to building single dwellings on undersized lots in the E2, E3 and RU2 zones and revision of Part 9.5: Dwelling House in Rural and Environmental Zones of the Lake Macquarie Development Control Plan 2014
----------------	---

Key focus area	1. Unique landscape 4. Diverse economy
Objective	1.1 Natural environments are protected and enhanced 4.5 New development and growth complement our unique character and sense of place, now and into the future
File	F2018/01181/02 - D11116164
Author	Economic Strategist - Daniel Starreveld
Responsible manager	Manager Integrated Planning - Wes Hain
Previous items	18NM007 - LEP Amendments To Allow Dwelling Entitlements For Undersized Lots Zoned E2 and E3 - Ordinary Council - 23 Apr 2018 7:00pm 20DP026 - Review of Planning Controls for Dwelling Developments on Undersized Allotments in Rural and Environmental Zoned Areas - Development and Planning Standing Committee - 09 Nov 2020 6:30pm 20NM015 - An enabling approach to building single dwellings on undersized lots in the E2, E3 and RU2 zones - Ordinary Council - 30 Nov 2020 6:30pm

Executive summary

This report responds to Council's decision dated 30 November 2020 (20NM015) to undertake further investigations regarding a clearer and more enabling planning pathway for a dwelling on an undersized lot in the C2 Environmental Conservation (previously E2), C3 Environmental Management (previously E3) and RU2 Rural Landscape zones.

Further investigations have identified that a planning approval pathway already exists and a dwelling can be approved on an undersized lot, subject to certain criteria being addressed as part of a development application. It is recommended to amend the Lake Macquarie Development Control Plan 2014 (LMDCP 2014) to provide clear guidance about the existing approval pathway and criteria that future development applications would have to address.

Recommendation

Council:

- A. notes the findings of the further investigations undertaken associated with dwellings on undersized lots in the C2 Environmental Conservation, C3 Environmental Management and RU2 Rural Landscape zones,
- B. prepares and exhibits an amendment to the Lake Macquarie Development Control Plan (LMDCP) 2014, as contained in Attachment 1, for at least 28 days, and
- C. considers a report on the draft LMDCP 2014 amendment after exhibition.

Context

There are hundreds of lots in the city that are zoned C2, C3 and RU2 that are below the minimum lots size (40ha for zone C2 and C3, and 20ha for zone RU2). This means a dwelling entitlement does not exist on these undersized lots and a development application for a dwelling is required to be supported by justification to vary the minimum lot size development standard (a clause 4.6 variation), as well as other studies to address site specific characteristics such as biodiversity, flooding, contamination and bushfire.

Council resolved on 23 April 2018 (18NM007) that staff:

- A. establish criteria to determine those undersized lots, in the E2 and E3 zone (now C2 and C3), where the construction of a dwelling would meet the objectives of the respective zone and avoid hazards such as bushfire and flooding,
- B. prepare a planning proposal to amend the *Lake Macquarie Local Environmental Plan 2014 (LMLEP 2014)* to provide a dwelling entitlement for those undersized lots that are deemed to meet the established criteria, and
- C. refer the criteria and resulting investigation to the Unique Landscapes Portfolio Committee for discussion.

Through early investigations and discussions with the Unique Landscapes Portfolio Committee, the scope of the project was expanded to include consideration of the RU2 Rural Landscape zone and eco-tourist facilities.

Staff subsequently identified 520 vacant undersized lots within the C2, C3 and RU2 zones. An investigation and assessment report was prepared which identified assessment criteria to evaluate the potential of vacant undersized lots to support a dwelling.

The outcome of the investigations was reported to Council on 9 November 2020 (20DP026) where Council resolved to incorporate the criteria into an amendment of the LMDCP 2014, rather than amending the *LMLEP 2014*.

Following the Council decision on 9 November 2020, Council resolved on 30 November 2020 (20NM015) to undertake further investigations regarding additional measures for a clearer and more enabling planning approval pathway for dwellings on undersized lots in E2, E3 and RU2 zones, to consult with Councillors during investigations and report back to Council with options and recommended future actions.

This report outlines the outcome of further investigations, consultation with Councillors and other stakeholders, and provides a recommended way forward for dwellings on undersized rural and conservation zoned lots.

Outcome of an enabling approach to building single dwellings on undersized lots in the E2, E3 and RU2 zones and revision of Part 9.5: Dwelling House in Rural and Environmental Zones of the Lake Macquarie Development Control Plan 2014

Discussion

Council staff undertook investigations and consultation with the NSW Department of Planning and Environment (DPE) throughout 2021 and 2022.

Investigations found that the planning approval pathway was not the cause of some development applications being refused or withdrawn for dwellings on undersized environmental or rural zoned land. Rather, it was the specific site characteristics that had caused development applications to be withdrawn or refused.

The DPE provided initial advice on 14 January 2021 and identified two LEP amendment options for Council to investigate:

1. An LEP amendment to enable a dwelling entitlement for mostly 'unconstrained' lots identified by environmental investigations.
2. A city-wide local clause to enable dwellings on undersized rural and conservation zoned lots where they satisfy certain environmental criteria.

Council's investigations found Option 1 would apply to 122 mostly unconstrained lots. Pursuing this option would require detailed environmental assessments for each site to determine how many lots could feasibly support a dwelling, and the identification of criteria future development applications would have to address. This option was deemed to be inequitable, as the remaining 398 undersized lots would not be able to use the criteria to seek approval for a dwelling entitlement.

Option 2 involved investigating the creation of a local clause for all undersized lots, with applications being assessed against environmental criteria, like that of eco-tourist facilities. This would eliminate the need for applicants to submit a development standard variation with their application to vary the minimum lot size, along with the required assessment and concurrence from the DPE, as well as a subsequent Council meeting to determine a development application.

However, there are challenges with option 2, particularly regarding the uncertainty of the DPE supporting such an LEP amendment. The justification required to support changing established policy and approval pathways would be substantial. Furthermore, an LEP amendment of this scope would require detailed site-specific investigations to determine whether undersized lots could support a dwelling.

Council subsequently sought formal advice from the DPE to determine the feasibility of pursuing either of the above options. On 30 March 2022, the DPE advised:

- there is no demonstrated need for an LEP amendment as an existing approval pathway in the *LMLEP 2014* already exists
- only 23 development applications were lodged over the past five years for a dwelling on an undersized environmental or rural zoned lot
- if a planning proposal (either option 1 or 2) was lodged, several studies for each site would be required including Biodiversity Assessment, Agricultural Land Assessment, Bushfire Risk Assessment and Flood Study. Additional studies may also include contamination, mine subsidence, heritage and infrastructure servicing
- further consultation and concurrence would be required with State agencies
- amending Part 9.5 of the *LMDCP 2014* may be more appropriate and is recommended.

Council staff investigated the costs for preparing the biodiversity, flooding and bushfire studies. The cost to Council of the required studies would be several million dollars and is considered prohibitive.

Outcome of an enabling approach to building single dwellings on undersized lots in the E2, E3 and RU2 zones and revision of Part 9.5: Dwelling House in Rural and Environmental Zones of the Lake Macquarie Development Control Plan 2014

Based on investigations, advice from the DPE, and with consideration of the regional planning framework and costs involved in any amendment to the *LMLEP 2014*, Council staff recommend pursuing an amendment to the *LMDCP 2014* (Attachment 1) to provide clear guidance to landowners and applicants on the existing approval pathway and matters to be addressed in any development application for a dwelling.

Community engagement and internal consultation

Council staff presented the initial DPE advice and information from investigations to a Councillor briefing in August 2021. Council staff presented the final outcomes of investigations and the DPE's formal advice to a Councillor briefing in October 2022. The briefing in October 2022 included a recommendation to pursue an amendment to the *LMDCP 2014*, which reflects the DPE's advice to amend the *LMDCP 2014*.

The Development Assessment and Certification team were consulted on the draft amendment to *LMDCP 2014*.

The proposed *LMDCP 2014* amendment will better inform future applicants of the approval process, expectations associated with environmental constraints and other matters to be addressed when preparing a development application.

Assessment of options

Council staff have considered a few options and consulted with Councillors and the DPE. An approval pathway already exists to enable the approval of a dwelling on an undersized lot in the C2, C3 and RU2 zones. While the existing approval pathway requires proponents to undertake detailed site investigations to demonstrate a dwelling is appropriate, it is considered that an amendment to the *LMDCP 2014* will provide a clear guide for landowners to work through the existing planning approval pathway and understand the matters to be addressed when preparing a development application for a dwelling. This is the recommended option.

Not endorsing the *LMDCP 2014* amendments will retain the existing uncertainty for landowners regarding the approval process, environmental constraint expectations and other matters to be addressed.

Next steps

If Council endorses the recommendation, staff will publicly exhibit the draft DCP amendment for a period of 28 days and report back to Council on the outcome of the public exhibition period.

Key considerations

Economic

The proposal will facilitate the development of new dwelling development within western Lake Macquarie.

Amending the *LMDCP 2014* will mitigate economic impacts to existing rural industries.

Environment

Preparing an amendment to the *LMDCP 2014* will ensure the impact to the environment from future dwelling development will be appropriately considered.

Community

The proposal enables landowners to obtain a rural lifestyle by pursuing an existing approval pathway for dwellings on undersized lots on rural and environmental zoned land. Including provisions under the LMDCP 2014 will provide greater guidance to landowners about merit assessment considerations of a development application regarding potential land use conflicts, such as impacts to agriculture, biodiversity, bushfire and scenic amenity.

Civic leadership

The proposal responds to landowner concerns regarding limitations to dwelling development on rural and environmental zoned land.

The proposed provisions under the LMDCP 2014 will improve information about Council's development controls to applicants and the community.

The proposal achieves a consistent approach that aligns with State and local strategic land use directions.

Financial

There are no financial implications from the recommendation, apart from staff time undertaking the proposed LMDCP 2014 amendment.

It is estimated that the cost to prepare the required studies to support an amendment to the *LMLEP 2014* would be several million dollars. This cost is not included in Council's Operational Plan and Budget 2023-2024 or the Long-Term Financial Plan.

An amendment to the *LMLEP 2014* would require the allocation of public funds towards a Council-initiated LEP amendment for the benefit of 520 private landowners. The study outcomes are likely to further reduce the number of properties that may benefit.

An approval pathway already exists under clause 4.6 of the *LMLEP 2014* with the onus on property owners to cover the costs of preparing a development application. This is in line with community expectations for expenditure of public funds. It is also consistent with the responsibilities of other landowners when seeking development consent for other forms of development. Furthermore, the DPE has advised against pursuing an amendment to the *LMLEP 2014* and therefore incurring the costs and preparing the required studies is unlikely to result in the *LMLEP 2014* being amended.

Infrastructure

Preparing an amendment to the LMDCP 2014 is the preferred approach from an infrastructure asset perspective, as it considers Council's ability to deliver services and infrastructure to new dwellings in often isolated locations.

Compliance

Preparing an amendment to the LMDCP 2014 is a standard Council activity governed by the provisions of the *Environmental Planning and Assessment Act 1979*.

Legislative and policy considerations

Environmental Planning and Assessment Act 1979

Environmental Planning and Assessment Regulation 2021

Hunter Regional Plan 2041

Greater Newcastle Metropolitan Plan 2036

Lake Macquarie Local Strategic Planning Statement

Lake Macquarie Housing Strategy

Lake Macquarie Local Environmental Plan 2014

Lake Macquarie Development Control Plan 2014

Attachments

- | | |
|--|-----------|
| <ol style="list-style-type: none"> 1. Draft Lake Macquarie Development Control Plan 2014 - Part 9.5 Dwelling House in Rural and Environmental Zones | D10872876 |
|--|-----------|



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

5 DWELLING HOUSE IN RURAL AND ENVIRONMENTAL ZONES

This section of the DCP provides Council's specific requirements for dwelling house developments only in RU2, RU4, C2, C3 and C4 Zones. Other requirements are contained in the relevant general development part (Parts 2 to 7) and/or Area Plans (Parts 10 to 12) of this DCP. Where a conflict exists between this section and the general development part of LM DCP 2014, this section prevails.

Provisions for dwelling houses in R2 and R3 zones are contained in Part 3 of this DCP.

Justification: Information has been added to provide clarity for landowners about the process for seeking to vary the minimum lot size requirements.

5.1 LOT SIZE

- Any development application seeking to vary the minimum lot size standard required for erection of a dwelling house needs to be supported by a written request prepared in accordance with Clause 4.6 of *Lake Macquarie Local Environmental Plan 2014 (LMLEP 2014)* and may require the concurrence of the Planning Secretary.

The following matters must be addressed in any written request made under Clause 4.6 of the *LMLEP 2014*. These matters should be read in conjunction with Part 2: Development in Rural Zones and Part 7: Development in Environment Protection Zones of this DCP and relevant [Development Guidelines](#).

Matter	Considerations
a. Zone objectives	<ul style="list-style-type: none"> Consistency with objectives of relevant zone under the <i>Lake Macquarie Local Environmental Plan 2014</i>
b. Vegetation	<ul style="list-style-type: none"> Extent of any proposed clearing required to provide a Building Area and any associated Bushfire Asset Protection Zone along with ongoing vegetation management requirements Location and significance of native vegetation, vegetation corridors and habitat for threatened species
c. Natural water systems	<ul style="list-style-type: none"> Core Vegetated Zones and Vegetated Riparian Zones are maintained in accordance with Part 2.10 – Natural Water Systems
d. Flooding	<ul style="list-style-type: none"> Flood liable and Flood prone land up to the Probable Maximum Flood level and Floodway Areas are avoided
e. Bushfire risk	<ul style="list-style-type: none"> Compliance with Planning for Bushfire Protection Asset Protection Zones can be provided where they are not located within Vegetated Riparian Zones
f. Heritage significance	<ul style="list-style-type: none"> Location and significance of sensitive Aboriginal landscape areas, Aboriginal Objects or Places, European heritage items, and conservation areas
g. Access and infrastructure	<ul style="list-style-type: none"> Legal vehicular access must be provided for safe evacuation in the event of an emergency including but not limited to bushfire and flooding Existing infrastructure including water, sewer, and stormwater should be utilised where available or provide suitable on-site infrastructure
h. Land use conflict	<ul style="list-style-type: none"> Avoids Biophysical Strategic Agricultural Land and fragmentation of prime production lands and other rural



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

industries

- Land use conflicts are minimised with buffers and/or screening of non-residential land uses, including but not limited to agriculture, National Parks, Nature Reserves, conservation lands, mineral resource areas and forestry areas
- Areas of cut and fill only permitted within the Building Area for the dwelling and car parking
- Nature and extent of any potential contamination or mine subsidence

i. Slope, soil, contamination, and mine subsidence

Note: Matters listed above may require preparation of studies.

