



City of
Newcastle



CITY OF NEWCASTLE

Ordinary Council Meeting

Councillors,

In accordance with section 367 of the Local Government Act, 1993 notice is hereby given that an Ordinary Council Meeting will be held on:

DATE: Tuesday 23 March 2021

TIME: 6.00pm

VENUE: Council Chambers
Level 1
City Administration Centre
12 Stewart Avenue
Newcastle West NSW 2302

J Bath
Chief Executive Officer

**City Administration Centre
12 Stewart Avenue
NEWCASTLE WEST NSW 2302**

18 March 2021

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The location of all meetings will be determined by the CEO in consultation with the Lord Mayor, having regard to any applicable Public Health Orders regarding COVID-19, and will be either via video conferencing platform or at an appropriate CN facility in accordance with the requirements of the Local Government Act 1993.

**ORDINARY COUNCIL MEETING
23 March 2021**

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	<i>(Business Paper to be distributed on the night in accordance with the Code of Meeting Practice, cl20.5)</i>	

FOR DOCUMENTS MARKED 'DISTRIBUTED UNDER SEPARATE COVER' REFER TO COUNCIL'S WEBSITE AT www.newcastle.nsw.gov.au

NOTE: ITEMS MAY NOT NECESSARILY BE DEALT WITH IN NUMERICAL ORDER

ITEM-22 CCL 23/03/21 - STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

REPORT BY: GOVERNANCE
CONTACT: DIRECTOR GOVERNANCE

PURPOSE

To seek approval to enter into a Heads of Agreement with Iris Capital, in accordance with the Independent Commission Against Corruption's Direct Negotiations: Guidelines for Managing Risk (ICAC Guidelines), regarding the potential to deliver the 'Stairway to Heaven' Concept.

RECOMMENDATION

That Council:

- 1 Authorises the Chief Executive Officer (CEO) to enter into a Heads of Agreement (HoA) with Iris Capital to reach in-principle agreement on the terms and conditions under which the parties might progress the Stairway to Heaven concept to create a landmark public space to enhance the visual and physical connections to Christ Church Cathedral (Cathedral), through an integrated approach incorporating City of Newcastle (CN) owned land and Iris Capital owned land as outlined at **Attachment A**.

- 2 Endorses entering into exclusive discussions with Iris Capital to develop the HoA in accordance with the Independent Commission Against Corruption (ICAC) Guidelines as outlined at **Attachment D**, and considers this report as providing public notice of CN's intention to enter into exclusive discussions with Iris Capital.

KEY ISSUES

- 3 At the Ordinary Council Meeting held on 8 December 2020, Council endorsed the 'Stairway to Heaven' Concept (Concept), first publicly raised in 2006, which proposed a new public space to enhance the visual and physical connections to the Cathedral.

- 4 In January 2021, CN appointed HillPDA to undertake independent feasibility analysis in accordance with Council's resolution, by assessing the feasibility to deliver the Concept under two options: (1) a stand-alone development of the CN owned Mall Car Park site at 92 King Street Newcastle; and (2) an integrated option involving the CN owned land in conjunction with the adjoining Iris Capital owned East End development. A site plan is at **Attachment A**.