5.2 SITING OF BUILDINGS

Objectives

- a. To ensure that development responds to the existing character of the locality.
- b. To conserve and enhance native vegetation, vegetation corridors, topographical features, and fauna habitat.
- c. To facilitate water management, including on-site detention and infiltration of stormwater.
- d. To maintain residential amenity in terms of privacy, views, solar access and separation.

Controls

1. In the RU2, RU4, C2, C3, and C4 zones development must retain significant natural features on the site including mature trees, rocky outcrops, and other major vegetation through the sensitive placement of buildings.

5.3 SETBACKS FOR COMMUNITY TITLE DEVELOPMENT

Objectives

- a. To permit the efficient use of land where dwellings are clustered in a community title subdivision.

Controls

1. In the RU2 and C3 zones a dwelling located within a subdivision under the *Community Land Development Act 2021*, must be setback a minimum of:
 - i. 4 metres from the front boundary; and
 - ii. 3 metres from a side boundary; and
 - iii. 10 metres from the rear boundary
2. In the RU4 zone a dwelling located within a subdivision under the *Community Land Development Act 2021*, must be setback a minimum of:
 - i. 4 metres from the front boundary; and
 - ii. 3 metres from a side boundary; and
 - iii. 5 metres from the rear boundary
3. In the C4 zone a dwelling located within a subdivision under the *Community Land Development Act 2021*, must have a:
 - i. side setback must be a minimum of 900mm for building height up to 4.5 metres.
 - ii. side setback must be a minimum of 1.5 metres for building height over 4.5 metres.
 - iii. side setback must be a minimum of 3 metres for building height over 2 storeys.



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

- iv. rear setback must be a minimum of 3 metres for building height up to 4.5 metres.
- v. rear setback must be a minimum of 6 metres for building height over 4.5 metres.

Note: The minimum setback of a point on a building is based on the building height at that point.

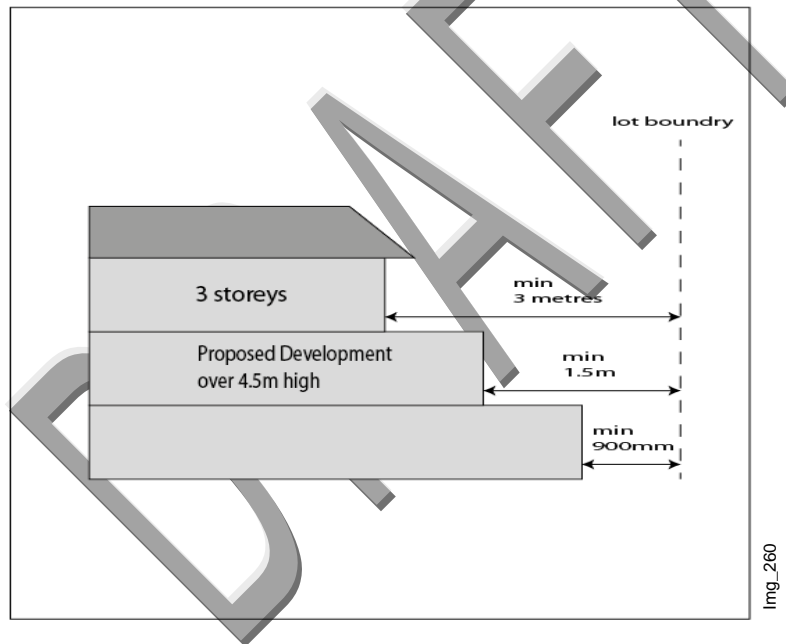


Figure 1 Side Setback for community title subdivision dwellings in C4 zone

5.4 BUILDING BULK

Objectives

- a. To minimise the visual impact of development when viewed from adjoining properties, the street or road, waterways, and land zoned for public recreation purposes.
- b. To minimise bulk and scale impacts which contribute to loss of privacy, views and overshadowing.

Controls

- 1. Building height, scale, and roof form must relate to the topography and the existing site conditions.
- 2. Verandas, recesses, surface treatments, and/or variations in material selection and colour must be utilised to reduce building bulk.
- 3. Unbroken walls in excess of 15 metres in length or 4 metres in height must be avoided by varying wall alignments, incorporating door and window openings, balconies, awnings, architectural detail or changes in materials to provide visual relief.
- 4. The scale and massing of landscape planting must be adequate to reduce the visual bulk of development.

5.5 GARAGES, CARPORTS AND SHEDS

Objectives

LMCC DCP 2014 – Revision XX
Page 17 – F2022/02090
Draft



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

- a. To ensure garages and carports do not dominate the streetscape or landscape setting.

Controls

In the RU4, RU2, C2, C3, and C4 zones:

1. Garages and carports must be integrated into the design of the dwelling or integrated into the design of an ancillary building.
2. Garages and carports that address the street or road, must not exceed 6 metres or 50% of the dwelling width, whichever is the lesser.
3. Where additional vehicular storage is required, garages and carports that address the street may be extended lengthwise, as opposed to increasing the width at the street.
4. Garages and carports must not be located in the front setback area.

5.6 ROOFS

Objectives

- a. To ensure roof forms are designed to complement the local character and topography.
- b. To ensure roofs are designed to conceal plant and other associated equipment.

Controls

1. On sloping sites roof planes must step with the topography.
2. Air conditioning units, lift motor rooms, and other plant must be fully integrated within the building volume, within the roof volume, or within an architectural roof feature.
3. Other roof elements such as photovoltaic panels, communication devices, antennae, satellite dishes, chimneys, and flues must not interfere with the outlook of viewers in neighbouring properties or in the public domain.

5.7 ENERGY EFFICIENCY AND GENERATION

Objectives

- a. To ensure building orientation maximises solar access and natural cross ventilation.
- b. To ensure energy efficiency is achieved in all developments.
- c. To allow opportunities for future installation of renewable energy generation and low carbon technology.
- d. To minimise the economic impacts of increasing electricity costs and any requirements to disclose energy efficiency when selling or leasing a property.

Controls

1. Buildings must be oriented to provide efficient use of solar energy and natural ventilation wherever possible.
2. Dwelling design must consider future potential for renewable energy generation and low carbon technology.
3. Development design should achieve a higher than compliant SEPP BASIX rating to reduce future energy costs.



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

5.8 VISUAL PRIVACY

Objectives

- a. To ensure the design of buildings provides an acceptable level of visual privacy for new and existing dwellings.

Controls

1. The layout of buildings must be designed to optimise privacy for occupants of both the new dwelling and existing dwellings.
2. The windows of dwellings must be located so they do not provide direct or close views (less than 9m away) into the windows of other dwellings.
3. Dwellings must be designed and orientated so that windows, balconies, and decks are not situated with a direct line of sight to the habitable rooms or private open space of any adjoining dwelling.

5.9 ACOUSTIC PRIVACY

Objectives

- a. To ensure that noise emissions do not result in noise intrusion which would be unreasonable for occupants of the development or neighbouring dwellings.

Controls

1. Developments near existing noise generating activities, such as roads and industry, must be designed to mitigate the effect of noise on the occupants.
2. Where practical noise sources such as air conditioning units and pumps must be located away from bedrooms and private open space of dwellings in the development and in neighbouring dwellings.
3. Building structures must be designed to minimise the transmission of sound, particularly to sleeping and living areas.

5.10 FRONT FENCES

Objectives

- a. To ensure that fencing and retaining walls are compatible with the existing landscape character.

Controls

In the RU2, RU4, C2, C3 and C4 zones:

1. Front fences and front fence returns must not exceed 1.2 metres in height and must not be more than 50% solid.
2. Front and side return fences must not be lapped or capped timber, or powder coated metal (Colorbond®) fencing.

5.11 SIDE AND REAR FENCES

Objectives

- a. To provide privacy and security for residents.
- b. To ensure that fencing and retaining walls are compatible with the existing landscape character.
- c. To avoid risks to native fauna.



Part 9 – Specific Land Use - Dwelling House in RU2, RU4, C2, C3 and C4 Zones

Controls

In the RU2, RU4, C2, C3 and C4 zones:

1. Side and rear boundary fences must not exceed 1.8 metres above the existing ground level.
2. The fence design and materials must be sympathetic to local landscape character.
3. The fence design must not cause any adverse risk to native fauna.

5.12 CUT AND FILL

Objectives

- a. To minimise the visual impact of ground shaping in sensitive landscapes.
- b. To ensure that the building design and retaining structures are appropriate for the site conditions with consideration to the slope, stability of the land, visual amenity, and the privacy of adjoining properties.
- c. To ensure that cut and fill does not significantly alter the flow of water or exacerbate flooding.

Controls

1. Cut and fill must only occur within the dwelling and car parking perimeter.
2. Cut must not exceed 1m and fill must not exceed 1m.
3. Cut or fill must not occur within three metres of the allotment boundary.
4. Batter slopes must not exceed a gradient of 1:4.
5. All proposed retaining structures in excess of 1m in height must be certified by an engineer, and certification details lodged with the development application.
6. Fill is not permitted in core riparian zones, foreshore areas, or flood storage areas.
7. Where development uses fill, that fill must not contribute to flooding, or pooling of water on other properties.
8. Any fill used must be Virgin Excavated Natural Materials (VENM).

23DP014	Charlestown - 5 Charles Street - Residential flat building
----------------	--

Key focus area	4. Diverse economy
Objective	4.5 New development and growth complement our unique character and sense of place, now and into the future
File	DA/1096/2022 - D11212906
Author	Development Planner - Scott Fatches, Section Manager Development - Amy Regado
Responsible manager	Manager Development Assessment and Certification - Michael Corrigan

Address 5 Charles Street, Charlestown

Owner FC Global Pty Ltd

Applicant WPP Pty Ltd

Executive summary

This application seeks consent for a residential flat building at 5 Charles Street, Charlestown.

The development proposes a maximum height of 28.64m, which is a 5.64m or 24 per cent variation to the maximum building height development standard of 23m and, as such, is required to be reported to Council for determination.

Planning Circular PS 20-002, issued by the NSW Department of Planning, Industry and Environment, identifies elected Council as the determining authority for development applications where a variation to a numerical standard is greater than 10 per cent.

A detailed assessment of the application has been undertaken, with the proposal deemed to meet the objectives of the *Lake Macquarie Local Environmental Plan (LMLEP) 2014* and the *Environmental Planning and Assessment Act 1979*.

The development application is considered acceptable on merit and is therefore recommended for approval, subject to conditions of consent.

Recommendation

Council:

- A. endorses the development standard variation under clause 4.6 of the *Lake Macquarie Local Environmental Plan 2014*, providing a maximum height of 28.64m, exceeding the 23m development standard by 5.64m or 24 per cent, and
- B. approves development application DA/1096/2022 for a residential flat building at 5 Charles Street, Charlestown, subject to conditions of consent.

Context

The site (see Figure 1) is zoned R3 Medium Density Residential under the *LMLEP 2014* and has a building height limit of 23m (refer to Figure 2).



Figure 1 – Subject site (site outlined in blue)

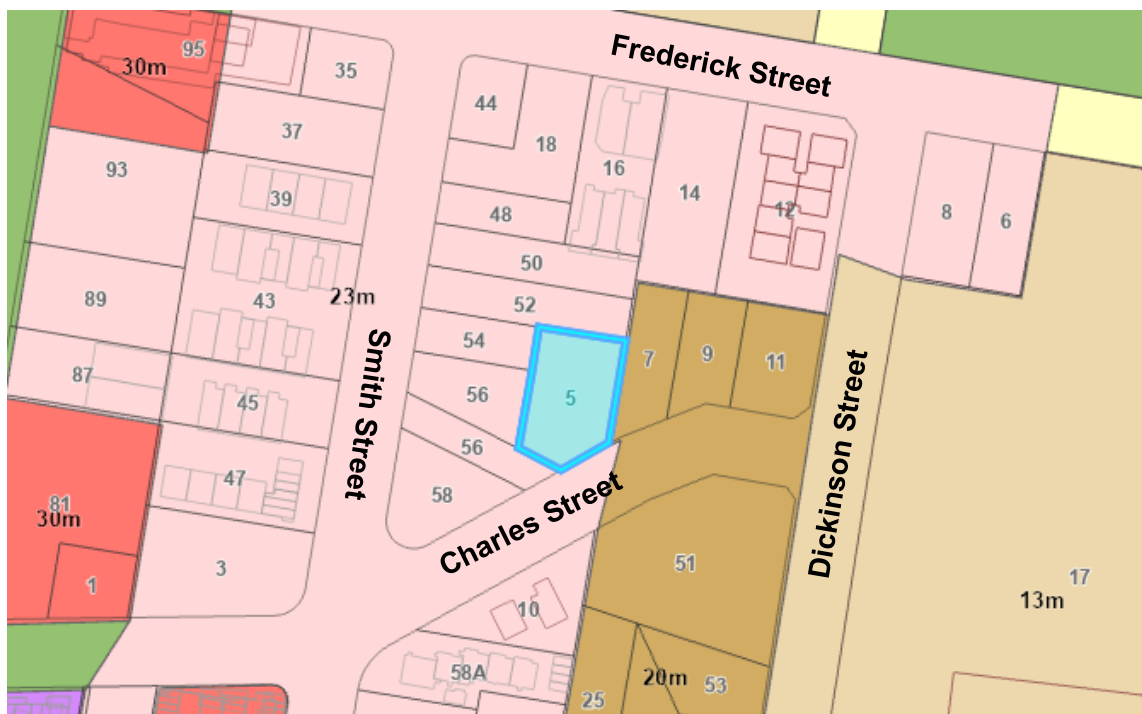


Figure 2 – Site building height (site outlined in blue)

The site contains an existing multi-dwelling development consisting of four units with ancillary structures, which are proposed to be demolished.

Directly adjoining the site to the north is the rear portion of two allotments, which front Smith Street, each accommodating retail/commercial premises. To the north-east, 14 Frederick Street has a development application currently under assessment for a seven-storey residential flat building (DA/2208/2022).

Directly adjoining the site to the east is 7-11 Charles Street, which has development approval for a seniors housing development (DA/1070/2022). To the west of the site are several small-scale commercial developments fronting Smith Street.

The development is situated on the fringe of the Charlestown town centre in a highly serviced location, with Charlestown Square and associated public transport facilities located about 400m west of the site (refer to Figure 3).

Recent approvals in the area are characterised by developments of similar scale and character, including:

- 'Highpoint' a 16-storey mixed-use development to the southwest (DA/1913/2016)
- 'Macquarie Tower' a 15-storey mixed-use development (DA/1120/2019)
- a four-storey health services facility currently under construction on the former Charlestown Public School site (DA/2630/2022)
- a seven-storey residential flat buildings to the east of the site at 7-11 Charles Street (DA/1070/2022).

The proposal is considered to be of the same scale and character being established within the locality.



Figure 3 – Site context (site outlined in blue)

Discussion

This application seeks consent for construction of a residential flat building. The development is in the form of a nine-storey building, including two levels of basement parking accessed from Charles Street. The development includes 27 residential apartments with a mix of two and three bedroom apartments, roof top communal area and 25 car parking spaces.

The application also includes demolition of all existing structures on the site.

The residential flat building is located within the R3 zone and is permissible with consent.

Plans for the proposal are provided in Attachment 1.



Figure 4 – Perspective from Charles Street

Height of building

Clause 4.3 of the *LMLEP 2014* provides a maximum building height of 23m for this site. The development proposes a maximum height of 28.64m, which represents a 24 per cent variation. The variation relates to the ninth floor, which includes three residential apartments, rooftop communal open space and rooftop services. Figure 5 shows the extent of the development above the height limit.

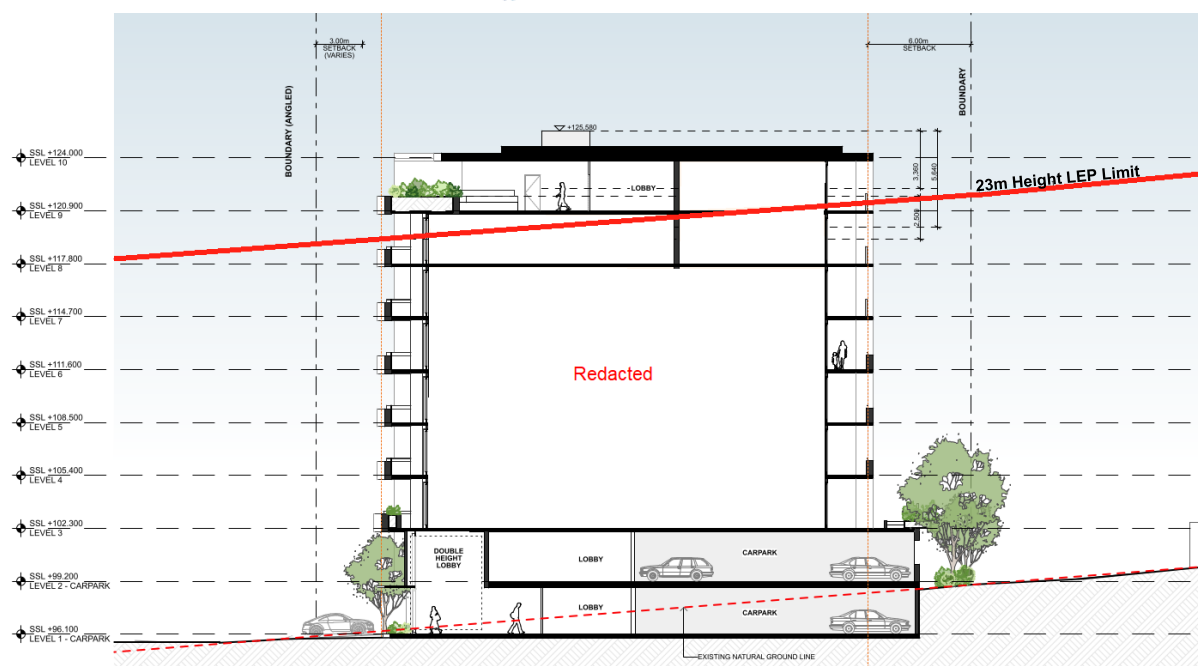


Figure 5 – Extent of development above 23m height limit (as indicated by solid red line)

A submission under clause 4.6 of the *LMLEP 2014* has been received requesting a variation to the maximum building height (see Attachment 2). The written submission provides the following justification as to why the development standard is unreasonable or unnecessary:

- The variation is a consequence of the sloping nature of the site and the need for the lift overrun and communal open space on the roof.
- The bulk of the building remains within the 23m height control, with the top storey exceeding the height limit.
- The design is attractive and is of a scale consistent with the desired future character of the area for Charlestown.
- The application maintains consistency with the objectives of the height of buildings development standard by providing a high-quality urban form.
- The proposed development is consistent with the objectives of the medium density residential zone.
- The development will not adversely impact on the amenity of surrounding properties or future occupants and will not adversely impact on the visual catchment from the street or adjoining sites.
- There are no adverse overshadowing impacts to properties to the south-west and east nor any adverse visual privacy impacts, and there is no significant view loss for existing or future development.
- The Lake Macquarie Local Strategic Planning Statement and Lake Macquarie Housing Strategy identify Charlestown as a strategic economic centre. The development is consistent with the principles of both, providing opportunities for additional infill housing to meet the diverse and changing needs of the community.

Assessment of the proposed building height has been undertaken and it is considered strict compliance with the height control is unreasonable and unnecessary as the site is capable of supporting a high-quality development, without having adverse impacts.

The design incorporates architectural elements and finishes, which create a high-quality residential building, meeting the objectives of the building height development standard.

Additional floor space gained through the height exceedance provides the ability to have high-quality communal space for residents and visitors in the form of outdoor common space at the rooftop level, in addition to providing much needed residential apartments in accordance with Council's Housing Strategy.

The development is consistent with the underlying purpose of the standard. It is considered there are sufficient planning grounds to justify contravening the development standard. Given there are no adverse impacts from the height exceedance or any other aspects, the variation is worthy of support.

Community engagement and internal consultation

The application was notified in accordance with Council's Community Participation Plan from 31 May 2022 to 22 June 2022. No submissions were received.

During the assessment of the application, internal consultation occurred with staff from Council's Development Assessment and Certification, Social and Community Planning, Environment Regulation and Compliance, Asset Management, and Environmental Systems departments. Matters raised throughout the assessment have been addressed through the submission of additional information or conditions of consent.

The development application was referred to Subsidence Advisory NSW. General Terms of Approval have been provided and are included in the proposed conditions of consent. The application was also referred to Ausgrid, who raised no objection, subject to inclusion of conditions.

Assessment of options

This report recommends Council approves development application DA/1096/2022 for a residential flat building development at 5 Charles Street, Charlestown, subject to conditions of consent. This is recommended as the development is consistent with the objectives of the R3 zone and height of buildings development standard and provides balanced outcomes that achieve a development that is in the public interest.

Should Council determine to refuse the development application, the reasons for refusal should be noted in the motion for refusal. Alternatively, Council may determine to refer the development application to the assessing officer to address specific issues identified.

Next steps

If Council approves the height variation and approves the development, the notice of determination will be finalised with conditions of consent.

Should Council refuse the development application, a notice of refusal stating the reasons will be issued. The applicant reserves the right to appeal the decision in the Land and Environment Court in this instance.

Key considerations

Economic

The development will have economic benefits to the city, as envisioned in the Lake Macquarie Local Strategic Planning Statement.

The development will provide additional and diverse housing stock to cater for the city's population, in a well-serviced location.

The development will contribute positively to the local economy through increased spending and multiplier effects.

Growing the city's economy and providing quality housing stock will help Lake Macquarie realise its potential as a desirable place to reside within the Hunter region and NSW.

Environment

The development is considered acceptable with regard to environmental impacts.

Environmental safeguards, such as dust suppression, traffic control, sediment and erosion control, waste management and noise mitigation, will be required during construction and these can be addressed through conditions of consent.

Community

Community consultation has been undertaken in accordance with the Council's Community Participation Plan. No submissions were received.

The development will provide a social benefit by providing additional housing diversity in a well-serviced, medium density location.

Civic leadership

Civic leadership is shown through Council implementing planning controls, including considering appropriate variation to the development standard, having considered the merits of the development.

Despite the departure from the height standards, the development is consistent with Council's adopted strategies including the Lake Macquarie Local Strategic Planning Statement and current and future Charlestown Town Centre Area Plan.

Financial

The application will be subject to development contributions that will contribute to local roads, public transport, open space, and recreation and community facilities.

Infrastructure

The development will provide a footpath along the front of the site in accordance with the Charlestown Streetscape Master Plan.

This permanent infrastructure will service the residents of the development and be available for the broader community, providing improved pedestrian access.

Compliance

The application has been assessed by staff and is reported to Council for determination in accordance with Planning Circular PS 20-002 issued by the NSW Department of Planning, Industry and Environment.

Legislative and policy considerations

Environmental Planning and Assessment Act 1979

Environmental Planning and Assessment Regulation 2021

Coal Mine Subsidence Compensation Act 2017

State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development

State Environmental Planning Policy (Resilience and Hazards) 2021

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

Lake Macquarie Local Environmental Plan 2014

Lake Macquarie Development Control Plan 2014

Lake Macquarie Community Participation Plan

Attachments

- | | | |
|----|--|-----------|
| 1. | Plans - DA/1096/2022 - 5 Charles Street Charlestown | D11229262 |
| 2. | Clause 4.6 variation request - DA/1096/2022 - 5 Charles Street Charlestown | D11229232 |



1 Ground Floor Demolition
SCALE 1:500 @ A3

Development Application



Architecture | Planning | Interiors

NEWCASTLE
115 King St (P.O. Box 958)
Newcastle NSW 2300
P. 02 4929 1843

CENTRAL COAST
128 Adelaide St (P.O. Box 4400)
East Gosford NSW 2250
P. 02 4321 0503

www.ckds.com.au
E. admin@ckds.com.au
ABN 12 929 231 269

North Point



Charles Street Development - RUGIA - FC Global Pty Ltd
Project # **21032**
5 Charles Street, Charlestown, NSW 2290

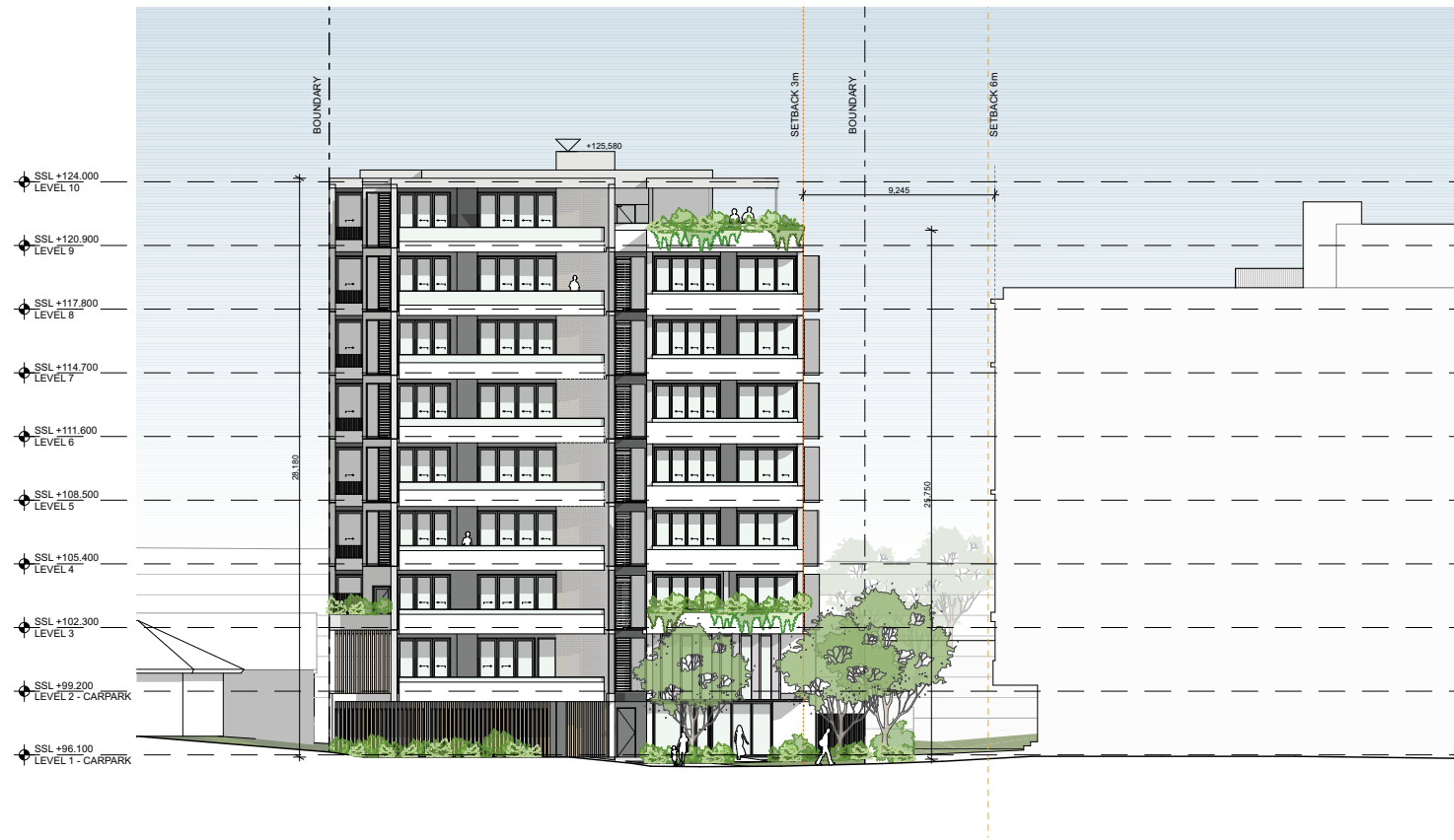
Ground Floor Demolition Plan
Drawing # **A-1001** Sheet **30**
AS SHOWN 31/8/2023



1 SITE PLAN
SCALE 1:500 @ A3

Development Application

	Architecture Planning Interiors			Charles Street Development - RUGIA - FC Global Pty Ltd Project # 21032 5 Charles Street, Charlestown, NSW 2290	Site Plan Drawing # A-1002 AS SHOWN	Sheet 30 31/8/2023
	NEWCASTLE 115 King St (P.O. Box 956) Newcastle NSW 2300 P. 02 4929 1843	CENTRAL COAST 1/28 Adelaide St (P.O. Box 4400) East Gosford NSW 2250 P. 02 4321 0503				