- 5 The original 2006 Concept has been reimagined to ensure it is a compelling and iconic opportunity for this prominent and highly valued heritage precinct that could transform the heart of the Newcastle Central Business District (CBD) as a destination for the community and visitors.
- 6 The 2021 vision for the Concept at **Attachment B** imagines enhancing the main north-south view axis to the Cathedral via a 93 metre long and 20 metre wide public space and stairway extending from Hunter Street to King Street, with a series of plaza spaces providing places to gather and meet. It retains 380 public car parking spaces located on the northern portion of the site (utilising the existing slope below King Street), a 300m² community facility, along with a new raised pedestrian connection along Laing Street integrated with the stairway.
- 7 A primary purpose of the Concept is to enhance the main north-south view corridor to the Cathedral. Whilst the Newcastle Development Control Plan 2012 has a range of controls relating to views to and from the Cathedral, the existing approval for the Iris Capital East End development did not enforce the main north-south view corridor. Therefore, if the East End development were to proceed in accordance with existing approvals, it would have a significant adverse impact on views to the Cathedral, as outlined at **Attachment C**.
- 8 The feasibility analysis indicates that the option to deliver the Concept through a stand-alone redevelopment of CN's Mall Car Park site would not be feasible. The Mall Car Park site, comprising 2,611m², is not of sufficient size to enable the Concept to be delivered. It would deliver a poor outcome in terms of built form, would not achieve the required view corridors to the Cathedral, nor enable the Stairway vision to be realised. The option of a stand-alone redevelopment of the Mall Car Park site to deliver the Concept will not be pursued any further.
- 9 The feasibility analysis indicates that the option to deliver the Concept through an integrated approach involving CN and Iris Capital owned land would be feasible. The proposed precinct for this integrated option, comprising 11,645m², is of sufficient size to enable the landmark new public space to be created which enhances the visual and physical connections to the Cathedral and provides for 380 public car parking spaces and community facilities along with development of the site for residential, retail and commercial purposes.
- 10 To date, only 'without prejudice' discussions have been held with Iris Capital in accordance with Council's resolution. Whilst the feasibility analysis indicates the integrated option would be feasible, no details have yet been agreed. To progress to the next stage, a HoA is required to reach in-principle agreement with Iris Capital on the terms and conditions under which the parties might progress the Concept.
- 11 To develop the HoA, CN will enter into exclusive discussions with Iris Capital, in accordance with ICAC Guidelines at **Attachment D**, including seeking authority to proceed and providing public notice via this report.

- 12 Entering into exclusive discussions with Iris Capital is justified with reference to the following ICAC criteria:
- i) Uniqueness – Iris Capital is in a unique position to offer a solution as the owner of the land adjoining the Mall Car Park site, which is the only other land upon which the Concept can be delivered. As such it is in the unique position to offer a solution that cannot be offered by competitors.
 - ii) Real Property Rights – Iris Capital own property that is both on and adjacent to the Concept site and required for the project to be technically and economically feasible.
 - iii) Further, it would be impractical to run a competitive process for the Concept, given Iris Capital is the only party which could deliver it given their real property interests in land required for the Concept.

FINANCIAL IMPACT

- 13 A budget of \$150,000 was approved in the December Quarterly Budget Review for the feasibility analysis. Additional budget will be required to progress the next stage and will be sought through normal budget processes.
- 14 Financial analysis will be undertaken in the next stage to assess the return on investment to CN.

COMMUNITY STRATEGIC PLAN ALIGNMENT

- 15 This report aligns with the following strategic directions of the Newcastle 2030 Community Strategic Plan:

Liveable Built Environment

5.1b Ensure our suburbs are preserved, enhanced and promoted, while also creating opportunities for growth.

5.1c Facilitate well designed and appropriate scale development that complements Newcastle's unique character.

Open and Collaborative Leadership

7.1a Encourage and support long term planning for Newcastle, including implementation, resourcing, monitoring and reporting.

7.2a Conduct Council business in an open, transparent and accountable manner.

IMPLEMENTATION PLAN/IMPLICATIONS

- 16 The exclusive discussions with Iris Capital will be supported by a negotiations plan, probity plan, due diligence, risk assessment and key stakeholder engagement plan, which will be submitted to the Asset Advisory Committee (AAC) along with the HoA.
- 17 It is anticipated that the HoA will be finalised by 30 June 2021, which would enable Iris Capital to submit planning applications during the second half of 2021.

RISK ASSESSMENT AND MITIGATION

- 18 CN's interests and associated risks have been mitigated to date by undertaking a feasibility analysis and key stakeholder engagement prior to any decision to proceed, with all discussions to date with Iris Capital conducted on a 'without prejudice' basis.
- 19 CN has made no commitments or decisions to proceed. The way forward outlined in this report includes appropriate probity, due diligence and risk assessment. Delivery pathways have not yet been confirmed, however any decision to dispose of CN land and / or enter into a Voluntary Planning Agreement will be subject to separate Council approval as per usual processes.

RELATED PREVIOUS DECISIONS

- 20 At the Ordinary Council Meeting held on 8 December 2020, Council resolved to endorse the Concept and authorised the CEO to undertake feasibility analysis and hold without prejudice discussions with Iris Capital to progress the Concept, including the requirement to protect public car parking spaces (estimated at 380) and social infrastructure to ensure these components are provided in any new concept, and referred the matter to the AAC and the Urban Design Consultative Group (UDCG) for advice.

CONSULTATION

- 21 CN's AAC was briefed on 18 February 2021 and will maintain oversight of the next stage of discussions.
- 22 Key stakeholder engagement included discussions with UDCG, the Cathedral and Newcastle Inner City Residents Alliance (NICRA). Minutes of the UDCG briefing on 24 February 2021 are at **Attachment E**. To date, NICRA has been briefed three times and has provided the submission at **Attachment F**.
- 23 CN held 'without prejudice discussions' with Iris Capital on 2 March 2021 to explore the potential for an integrated approach involving CN's Mall Car Park and adjoining Iris Capital owned East End development. CN made no commitments or decisions to proceed. Iris Capital has outlined its willingness to work with CN in a submission at **Attachment G**.

BACKGROUND

- 24 In 2006, a group of prominent Novocastrians put forward a proposal to link the Cathedral to the Harbour with a new public space. The concept, known as 'Stairway to Heaven' (*Le Scale alla Chiesa di Christ*) proposed a public space from the Harbour to Cathedral Park, by introducing a grand staircase full of activity and purpose.
- 25 The Mall Car Park was constructed in 1961 and temporarily closed in April 2020 due to structural concerns. In January 2021, CN submitted a development application to demolish the existing Mall Car Park, in accordance with Council's resolution of 8 December 2020. A separate report is proposed to be submitted to Council seeking approval to enter into a contract for the demolition.
- 26 The Hunter and Central Coast Joint Regional Planning Panel approved concept plans for Iris Capital's four-stage East End development in December 2017, including 563 units and parking for 553 vehicles. Stages 1 and 2 have been approved with Stage 1 complete and Stage 2 commencing construction. Iris Capital have indicated their intention to submit development applications for Stages 3 and 4 in 2021.

OPTIONS

Option 1

- 27 The recommendation as at Paragraph 1 – 2. This is the recommended option.

Option 2

- 28 Council resolves not to proceed further with the Stairway to Heaven Concept. This is not the recommended option.

REFERENCES

ATTACHMENTS

- Item 22 Attachment A:** Site Plan
- Item 22 Attachment B:** 2021 Vision for Stairway to Heaven
- Item 22 Attachment C:** View Corridors to Christ Church Cathedral
- Item 22 Attachment D:** Independent Commission Against Corruption (ICAC) Direct Negotiations: Guidelines for Managing Risk (2018) <https://www.icac.nsw.gov.au/ArticleDocuments/232/Direct%20Negotiations%20-%20guidelines%20for%20managing%20risks%20in%20direct%20negotiations%203Aug18.pdf.aspx>

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Item 22 Attachment E: Urban Design Consultative Group Minutes

Item 22 Attachment F: Submission from Newcastle Inner City Residents Alliance

Item 22 Attachment G: Submission from Iris Capital

Item 22 Attachments A – G distributed under separate cover

ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

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PAGE 7	ITEM-22	Attachment B:	2021 Vision for Stairway to Heaven
PAGE 46	ITEM-22	Attachment C:	View Corridors to Christ Church Cathedral
PAGE 49	ITEM-22	Attachment D:	Independent Commission Against Corruption (ICAC) Direct Negotiations: Guidelines for Managing Risk (2018)
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PAGE 79	ITEM-22	Attachment F:	Submission from Newcastle Inner City Residents Alliance
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CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

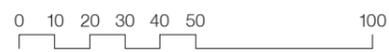
ITEM-22 **Attachment A:** Site Plan

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Site Plan

Scale
1:2000@A3



Drawing number
01
Revision number
01

Project number
6402
Project name
Stairway to Heaven

Project address
92 King Street Newcastle
Client
HILLPDA

Key

- Iris Capital (complete/underway)
- Iris Capital (pending)
- Mall Car Park
- Stairway to Heaven

SJB Urban
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SJB Architecture (NSW) Pty Ltd
ABN 20 310 373 425 ACN 081 094 724
Adam Haddow 7188 John Pradel 7004





Site Plan

Scale
1:1000@A3



Drawing number
01
01

Project number
6402
Project name
Stairway to Heaven

Project address
92 King Street Newcastle
Client
HILLPDA

Key

- Block 1 (Iris)
- Block 2 (Iris)
- Block 3 (Iris)
- Block 4 (Iris)
- Mall Car Park