01 South Elevation
SCALE 1:200 @ A3

Development Application



Architecture | Planning | Interiors

NEWCASTLE
115 King St (P.O. Box 958)
Newcastle NSW 2300
P. 02 4929 1843

CENTRAL COAST
1/28 Adelaide St (P.O. Box 4400)
East Gosford NSW 2250
P. 02 4321 0503

www.ckds.com.au
E. admin@ckds.com.au
ABN 12 029 231 269

North Point



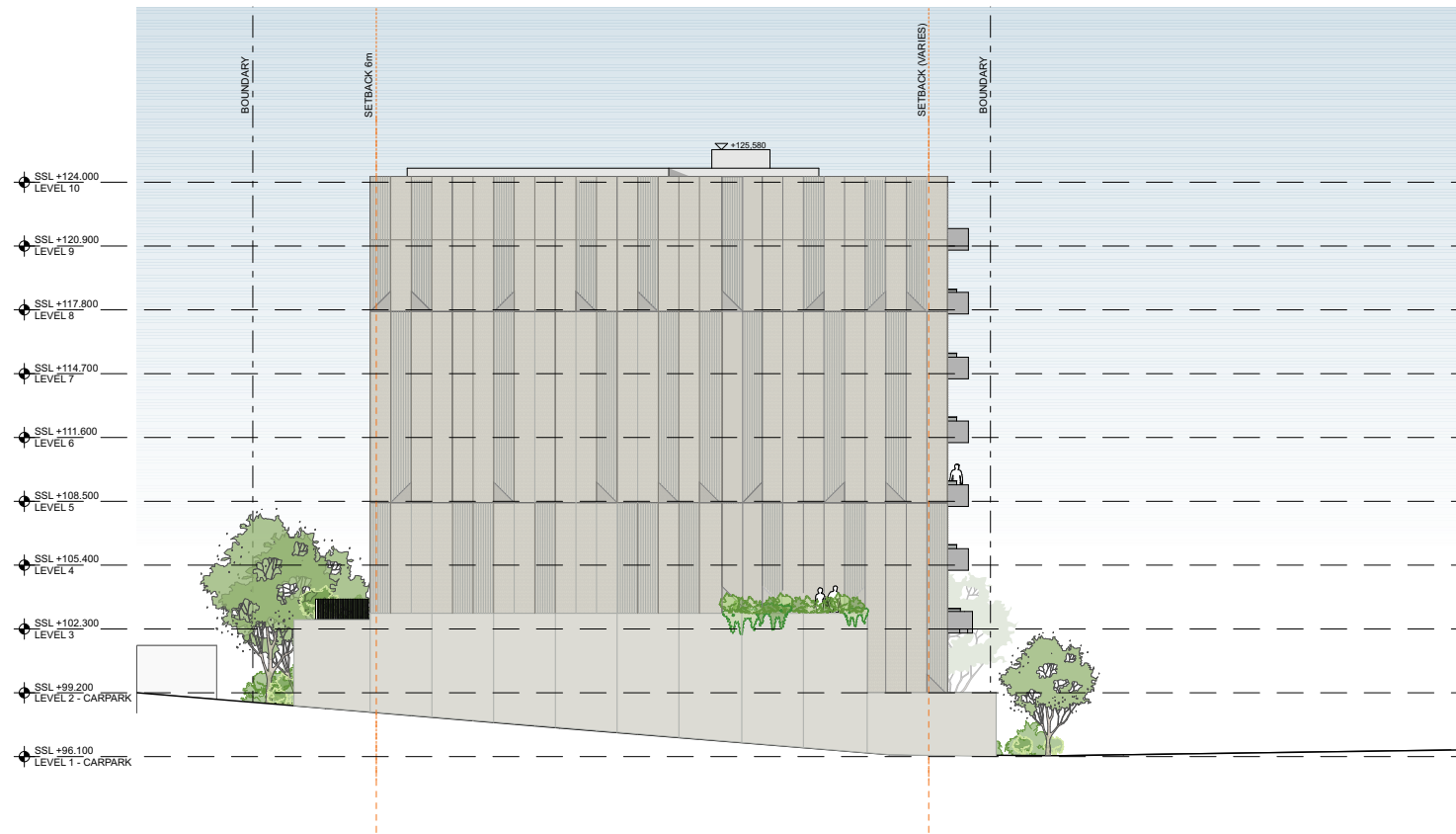
**Charles Street Development -
RUGIA - FC Global Pty Ltd**

Project #
21032
S Charles Street
Charlestown, NSW 2290

South Elevation

Drawing #
A-2001
AS SHOWN

Sheet #
31
31/8/2023



01 West Elevation
SCALE 1:200 @ A3

Development Application

	Architecture Planning Interiors			Charles Street Development - RUGIA - FC Global Pty Ltd Project # 21032 5 Charles Street Charlestown, NSW 2290	West Elevation
	NEWCASTLE 115 King St (P.O. Box 958) Newcastle NSW 2300 P. 02 4929 1843	CENTRAL COAST 128 Adelaide St (P.O. Box 4400) East Gosford NSW 2250 P. 02 4321 0503			www.ckds.com.au E. admin@ckds.com.au ABN 12 129 231 269
					30 31/8/2023



Development Application

Architecture | Planning | Interiors

NEWCASTLE
115 King St (P.O. Box 958)
Newcastle NSW 2300
P. 02 4929 1843

CENTRAL COAST
1/28 Adelaide St (P.O. Box 4400)
East Gosford NSW 2250
P. 02 4321 0503

www.ckds.com.au
E. admin@ckds.com.au
ABN 12 129 231 269

North Point

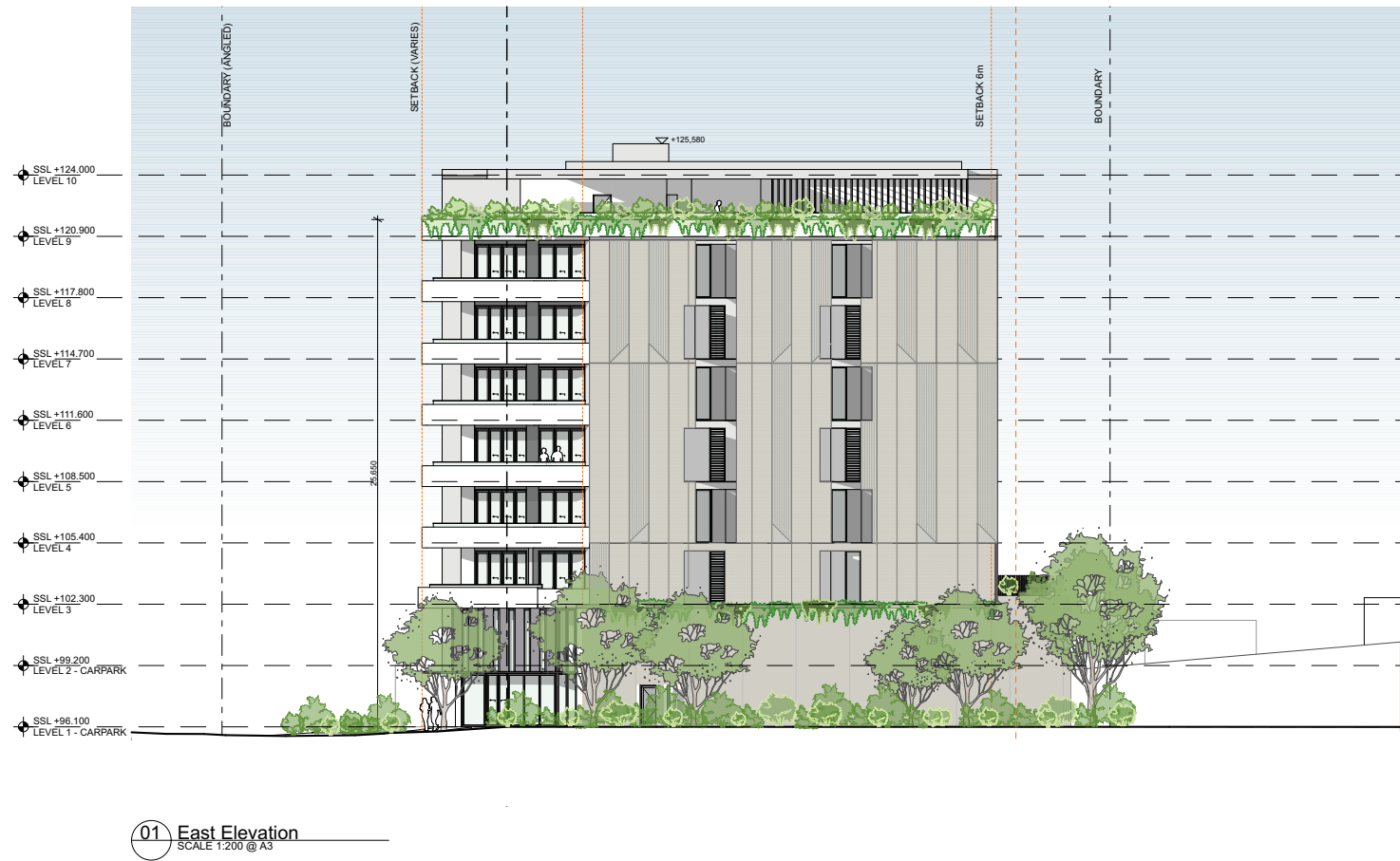
Charles Street Development - RUGIA - FC Global Pty Ltd