SJB Urban
Level 2, 490 Crown Street, Surry Hills NSW 2010
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SJB Architecture (NSW) Pty Ltd
ABN 20 310 373 425 ACN 081 094 724
Adam Haddow 7188 John Pradel 7004

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ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment B:** 2021 Vision for Stairway to Heaven

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SJB Urban



2021 Vision Pack

Stairway to Heaven

Prepared for

Hill PDA - Client of City of Newcastle

Issued

15 March 2021

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Surry Hills NSW 2010

Australia

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We create amazing places



At SJB we believe that the future of the city is in generating a rich urban experience through the delivery of density and activity, facilitated by land uses, at various scales, designed for everyone.

Version: 04
Prepared by: WM, BL
Checked by: FL

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Issued

01	Draft for information	12.02.2021
02	Draft for information	15.02.2021
03	DCP View Corridor images added	15.02.2021
04	Concepts and visualisations added	12.03.2021

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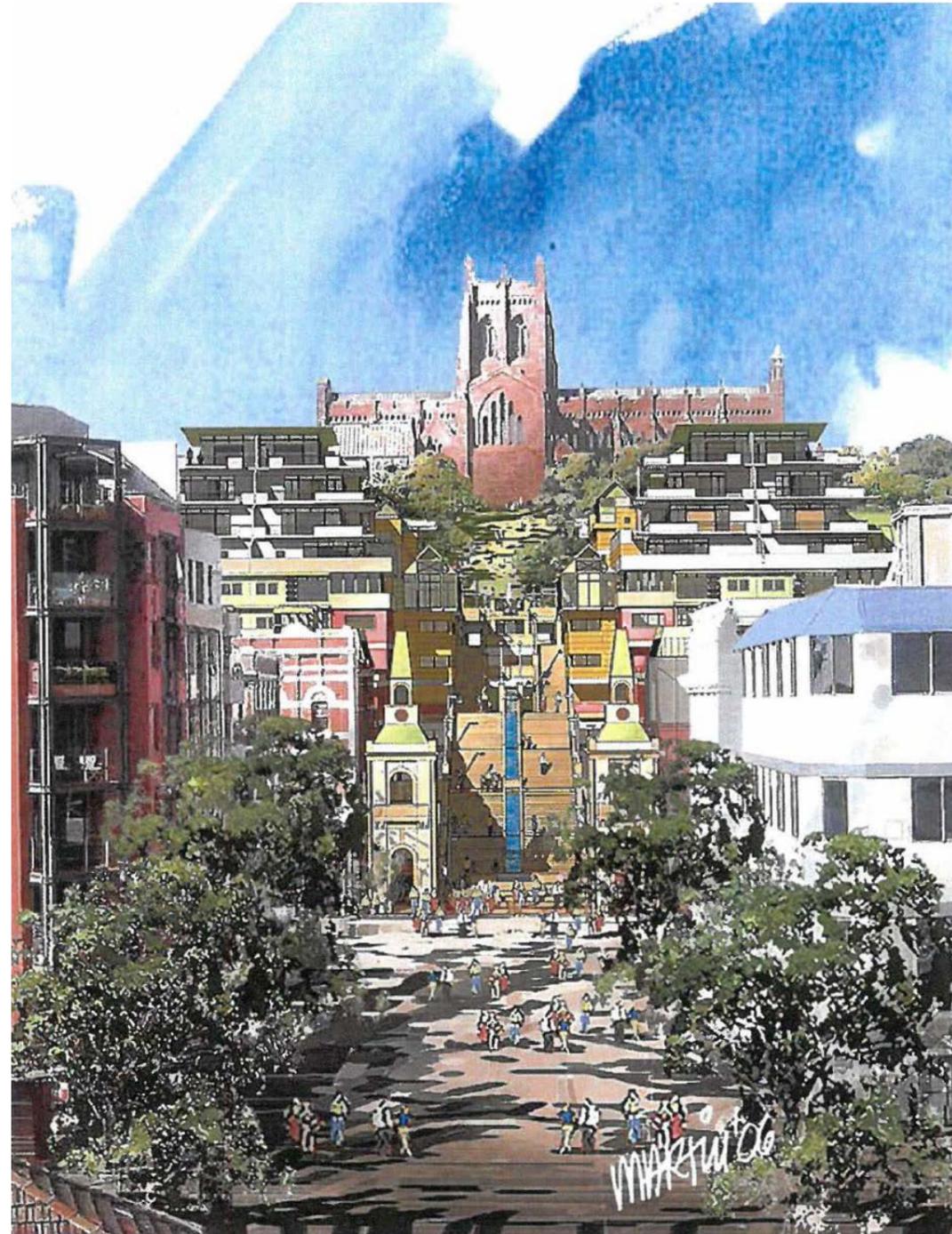
Introduction