Project # **21032**
S Charles Street
Charlestown, NSW 2290

North Elevation

Drawing # **A-2003**
AS SHOWN

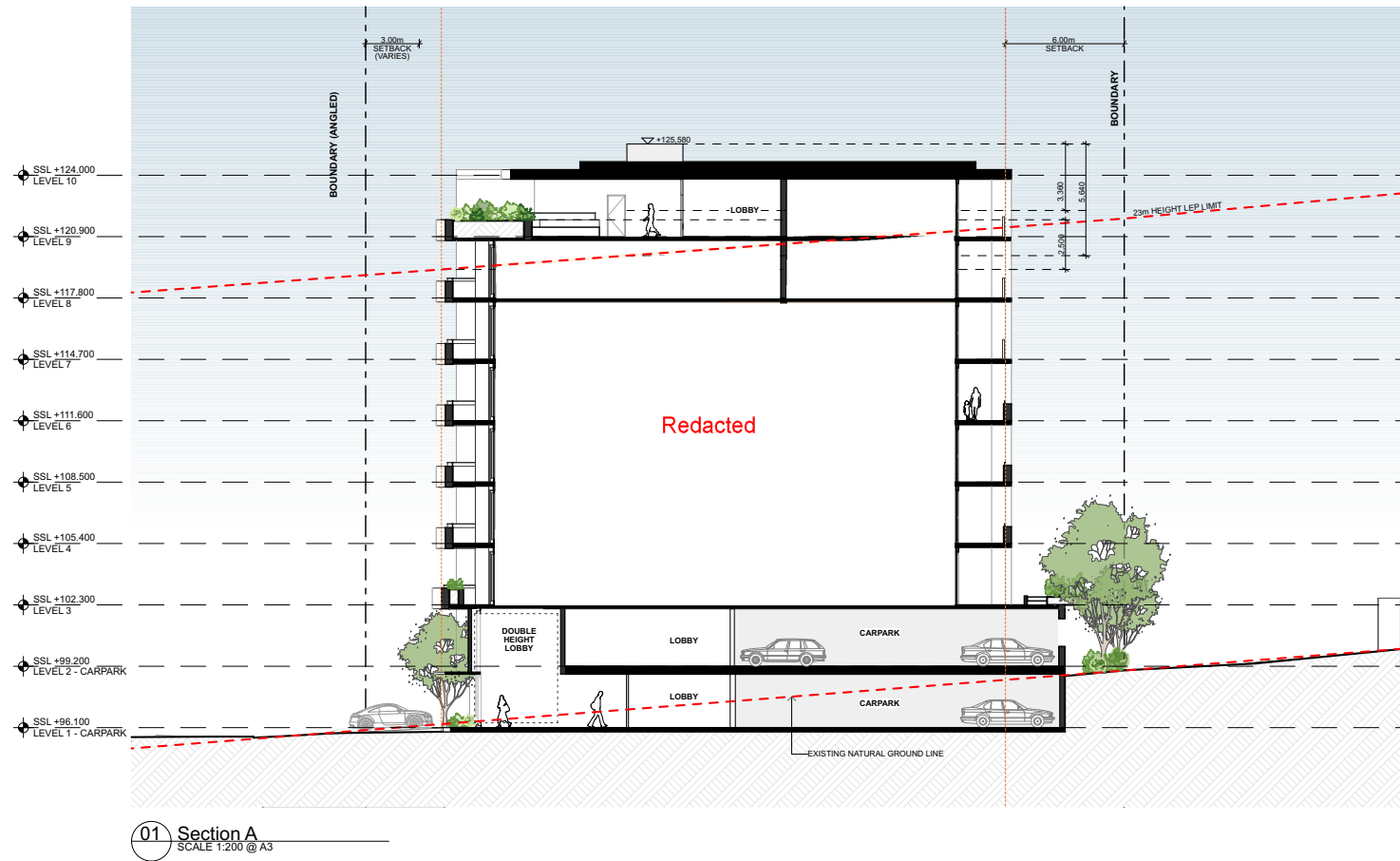
Sheet # **31**
31/8/2023



01 East Elevation
SCALE 1:200 @ A3

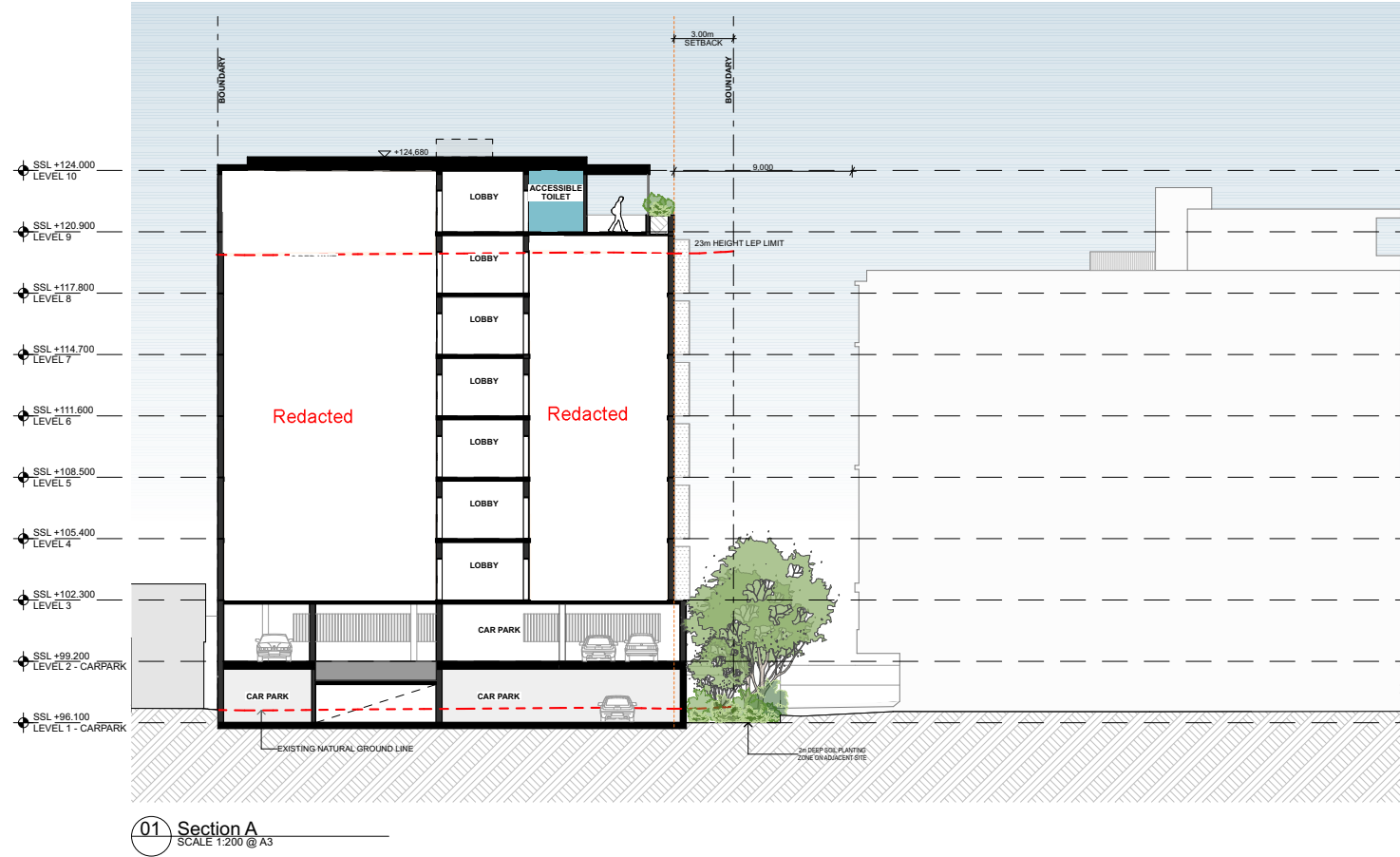
Development Application

	Architecture Planning Interiors			Charles Street Development - RUGIA - FC Global Pty Ltd Project # 21032 5 Charles Street Charlestown, NSW 2290	East Elevation Drawing # A-2004 AS SHOWN	Sheet 30 31/8/2023
	NEWCASTLE 115 King St (P.O. Box 958) Newcastle NSW 2300 P. 02 4929 1843	CENTRAL COAST 1/28 Adelaide St (P.O. Box 4400) East Gosford NSW 2250 P. 02 4321 0503				



Development Application

	Architecture Planning Interiors NEWCASTLE 115 King St (P.O. Box 958) Newcastle NSW 2300 P: 02 4929 1843 CENTRAL COAST 1/28 Adelaide St (P.O. Box 4400) East Gosford NSW 2250 P: 02 4321 0503 www.ckds.com.au E: admin@ckds.com.au ABN 12 129 231 269	North Point 	Charles Street Development - RUGIA - FC Global Pty Ltd Project # 21032 5 Charles Street Charlestown, NSW 2290	Section A Drawing # A-3001 AS SHOWN 11/9/2023 Sheet # 32
--	--	-----------------	--	---

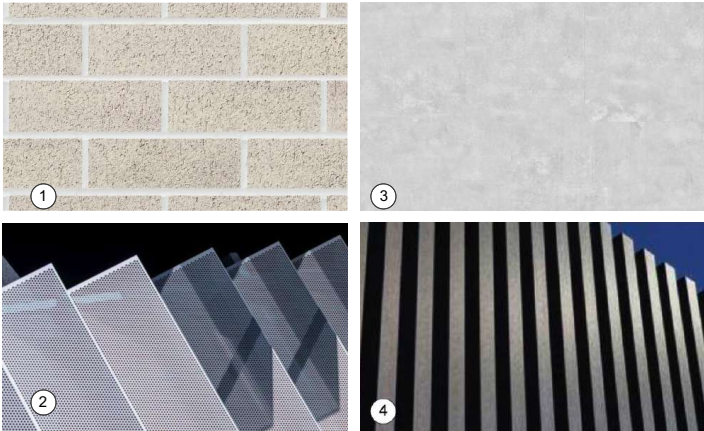


Development Application

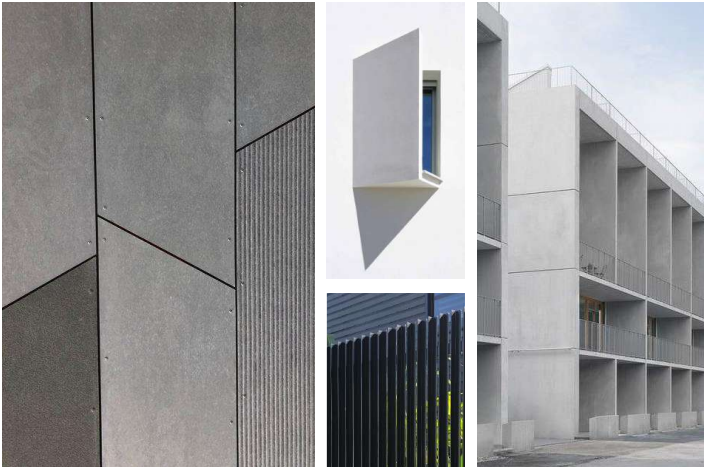
	Architecture Planning Interiors			Charles Street Development - RUGIA - FC Global Pty Ltd Project # 21032 5 Charles Street Charlestown, NSW 2290	Section B Drawing # A-3002 AS SHOWN 11/9/2023	Sheet # 32 11/9/2023
	NEWCASTLE 115 King St (P.O. Box 958) Newcastle NSW 2300 P. 02 4929 1843	CENTRAL COAST 1/28 Adelaide St (P.O. Box 4400) East Gosford NSW 2250 P. 02 4321 0503				



VIEW FROM CHARLES STREET



- ① FACE BRICK
- ② PERFORATED METAL PRIVACY SCREENS
- ③ NATURAL GREY PRECAST CONCRETE
- ④ BLACK ALUMINIUM BATTENS & BALUSTRADES



Development Application

Architecture | Planning | Interiors

NEWCASTLE
115 King St (P.O. Box 958)
Newcastle NSW 2300
P. 02 4929 1843

CENTRAL COAST
1/28 Adelaide St (P.O. Box 4400)
East Gosford NSW 2250
P. 02 4321 0503

www.ckds.com.au
E. admin@ckds.com.au
ABN 12 129 231 269

North Point

Charles Street Development - RUGIA - FC Global Pty Ltd
project # **21032**
5 Charles Street, Charlestown, NSW 2290

Perspectives / Precedents
drawing # **A-5001**
AS SHOWN

sheet **30**
31/8/2023

This document is the property of CKDS Architecture and Planning Pty Ltd. It is to be used for the project and site only. It is not to be reproduced, copied, or distributed without the written consent of CKDS Architecture and Planning Pty Ltd. It is to be kept confidential and secure. It is to be destroyed when no longer required.



Amended Clause 4.6 Variation Request

CLAUSE 4.3 HEIGHT OF BUILDINGS, LMLEP 2014

Proposed Residential Flat Building Development

5 Charles Street, Charlestown

SEPTEMBER 2023

Ref: 1087_CI 4.6

CLAUSE 4.6 VARIATION REQUEST FOR
Residential Flat Building Development

WPP Pty Ltd

Address:
60 Denison Street Hamilton East NSW 2303

Contact:
ph: 0484 694 122
email: anthonywilliams@wppgroup.com.au

DOCUMENT STATUS

Issue	Date	Description	By
1	01/11/2021	Draft	LK
2	11/02/2022	Final	AW
3	08/03/2023	Amended Draft	LK
4	13/03/2023	Amended Final	AW
5	05/09/2023	Final Approval	AW

Copyright © Williams Planning and Property Services Pty Ltd

This document has been authorised by Anthony Williams
Date 05/09/2023

Disclaimer
This report has been prepared based on the information supplied by the client and investigation undertaken by Williams Planning and Property Services Pty Ltd (WPP Pty Ltd) & other consultants. Recommendations are based on WPP's Pty Ltd professional judgement only and whilst every effort has been taken to provide accurate advice, Council and any other regulatory authorities may not concur with the recommendations expressed within this report. This document and the information are solely for the use of the authorised recipient and this document may not be used, copied or reproduced in whole or part for any purpose other than that for which it was supplied by WPP Pty Ltd. WPP Pty Ltd makes no representation, undertakes no duty and accepts no responsibility to any third party who may use or rely upon this document or the information.

Confidentiality Statement
All information, concepts, ideas, strategies, commercial date and all other information whatsoever contained within this document as well as any and all ideas and concepts described during the presentation are provided on a commercial in confidence basis and remain the intellectual property and Copyright of WPP Pty Ltd and affiliated entities.
This document has been registered with our solicitors along with a copy of all previous materials.

TABLE OF CONTENTS

1	Introduction	4
2	Standard to be Varied	5
3	Clause 4.6 of the LMLEP 2012	6
4	Extent of Variation	8
5	Supplementary Considerations	10
5.1	Site Location and Context	10
5.1.1	Local Context	10
5.1.2	Character and Built Form	11
5.1.3	Adjoining Approval	15
5.2	Consistency with Strategic Framework	17
5.2.1	Hunter Regional Plan 2041	17
5.2.2	Greater Newcastle Metropolitan Plan 2036	17
5.2.3	Lake Macquarie Local Strategic Planning Statement and Housing Strategy	18
5.3	Consistency with Charlestown Strategic Centre Planning Proposal	19
5.4	Consistency with Charlestown Town Centre Area Plan	21
6	Unreasonable or Unnecessary	24
7	Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))	25
8	The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))	31
9	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 (Clause 4.6(4)(a)(ii))	32
9.1.1	Height of Building (Clause 4.3)	32
9.1.2	Objectives of the Zone	33
10	The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))	34
11	Whether contravention of the development standard raises any matter of significance for State or Regional Environmental Planning (Clause 4.6(5)(a))	34
12	The public benefit of maintaining the development standard (Clause 4.6(5)(b))	34
13	CONCLUSION	35

FIGURES

Figure 1 – LMLEP HOB Map	5
Figure 2 - Maximum Building Height Section	9
Figure 3 - Maximum Building Height Section	9

ii

Figure 4 - Maximum Building Height Plane.....	10
Figure 5 - Site Context (Source: CKDS).....	11
Figure 6 - Nearby New and Approved Developments (Source: CKDS)	12
Figure 7 – View of 8-storey and 16-storey buildings to the south-west of the site, looking south-west from Smith Street (note the 8-storey building is within the R3 zone).....	12
Figure 8 – View of buildings to the south-west of the site, looking west from Charles Street	13
Figure 9 – View of buildings to the south-west of the site, looking south-west from the corner of Charles Street and Smith Street.....	13
Figure 10 - Charlestown Town Centre Area Plan	15
Figure 11 - Approved Development at 7-11 Charles St - Building Height Plane.....	16
Figure 12 – North East Growth Area (Source: LMHS).....	19
Figure 13 - Existing and Proposed Zoning.....	20
Figure 14 – Existing and Proposed Building Height	21
Figure 15 - CTCAP Block Plan	22
Figure 16 - SEPP 65 Compliant Conceptual Response to CTCAP	23
Figure 17 - Conceptual Response to CTCAP, showing future development potential of adjacent site to the west	23
Figure 18 - Extract of Shadow Diagrams	28
Figure 19 - Deep Soil Landscape Plan - Adjoining Sites (Source: Xeriscapes)	29

1 Introduction

This request has been prepared in accordance with Clause 4.6 of the *Lake Macquarie Local Environmental Plan 2014* to justify a variation to the Height of Buildings development standard proposed in a Development Application for a part 8 / part 9 storey residential flat building development at the site.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application. In particular, it is submitted that there are strong strategic planning and urban design grounds to support the overall proposed building height.

It is considered that the proposed development responds appropriately to surrounding built form, including approved and desired future built form, and meets the relevant objectives of the site's R3 zoning.

This request has been prepared having regard to the Department of Planning and Environment's 'Guidelines to Varying Development Standards' (August 2011) and various relevant decisions in the New South Wales Land and Environment Court (LEC) and New South Wales Court of Appeal.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard. These three matters, as established by relevant NSW LEC and Court of Appeal decisions, are:¹

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That 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 [clause 4.6(4)].

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

¹ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [23], *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

2 Standard to be Varied

The standard that is proposed to be varied is the Height of Buildings development standard set out in Clause 4.3 of the of the Lake Macquarie Local Environmental Plan 2014 (LMLEP).

As shown in **Figure 1**, the maximum building height map for the area prescribes a maximum building height of 23m for the site. Building Height is defined as:

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) 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.

The development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

Figure 1 – LMLEP HOB Map



3 Clause 4.6 of the LMLEP 2012

The objectives and provisions of Clause 4.6 are as follows:

4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows—*
 - (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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (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.*
- (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*
 - (b) *the concurrence of the Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning Secretary must consider—*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

When this Plan was made it did not include all of these zones.

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
- (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (ca) *clause 2.8, 6.1 or 6.2.*

The development standards in clause 4.3 are not expressly excluded from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6.(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclause 4.6(3) and (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of 'an appropriate degree of flexibility' in applying the development standard and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast to Clause 4.6(6).

4 Extent of Variation

The proposal will involve the demolition of existing development within the site and the erection of a part 8 / part 9 storey residential development comprising 27 apartments. The proposed units will be provided in a single 7-storey building 'tower' above a part 1 / part 2 storey podium accommodating 25 car parking spaces.

As discussed in the following sections, the proposed development has been sited and designed to respond to a number of key considerations and constraints including the proposed housing typology, the desired future character of the area, surrounding built form (including approved and proposed), the amenity of adjoining development, as well as the amenity of future residents on the site including opportunities for rooftop open space. The proposal provides high-quality communal space for residents and visitors in the form of outdoor common space at the rooftop level that benefits from views over the area, and has access to a generous lobby and accessible amenities for convenience. This space provides a pleasant outlook to the south across Lake Macquarie and distant ridge lines.

The proposal has also been designed to respond to the slope of the site which falls from north to south by approximately 3.15m, with the northern extent of the building benched into the slope by almost 3m below existing ground levels. Despite the constrained site footprint, the proposal achieves 15.9% deep soil plantings across the site, including a 3.0m wide deep soil zone along the eastern boundary.

As shown on the plans extracted in **Figures 2 - 4 below**, the proposed building reaches a maximum height of 28.64m at the highest part of the building, being the top of the lift overran. The western extent of the southern elevation, as measured from ground level (existing) is lower at 28.18m. The proposal therefore exceeds the prescribed maximum height by 5.64m (24%). The maximum height exceedance is exacerbated by the site's north to south slope, with the northern elevation only reaching a maximum height of 25.30m, exceeding the prescribed maximum height by 2.3m (10%).

Figure 2 - Maximum Building Height Section

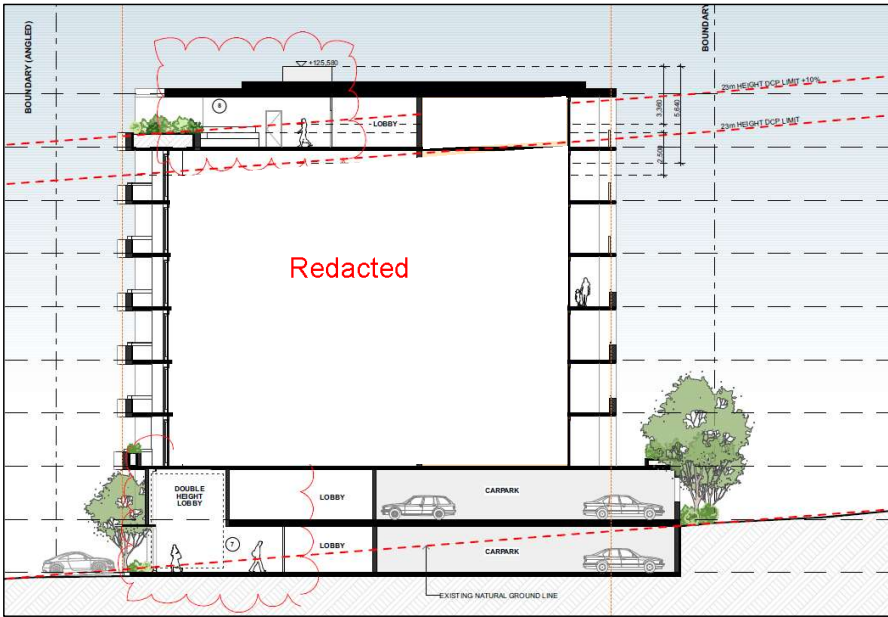
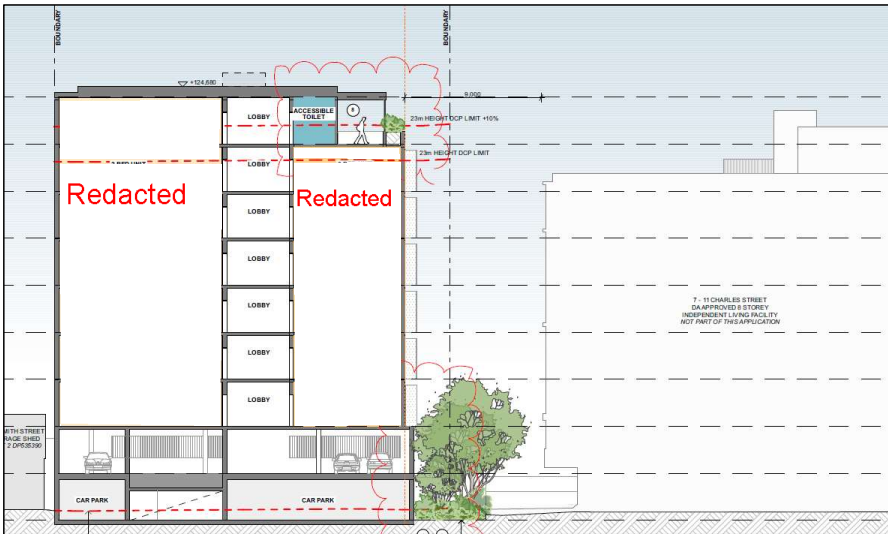
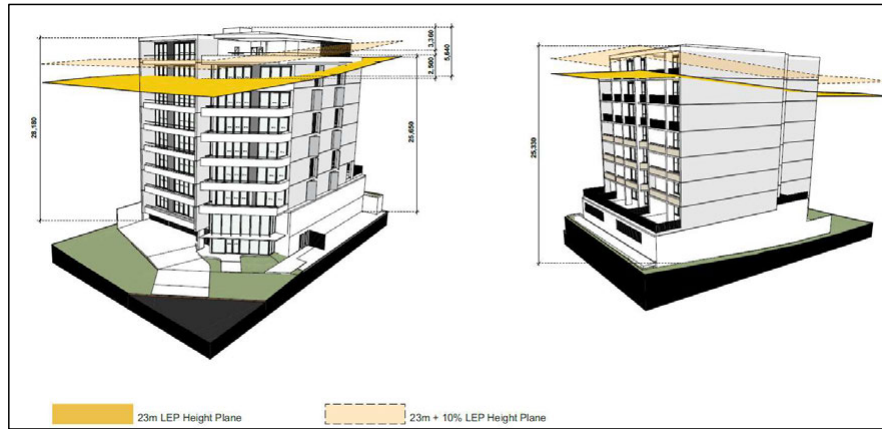


Figure 3 - Maximum Building Height Section





5.1.1 Local Context

In 2019, the Department of Planning Infrastructure and Environment (DPIE) issued 'Secretary's Environmental Assessment Requirements' for a \$70 million health service facility, in the form of a

private hospital and medical centre situated on the corner of the Pacific Highway and Frederick Street. Should this facility be constructed, it will be less than 100 metres from the subject site.

Figure 5 - Site Context (Source: CKDS)



5.1.2 Character and Built Form

The prevailing built form in the area is typified by older-style detached weatherboard and masonry dwellings, some of which accommodate retail / commercial uses. These dwellings interspersed with townhouse and residential flat building developments over varying ages, as well as low-scale community, civic and recreational developments.

Some new high-rise developments have emerged, including an 8-storey building constructed on an R3 zoned site less than 95m to the south-west of the site, and adjoining 16-storey building to the south-west bounded by the Pacific Highway, Charles Street and Smith Street (see **Figures 6-9**). In addition, No. 10 Charles Street to the south-west of the site has an existing approval for a 6-storey residential flat building, comprising 12 residential units. As outlined in Section 5.1.3, Council has recently granted approval for a part 7 / part 8 storey seniors housing development comprising 40 independent living units at the adjoining site known as 7-11 Charles Street Charlestown. We further note that the adjoining R3-zoned allotment to the north of the site, at No. 14 Frederick Street, is currently being considered for redevelopment for the purposes of multi-storey residential development.

Figure 6 - Nearby New and Approved Developments (Source: CKDS)



Figure 7 – View of 8-storey and 16-storey buildings to the south-west of the site, looking south-west from Smith Street (note the 8-storey building is within the R3 zone)



Clause 4.6 Variation Request | Lot 893 DP755233

Figure 8 – View of buildings to the south-west of the site, looking west from Charles Street



Figure 9 – View of buildings to the south-west of the site, looking south-west from the corner of Charles Street and Smith Street



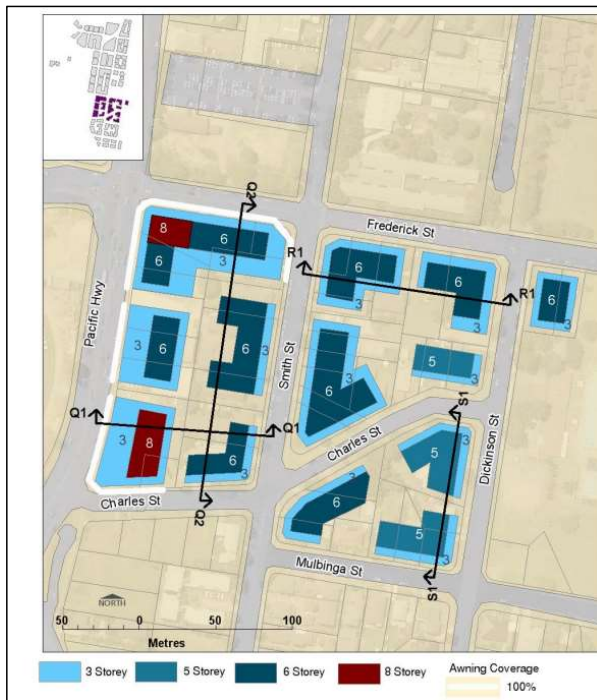
13

WPP | PLANNING
& PROPERTY

In terms of desired built form and character, the site is in a transitional area from commercial / business zoning along the Pacific Highway to the west to residential areas to the east, and the corresponding transition from sites permitting relatively tall buildings to those of comparatively lesser scale. In summary:

- The site and adjoining areas to the immediate north, east, south and west are zoned R3 – Medium Density Residential, with RE1 – Public Recreation in close proximity to the east. Less than 25m to the north is a B4 – Mixed Use zoned area which extends north and west to the B3 – Commercial Core Zone along the Pacific Highway. The site is not in proximity to any areas of R2 – Low Density Residential Development zoning.
- Under Council's LEP, a varying maximum permissible building height has been applied to the surrounding R3 zoned areas, ranging from 43m and 30m to the south and west (the southern gateway' to the city centre) and 10m in the established residential areas to the east. These height limits form part of the transition in maximum height limits from west to east, which reach a maximum of 36.5m and 53m in the B3 zone along the highway.
- The permissible height limits applied to the site and surrounding R3 zones areas to the south and west are considered to be indicative of the desired future character for the area with building height controls a key factor in guiding desired future character and built form.
- As outlined in Section 5.3, a planning proposal is currently on exhibition seeking to rezone several parcels of land, including an uplift in height for certain sites, within the Charlestown strategic centre. The proposed changes further reinforce the area of Charlestown on the eastern side of the Pacific Highway as being capable of supporting increased density.
- The DCP chapter *Charlestown Town Centre Area Plan* (CTCAP) provides additional guidance on the desired future character for the area. It includes block plans which generally reflect the transition in LEP heights from west to east, from 15 storeys to 5 storeys. The CTCAP envisages a 5 – 6 storey outcome on the site. Council's pre-DA advice for an adjoining scheme stated: *'It is noted that the DCP block provides only a contextual built form, noting it is not always possible to amalgamate sites to achieve the proposed form. It forms a good base to show expected streetscape but not landscape layouts. Regarding the two front setbacks, Council would envisage this to be set by the Area plan while side setbacks would be consistent with the ADG separation requirements.'* To the immediate west, the CTCAP envisages a 6 storey outcome, while as provided in **Figure 10**, the block to the immediate south (Block S) will see a 5 – 6 storey outcome.

Figure 10 - Charlestown Town Centre Area Plan



5.1.3 Adjoining Approval

At the Council meeting on 27 February 2023, Council approved (with unanimous support) a part 7 / part 8 storey seniors housing development comprising 40 independent living units at the adjoining site known as 7-11 Charles Street Charlestown.

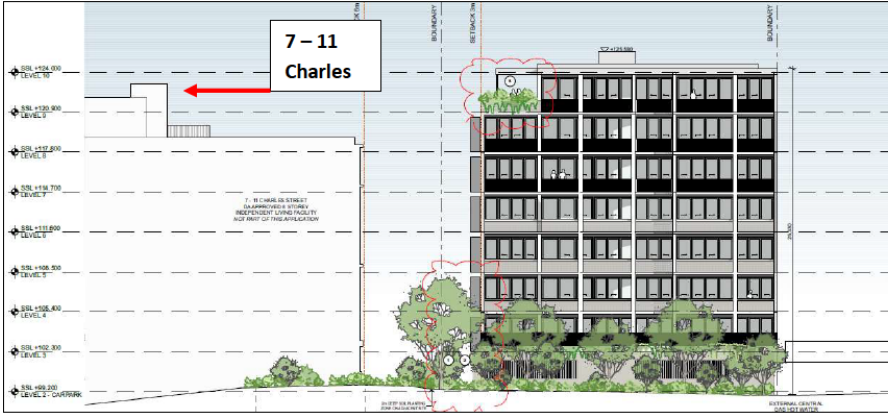
The site is currently subject to a maximum building height of 20m under the LMLEP 2014 and the approved development exceeded the prescribed maximum height by 4.63m, representing a 23% exceedance (see **Figure 11**).

Importantly, the councillors who spoke at the meeting emphasised the importance of housing diversity in Charlestown and the overall quality of the project as reasons for supporting the development application, including the 23% building height exceedance. We note the exceedance of the proposed development, also at the lift overrun, is 24%

Combined, the current proposal and approved scheme incorporate landscaping and screening along the shared side boundary along with a generous 9m setback. This has the effect of improving privacy and amenity for residents of both developments and allowing for appropriate visual separation between the two built forms.

While proposing an additional level to this adjoining approval, given the orientation of the site and limited building footprint, the proposed built form is not considered to be out of context. The additional height would not be overly noticeable in the context of the adjoining built form which is significantly bulkier and occupies a larger footprint than the current proposal.

Figure 11 - Approved Development at 7-11 Charles St and Proposed Development at 5 Charles



5.2 Consistency with Strategic Framework

5.2.1 Hunter Regional Plan 2041

The *Hunter Regional Plan 2041* (the HR Plan) is the regional strategy applying to the subject site. It builds on the previous plan and resets the regional plan priorities to ensure it continues to respond to the region's needs for the next 20 years.

The proposed development is consistent with the vision for the Hunter set out in the HR Plan. In particular, the proposal will deliver greater housing choice in an existing community close to jobs, services, and community and transport infrastructure. It will make a positive contribution towards reinforcing the role of Greater Newcastle as the centrepiece of the Region and facilitating the enhanced social and economic opportunities that this will create.

The proposed development is not inconsistent with any of the objectives set out in the HR Plan and, indeed, supports its housing aspirations, particularly relating to Objective 3 (Create 15-minute neighbourhoods to support mixed, multi-modal, inclusive and vibrant communities), Objective 4 (An inter-connected and globally focused Hunter without car dependent communities) and Objective 5 (Plan for 'nimble neighbourhoods', diverse housing and sequenced development).

The proposal is directly consistent with Planning Priority 3 which seeks to 'Grow Charlestown as a diverse, vibrant and mixed use strategic centre'. This planning priority recognises the need to consider housing diversity throughout the centre and a mix of uses in the existing retail core, including high density residential areas.