1

1.1 Introduction

SJB have been appointed as a sub-consultant to Hill PDA to update and reimagine the Stairway to Heaven concept first proposed by EJE Architecture in 2006. The updated vision and concept outlines the key principles, parameters and considerations for the stairway, as well as the key moves for the surrounding public domain that are proposed to be integrated with the stairway.

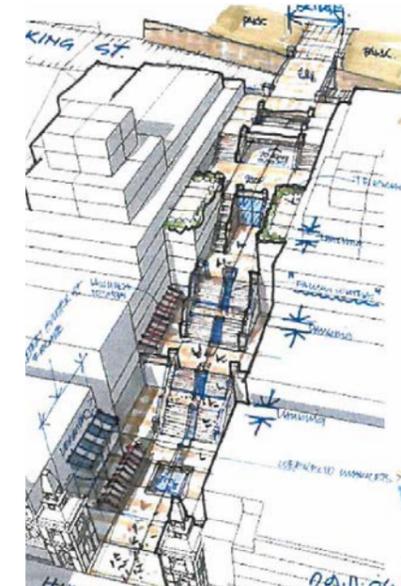
This 2021 document has been prepared as part of a feasibility analysis commissioned by City of Newcastle. It should be noted that it does not represent an endorsed or preferred option by the City of Newcastle.



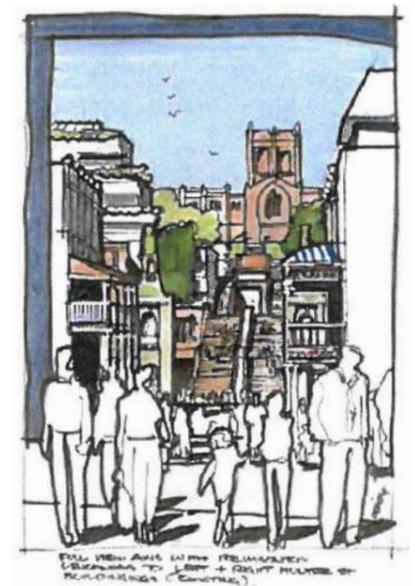
EJE Architecture, 2006



EJE Architecture, 2006



EJE Architecture, 2006



EJE Architecture, 2006

Project Background

2

Project Background

2.1 Strategic Context

The Newcastle Urban Renewal Strategy (NURS) 2012 identifies the challenges faced by the Newcastle City Centre and Hunter Street, which stretches over 3km from Wickham in the west to Pacific Park in the east. Generating enough development to activate this length of city is a long term proposition. In the short to medium term development and activity can be focused on three Activity Nodes (Page 68), each defined according to existing land uses and their development potential.

Since the implementation of the strategy, Wickham (The West End) is becoming the new Central Business District (CBD), with commercial towers being supported by new residential development to the north and south of the existing rail line. Civic (Civic) is located at the mid-point of Hunter Street, where the new Law Courts and Newcastle University Campus are being developed, reinforcing the existing civic uses, which include the Council Offices, Civic Theatre and Newcastle Museum.

The East End is where the site is located, in the centre of the activity node. The character of the East End is a mixed-use precinct, with retail supported by new residential and commercial uses. Existing features include the Christ Church Cathedral, Queens Wharf and Hunter Street Mall, which runs through the site.

The adjacent diagram illustrates the location of the site in relation to the three activity nodes and their associated services, public buildings, and places of interest.