5.2.2 Greater Newcastle Metropolitan Plan 2036

The *Greater Newcastle Metropolitan Plan 2036* (GNMP) sets out the strategies and actions that will drive sustainable growth across the five (5) Local Government Areas of Cessnock, Lake Macquarie, Newcastle City, Port Stephens and Maitland which make up Greater Newcastle. The Plan aims to achieve the vision set out in the *Hunter Regional Plan 2036* – for the Hunter to be the leading regional economy in Australia with a vibrant new metropolitan city at its heart.

The proposal is consistent with the GNMP, which seeks to locate new homes near infrastructure and open space. The proposal contributes to Greater Newcastle's network of connected centres which enable mixed use functionality and offer a range of housing choice and other services. The site is identified as an Existing Urban Area with Infill Housing Opportunities within the Housing Opportunities Map in the GNMP, and will assist in meeting the projections of 13,700 new dwellings in Lake Macquarie by 2036.

The proposal contributes to:

- **Strategy 4:** Grow health precincts and connect the health network: The proposal seeks to develop higher-density housing close to frequent public transport and within an identified strategic centre. The site is in walking distance of a range of specialist consulting rooms and general practitioners. Additionally, the subject land is located approximately 100m from a public bus stop with services to the John Hunter Hospital and Newcastle CBD. Higher-density housing in this location would provide opportunities for residents to access health precincts

including Belmont Hospital (11 km), Lake Macquarie Private Hospital at Gateshead (2.9km), Warners Bay Private Hospital (7km) and John Hunter Hospital (8km).

- **Strategy 16:** The strategy identifies the focus of housing delivery in existing urban areas will be within strategic centres and along urban renewal corridors in the metro core. Such locations, including Charlestown, are earmarked to play an important role in accommodating future housing and are described in the strategy as mixed use neighbourhoods that offer a range and choice of housing. The proposal is evidently consistent with Strategy 16.

5.2.3 Lake Macquarie Local Strategic Planning Statement and Housing Strategy

Council's Local Strategic Planning Statement (LSPS) and Lake Macquarie Housing Strategy (LMHS) highlight the importance of Charlestown as a 'strategic economic centre' which benefits from high levels of access to services, public transport, entertainment and amenity. It is identified as a priority housing area / growth area in the 'North East Growth Area', capable of supporting medium and high-density residential growth, with future growth concentrated on the eastern side of Pacific Highway. Intensive multistorey commercial and residential development are identified as a key component in the current and future redevelopment of Charlestown as a 'strategic economic centre'. The LSPS seeks to orientate future growth to the east of the Pacific Highway.

Several planning strategies in place, particularly the LMHS, highlight the need for a fundamental shift towards infill housing to meet the diverse and changing needs of the community. In this respect, the LMHS notes that an extra 13,700 dwellings will be required in the LGA, with 5,750 or 41% of these to be delivered in 'apartments'.

The LMHS also identifies that 6.6% of the LGA's population includes persons with a disability, which is higher than the state average and forecasted to increase, but does not currently include specific actions for accessible housing. To help address this gap, in April of 2021, Council resolved to incorporate changes into the LMHS to focus on housing for people with disabilities and endorsed the exhibition of the draft Ending Homelessness Plan 2021-2024. The update of the LMHS will include a disability focus to increase the amount of accessible housing as a proportion of the city's stock. The LGA's current and forecasted number of persons requiring assistance will drive the need for smaller households in accessible locations such as Charlestown.

The proposal provides much-needed apartment style housing in response to growing demand for this type of housing in accessible locations.

Figure 12 – North East Growth Area (Source: LMHS)



5.3 Consistency with Charlestown Strategic Centre Planning Proposal

On 26 January 2023, DPIE issued Gateway determination to amend the Lake Macquarie Local Environmental Plan 2014 to rezone several parcels of land within the Charlestown strategic centre. The objective of the planning proposal is to support the role of Charlestown as a regionally significant strategic centre providing housing, jobs and services for the region. At the time of writing, the Planning Proposal is currently on public exhibition from 6 March 2023 to 3 April 2023.

The proposal seeks to rezone the subject site and adjoining allotments within the street block from R3 Medium Density Residential to B4 Mixed Use (see **Figure 13**). While the existing 23m building height standard applying to the site is not proposed to change, the proposal seeks to increase the height standard applying to the adjoining sites to the east from 20m to 23m (see **Figure 14**).

The proposed changes further reinforce the area of Charlestown on the eastern side of the Pacific Highway as being capable of supporting increased density. They also reinforce the position of the site within the transitional area from commercial / business zoning along the Pacific Highway to the west to residential areas to the east. Furthermore, it is considered that the increase in building height on the adjoining sites to the east helps to reinforce the suitability of the subject site to accommodate additional height.

Figure 13 - Existing and Proposed Zoning

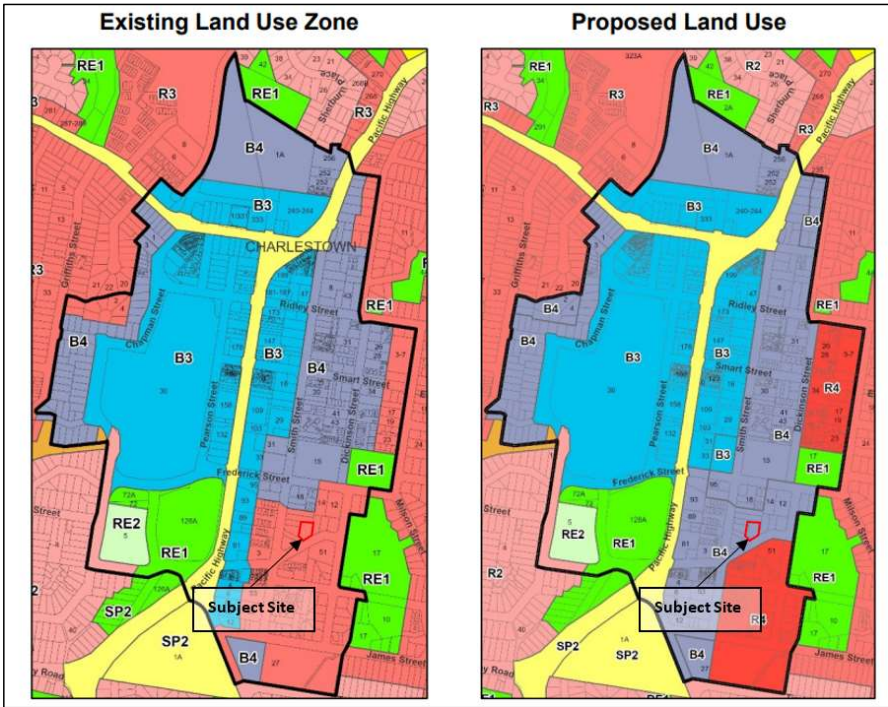
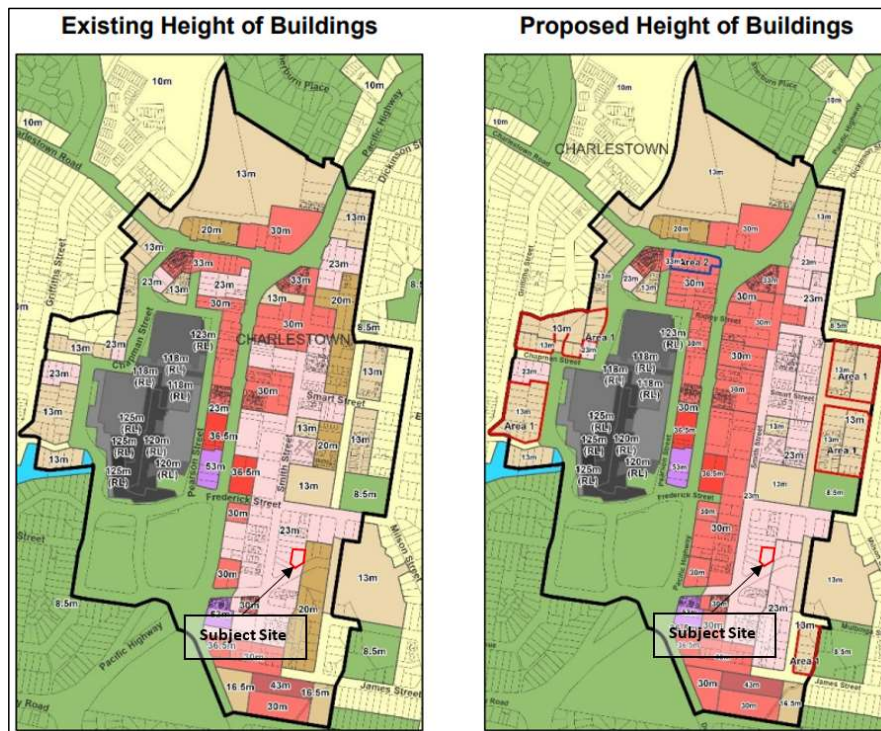


Figure 14 – Existing and Proposed Building Height



The planning proposal is also supported by proposed changes to the Charlestown Town Centre Area Plan contained in the LMDCP 2014. Key changes include replacement of the 'block plans' with new building frontage and setback requirements based on the desired street character and amenity.

5.4 Consistency with Charlestown Town Centre Area Plan

The Charlestown Town Centre Area Plan (CTCAP) forms part of the LMDCP 2014. It provides additional guidance on the desired future character for the area as well as underpinning population and housing typologies. It includes block plans which generally reflect the transition in LEP heights from west to east, from 15 storeys to 5 storeys across a range of land use zones.

While the indicative built form outcomes shown in the CTCAP are conceptual and cannot be rigidly adhered to, it is important for proposals to have regard to the development objectives in the CTCAP whilst also responding the desired built form outcomes shown in the block plans. The block plans also allow proponents to consider how future development may occur in a manner which is consistent with the CTCAP, while taking into account other site specific and 'block' specific attributes, including other developments and the likelihood of lot consolidation.

The below analysis shows the subject site relative to the CTCAP block plan (**Figure 15**) followed by potential future development scenarios, which takes into account realistic opportunities for lot

consolidation, LEP height considerations and indicative setbacks. The extract at **Figure 16** shows how any future development on the site which achieves full compliance with SEPP 65 setbacks/ separation distances would be severely constrained, with a tower width of only 8m, and incapable of achieving the required yield for the site. The extract at **Figure 17** shows a likely future development scenario for the site, which includes carefully considered reduced setbacks particularly along the western boundary. These reduced setbacks have been informed by a feasibility study undertaken by CKDS Architecture which demonstrates that the reduced setbacks will not comprise the future development potential of adjacent sites to the west, including with respect to privacy and solar access.

Importantly, the scheme maintains the central open space area within the street block, to the rear of the site, which is contemplated by the CTCAP block plan.

Figure 15 - CTCAP Block Plan

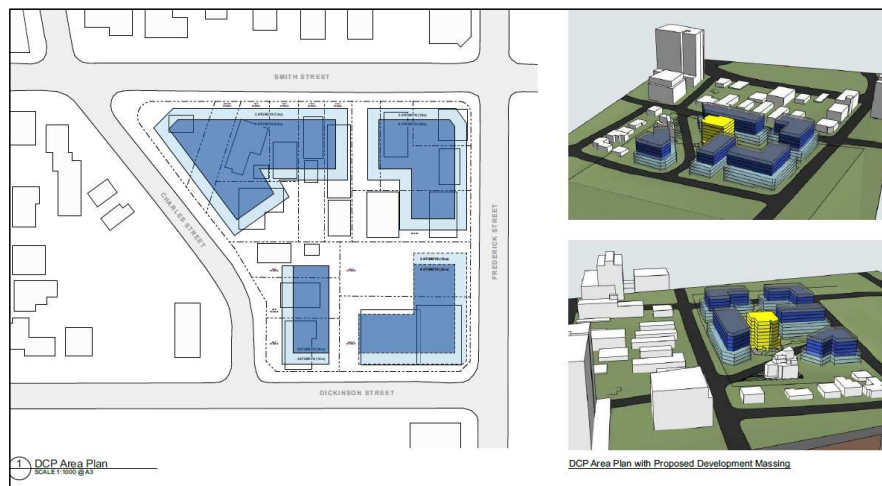
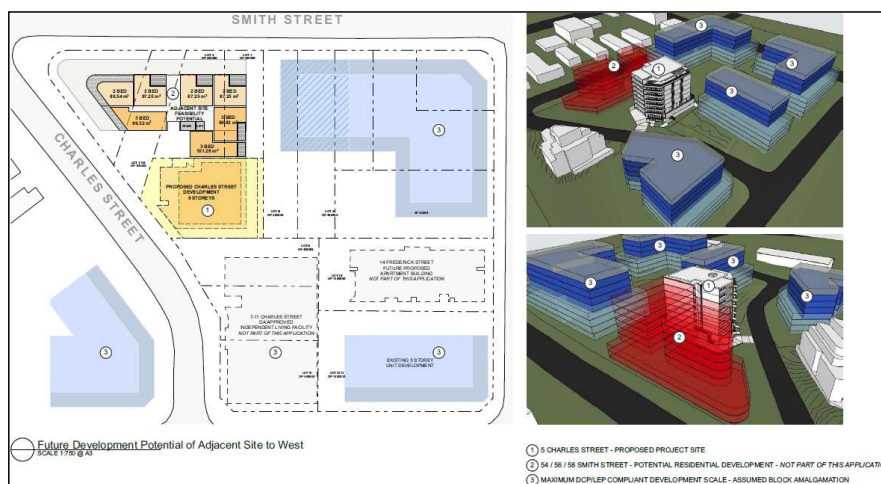


Figure 16 - SEPP 65 Compliant Conceptual Response to CTCAP



Figure 17 - Conceptual Response to CTCAP, showing future development potential of adjacent site to the west



While further fine grain site analysis is necessary, along with design development and consolidation, this analysis shows how the proposal would not compromise the intent of the CTCAP block plan (including the central open space area), while acknowledging established development, the practicalities of lot consolidation and desired future character. In this context, the likely impacts of the proposal on the CTCAP are seen to be positive and appropriate.