KEY

- The site
- T Train station
- L Light Rail Stop
- 1 Hamilton TAFE
- 2 Schools
- 3 Newcastle Police Station
- 4 Newcastle Fire Station
- 5 Newcastle Museum
- 6 Newcastle Maritime Centre
- 7 Newcastle Town Hall
- 8 Newcastle Regional Library
- 9 Christ Church Cathedral
- 10 Hunter Street Mall



Project Background

2.2 Site Context

The site is located between Hunter and King Street, north of the Christ Church Cathedral and Cathedral Park. Its surrounding context consists largely of mixed use development to the east, transitioning to a more residential character to the west. The Hunter River and foreshore is located to the north, which is currently accessible by a variety of transport services, including buses, light rail and ferry.

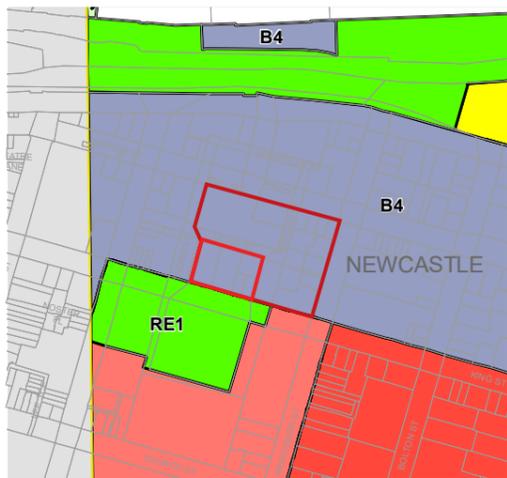


KEY

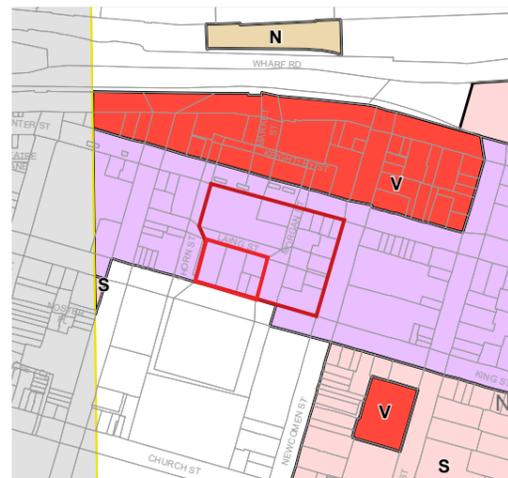
-  Light rail stop
-  Iris Capital (complete/underway)
-  Iris Capital (pending)
-  Stairway to Heaven

Project Background

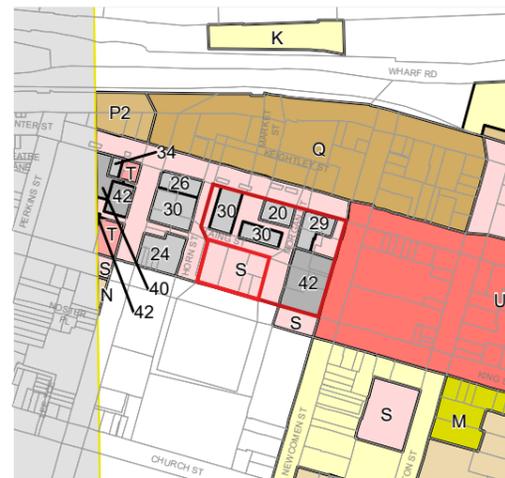
2.3 City of Newcastle Local Environmental Plan 2012



NLEP 2012 - Land Zoning Map



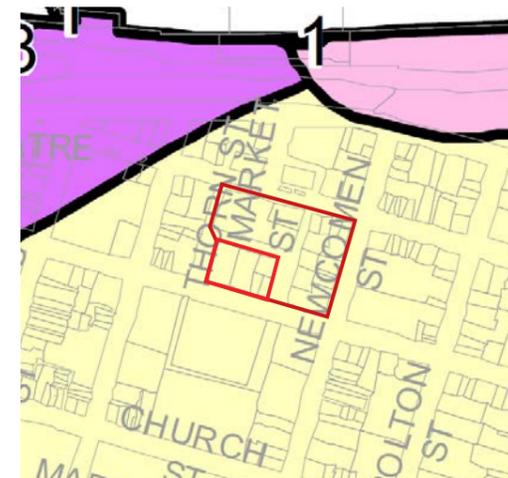
NLEP 2012 - Floor Space Ratio (FSR) Map



NLEP 2012 - Maximum Building Height Map



NLEP 2012 - Heritage Map



NLEP 2012 - Acid Sulfate Soils Map

Land Zoning

The car park and broader Iris Capital sites are zoned as B4 Mixed Use.

Floor Space Ratio

There is an FSR of 4.0:1 applicable to the car park and broader Iris Capital sites.

Maximum Building Height

The car park site has a maximum building height of 24 metres with a range of heights applied to the remainder of the Iris Capital sites between 24 and 42 metres.

The Maximum Building Heights for the lots listed in Concept Approval DA2017_00701 supersede the above where relevant

Heritage

There are no heritage listings within the Mall car park site but the Iris Capital site contains I403. The broader context is located within the Newcastle City Centre Heritage Conservation Area (HCA).

Acid Sulfate Soils

The whole subject site has a Class 5 rating.

- B4** Mixed Use. Objectives of this zone:
 - To provide a mixture of compatible land uses.
 - To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
 - To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.
- R3** Medium Density Residential
- R4** High Density Residential
- RE1** Public Recreation
- SP3** Tourist

- N** 1.0:1
- S** 1.5:1
- V** 3.0:1
- X** 4.0:1

Under the NLEP 2012, Clause 4.5 - Calculation of floor space ratio and site area; (2) Definition of "floor space ratio" The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.

- K** 10 metres
- M** 12 metres
- N** 14 metres
- P2** 18 metres
- Q** 20 metres
- S** 24 metres
- T** 27 metres
- U** 30 metres
- RL2** RL 20 - 40
- RL3** RL 40 - 60

Under the NLEP 2012 Dictionary, **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.

- I...** Item - General
- ///** Conservation Area - General

121 Hunter Street is noted under SLEP as I403 with the Statement of Significance reading as follows 'It contributes to the overall architectural character of the Hunter Street Mall and it is an interesting example of an Edwardian commercial building.'

Physical description:
 Three storey building of red brick construction. The buildings main feature is the circular windows with key stone inserts on the first and second storey which project up to the parapet cornice. Architect - Mr Silk National Trust - The ground floor facade was completely altered in connection with the Kern Market Square Development.

Modifications and dates:
 Remodelled in 1939.'

- 1**
- 2**
- 3**
- 5**

Under the NLEP 2012, Clause 6.1 - Acid Sulfate Soils, development consent is required for carrying out of works:

- On Class 5 land;
- Works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land