6 Unreasonable or Unnecessary

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827, 'Wehbe'). This judgement states:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the standard are achieved notwithstanding non-compliance with the standard"

The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)"

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purpose of this Clause 4.6 variation)

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that 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 the standard is unreasonable and unnecessary; and
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

“... Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The development is consistent with the standard (height of buildings) and zone objectives, even with the proposed variation to the maximum building height;
- There are no additional significant adverse impacts arising from the proposed non – compliance; and
- Important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

7 Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* (paragraph 24) states:

*“The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]*. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]*.”*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 90* and *Four2Five Pty Ltd v Ashfield (2015) NSQCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The height breach is, in part, a result of the site topography where the site falls from north to south by approximately 3 metres. As a result, the maximum height breach ranges from 5.64m (24% variation) at the lift overrun to only 25.30m (10% variation) at the northern elevation where the lower building level has been benched into the slope by almost 3m

25

below existing ground levels. While the development's overall height could be reduced by lowering the car parking level(s) further into the site, however this would result in excessive excavation which would come at a significant cost while also requiring substantial retaining walls. Topography is a site specific condition that contributes to the extent in the variation to the LMLEP 2014 height limit.

2. Council's Lake Macquarie Housing Strategy (LMHS) projects that the LGA's population will grow by almost 30,000 people by 2036, or 14 per cent. Several planning strategies in place, particularly the LMHS, highlight the increasing demand for more housing to meet the needs of the population. The LMHS seeks to grow housing diversity, particularly close to centres that have good transport accessibility, better access to services, jobs, schools, hospitals and recreation, and that can maintain affordability into the future. In this respect, the LMHS highlights the need for a fundamental shift towards well-located infill housing to meet the diverse and changing needs of the community. It notes that an extra 13,700 dwellings will be required in the LGA, with 5,750 or 41% of these to be delivered in 'apartments'.

With specific reference to Charlestown, Planning Priority 3 of the Hunter Regional Plan 2041 seeks to 'Grow Charlestown as a diverse, vibrant and mixed use strategic centre'. This planning priority recognises the need to consider housing diversity throughout the centre and a mix of uses in the existing retail core, including high density residential areas.

In line with state government strategic documentation, Council's Local Strategic Planning Statement and LMHS highlight the importance of Charlestown as a 'strategic economic centre' which benefits from high levels of access to services, public transport, entertainment and amenity. It is identified as a priority housing area / growth area in the 'North East Growth Area', capable of supporting medium and high-density residential growth. Intensive multistorey commercial and residential development is identified as a key component in the current and future redevelopment of Charlestown as a 'strategic economic centre'. The LSPS seeks to orientate future growth to the east of the Pacific Highway.

Furthermore, Council's current Planning Proposal for the Charlestown Strategic Centre clearly signals Council's strategic intention for the area and subject site as being suitable for higher density development due to its proximity to shops, services and public transport routes. The key intended outcome of the planning proposal is 'to support the role of Charlestown as a regionally significant strategic centre providing housing, jobs and services for the region.'

In this context, the social benefits of providing high-quality apartment-style housing stock that is supported by high-amenity indoor and outdoor communal space, and within a highly sought after location, should be given weight in the consideration of the variation request. The proposed apartment typologies are a result of market research, which identified the demand for couple and family apartment style-housing in a popular family-orientated neighbourhood. The proposed mix offers excellent lifestyle and affordability options catering to a range of demographic groups.

The additional distribution of floor space required to produce a higher quality, family-friendly apartment necessitates a built form outcome with larger units (two bedroom units measuring 86.59 m² to 90.63m² and three bedroom units measuring 115.28 m²) resulting in fewer units per floor when compared to conventional two and three bedroom residential units (ADG minimum 70m² for two bed units and 95m² for three bedroom units). Thus to achieve the required yield to achieve project feasibility, additional height is needed.

Under the circumstances a compliant outcome would not deliver the yield required to allow for higher-quality, family-friendly apartments in a strategically identified growth centre, consistent with the state and local government strategic framework. The additional height is therefore required to deliver the housing typology proposed and therefore relevant in contemplating the planning grounds for justifying the contravention.

3. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - a. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining residential properties to the south-west and east when compared to a compliant building envelope. The height breach will not result in unreasonable loss of solar access to properties to the south-east, south or south-west. Where the proposal results in any additional overshadowing compared to a compliant scheme, the extent of additional impact would be insignificant and not noticeable to the affected dwellings. Of note, part of the additional shadows cast by the non-compliant height during the morning and afternoon periods will fall onto the road reserves of Smith Street and Dickinson Street rather than impacting upon nearby dwellings.

Figure 18 - Extract of Shadow Diagrams



- b. The height breach does not result in any additional adverse privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy to adjoining properties when compared to a compliant scheme. Under the circumstances of the site, and having regard to the adjoining built form, the scheme relies on a combination of building separation, appropriate placement of fenestration and use of design elements such as angled blades, where compliant distances cannot be achieved or windows may be directly or partially addressing one another. Particular regard has been given to future potential multi-storey residential development to the east.

While privacy considerations are not as relevant to the northern, western and southern elevations, which predominantly overlooks onto the low rise commercial premises and the church, appropriate mitigation measures have been incorporated into the design to ensure the proposal does not compromise the future development potential of the block.

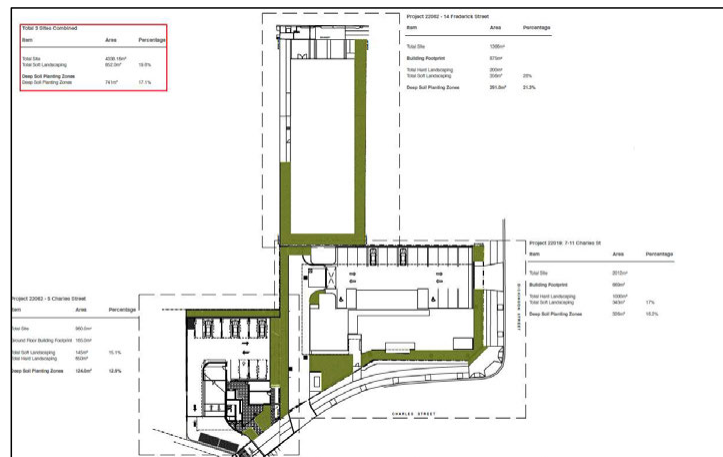
The impacts do not change as a result of the additional height and thus any loss of privacy or perceived loss of privacy caused by the non compliant height would be insignificant.

- c. The extent of the additional height is not considered to create any adverse built form impacts, particularly when considered in the context of the adjoining approval at 7-11 Charles Street. While proposing an additional level to the adjoining approval, given the orientation of the site and limited building footprint, the proposed built form is not considered to be out of context and the additional height would not be overly noticeable in the context of the adjoining built form which is significantly bulkier than the current proposal.

- d. The height breach will not result in significant view loss for existing or future development. The location of the breach relative to the topography of the site and surrounds and orientation of the allotment relative to the orientation of the building reduces the likelihood of view loss in an eastern or south eastern direction. The extent of view loss caused by the non compliant element would be insignificant.

The height and building typology is generally consistent with that provided in the Charlestown Area Plan, and the proposed height will not comprise the future development potential of adjacent sites, including with respect to privacy and solar access. Importantly, the scheme maintains the central open space area within the street block, to the rear of the site, which is contemplated by the CTCAP block plan. Indeed, the proposal achieves 12.9% deep soil plantings across the site, which is generally consistent with the 15% envisaged under the DCP Area Plan. When considered with adjoining approved and proposed development, 17.1% deep soil plantings is achieved in excess of requirements (see **Figure 19**).

Figure 19 - Deep Soil Landscape Plan - Adjoining Sites (Source: Xeriscapes)



4. The proposal meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone (as detailed in **Section 8** below). It is noted that the site is intended to be rezoned to B4 Mixed Use under Council's current Planning Proposal for the Charlestown Strategic Centre. The planning proposal clearly signals Council's strategic intention for the area and subject site as being suitable for higher density development due to its proximity to shops, services and public transport routes. The proposed development is considered to be wholly consistent with the key intended outcome of the planning proposal, 'to support the role of Charlestown as a regionally significant strategic centre providing housing, jobs and services for the region.'
5. The proposed development achieves the objects provided in Section 1.3 of the EP&A Act, specifically:

- a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential accommodation (1.3(c));
 - b. To promote the delivery and maintenance of affordable housing (1.3(d));
 - c. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g));
6. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)*. In particular:
- a. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - b. Approval of the proposed variation will allow for variation of building height and scale across the locality which is a commonly accepted urban design approach instead of buildings with consistent height; and
 - c. Approval of the proposed variation will support a variety of housing typologies in the locality by providing a well located and compact development that will provide a better choice of apartment-style housing (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, in particular the effect of topography on the built form outcome, and the design implications associated with the provision of generous family-sized apartments. Insistence on compliance with the height control would result in the removal of two levels (one whole and one partial), a loss of 7 units and generous communal outdoor space. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is complementary to the local context and desired future character of the R3 Zone at Charlestown.

It is noted in *Initial Action Pty Ltd v Woollahra Municipal council (2018) NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 Variation does and does not need to satisfy. Importantly, there does not need to be a 'better' planning outcome.

86. *The second way is an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a “better environmental planning outcome for the site” relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

8 The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed.

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standards has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). this written request has addressed Clause 4.6(3)(a) in **Section 5** above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in **Section 8** below). Clause 4.6(3)(b) is addressed in **Section 6** above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives of development in the zone which within the development is proposed to be carried out. The second opinion of satisfaction under Cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in **Section 8** below.

9 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 (Clause 4.6(4)(a)(ii))

9.1.1 Height of Building (Clause 4.3)

The height of building objectives contained in clause 4.3 of the LMLEP 2014 are addressed as follows:

Objective (a) to ensure the height of buildings are appropriate for their location

The height of the proposed building is considered appropriate in its location for the following reasons:

- The built form outcome is of a height and scale which is consistent with the desired future character for Charlestown, and will not result in unreasonable loss of amenity to surrounding properties by way of excessive overshadowing, unreasonable view loss or loss of privacy;
- The scale mediates between that of the envisaged future character to the west and the existing buildings to the east, reinforcing the urban outcomes for the area. The northern part of the site almost fringes the B4 – Mixed Use Zone which extends north and west to the B3 – Commercial Core Zone along the Pacific Highway, and would form part of a consistent transition away from taller built form outcomes closer to the Pacific Highway of a commercial or mixed use character to lower density housing typologies and open space to the east. The site is not in proximity to any areas of R2 – Low Density Residential Development zoning. Of note, the site is intended to be rezoned to B4 Mixed Use under Council's current Planning Proposal for the Charlestown Strategic Centre. The planning proposal clearly signals Council's strategic intention for the area and subject site as being suitable for higher density development due to its proximity to shops, services and public transport routes;
- The height and scale is generally consistent with the existing 8-storey building within the R3 zone, less than 95m to the south-west of the site;
- The height and scale is considered to be consistent with the adjoining approval at 7-11 Charles Street. While proposing an additional level to the adjoining approval, given the orientation of the site and limited building footprint, the proposed built form is not considered to be out of context and the additional height would not be overly noticeable in the context of the adjoining built form which is significantly bulkier than the current proposal;
- Whilst exceeding the maximum building height allowed under Clause 4.3, the height and building typology is generally consistent with that provided in the Charlestown Area Plan.

(b) to permit building heights that encourage high quality urban form

The proposal has been architecturally designed to create a modern building that achieves a high-quality urban form. The building's height and massing has been considered with respect to the site's topography and to reduce visual bulk and scale through a refined tower form above the podium base.

The scale mediates between that of the envisaged future character to the west and the existing buildings to the east, reinforcing the urban outcomes for the area. The podium has been benched into the site, with car parking areas partly below natural ground level, to minimise overall building height and to better visually integrate the development into its surrounds.

The additional height also facilitates the provision of a landscaped frontage and deep soil zone along the rear and eastern side boundary by allowing the building's ground-level footprint to be minimised. This built form outcome facilitates the provision of apartment-style housing in an attractively landscaped setting.

The development's overall height could be reduced by lowering the car parking level(s) further into the site, however this would result in excessive excavation which would come at a significant cost while also requiring substantial retaining walls.

9.1.2 Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of the R3 Zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain and enhance the residential amenity and character of the surrounding area.*

With respect to zone objectives (1) and (2), the proposal would contribute to the variety of housing types in the locality, providing much-needed apartment style housing including housing suitable for persons with a disability. When considered in the context of the height and scale of development allowed in the R3 Medium Density Zone at Charlestown, the proposal is found to be consistent with a medium density residential environment.

With respect to the zone objective fourthly referred to, the proposal would enhance the residential amenity and character of the surrounding area through replacing housing stock at the end of its useful life and providing a built form outcome which, for the occupants of the building, would afford appropriate natural lighting, ventilation, privacy and access to private open space within the development as well as external public open space. This is evident in an evaluation of the proposal against the provisions of the Apartment Design Guidelines prepared by CKDS (**Appendix 6** of SEE). The occupants would also benefit from high levels of access to a range of services and public amenities offered in close proximity to the site.

The built form outcome is of a height and scale which is consistent with the desired future character for Charlestown, and will not result in unreasonable loss of amenity to surrounding properties by way of excessive overshadowing, unreasonable view loss or loss of privacy.

In forming part of the transition from a low density to medium density environment, the proposal would make contributions to the Council under Section 7.11 of the EP&A Act 1979. Such contributions would be utilised to facilitate improvements to local road facilities, public transport facilities, local open space, recreation and community facilities. The specific proposed infrastructure enhancements for the 'Charlestown Catchment' are detailed in the *LMCC Development Contributions Plan – Charlestown Contributions Catchment*. Through making contributions to the maintenance and improvement of existing infrastructure and the delivery of new public infrastructure within the catchment, the proposal will result in an enhancement to the residential amenity and character of the surrounding area.

10 The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))

The concurrence of the Secretary can be assumed as provided in Planning Circular PS 2020 – 02.

11 Whether contravention of the development standard raises any matter of significance for State or Regional Environmental Planning (Clause 4.6(5)(a))

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application. There are no matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application, and we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence pursuant to clause 4.6(5).

12 The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on site by up to 5.64m (24%), it is evident that the proposed development is consistent with the objectives of the development standard and objectives of the zone in which the development is proposed to be carried out.

13 CONCLUSION

This submission requests a variation under clause 4.6 of the Lake Macquarie Local Environmental Plan 2014 to the height of buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this proposed development;
- The proposed development achieves the objectives of the development standard (Test 1 of Wehbe) and is consistent with the objectives of the R3 Medium Density Residential zone; and
- There are sufficient environmental planning grounds to justify the contravention.

With respect to the public interest, the Council as consent authority can be satisfied as required that the development achieves the objectives of the development standard and is consistent with the objectives of the R3 zone notwithstanding non-compliance with the height of buildings standard.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 2020 - 02.

Having regard to the above, it is considered appropriate for the Council as consent authority to exercise the flexibility provided by clause 4.6 in the circumstances of this application and agree to vary the building height development standard as proposed.