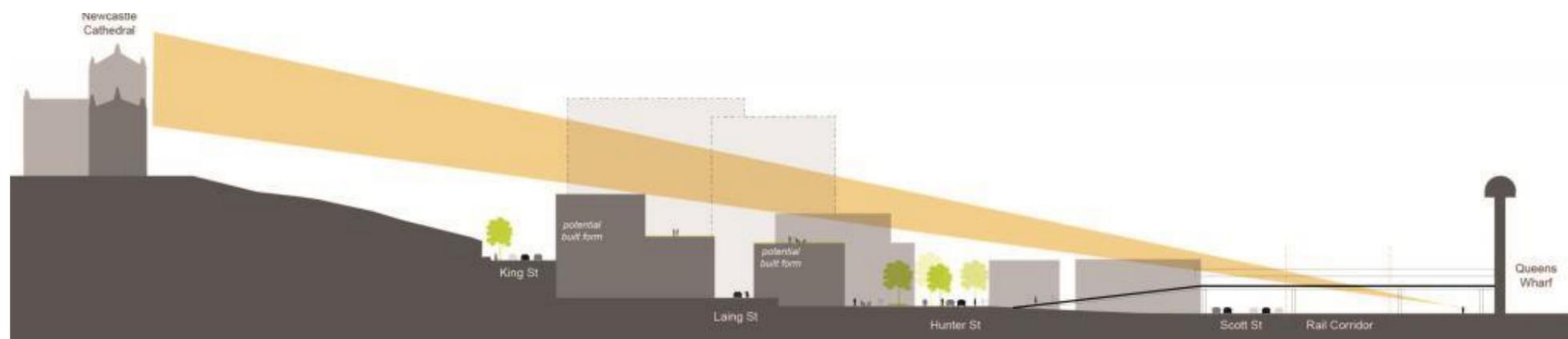
Project Background

2.4 DCP View Corridors

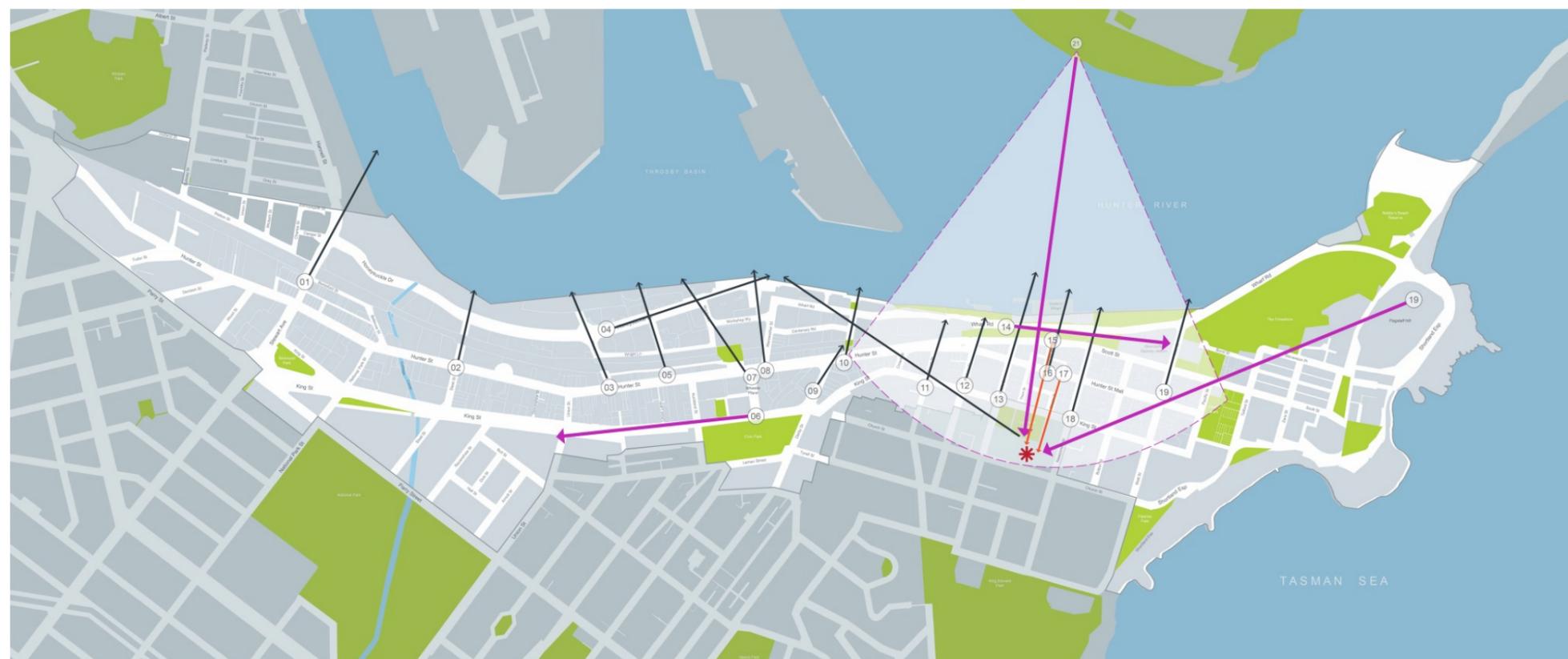
B2 - Views and Vistas

'Preserving significant views around the city is critical to place-making, wayfinding and for retaining the unique character of Newcastle. Significant views include views from public places towards specific landmarks, heritage items or areas of natural beauty. The most important views in Newcastle tend to be along streets leading to the water or landmark buildings, including Christ Church Cathedral and Nobby's Head.'

'With the redevelopment of the former rail corridor lands, key views and vistas are to be established and will create a visual connection and link the city to the foreshore.'



NDCP 2012 - 6.01 Newcastle City Centre - p38



KEY

- ← Vista towards Harbour
- ← Vista terminating in built form / landmark
- * Christ Church Cathedral
- ← View terminating in Cathedral
- - - City skyline with Cathedral

NDCP 2012 - 6.01 Newcastle City Centre - p39

Project Background

2.5 Hunter Street Mall Precinct (NDCP 2012)

'Future Character

This precinct has the potential to develop as boutique pedestrian-scaled main street shopping, leisure, retail and residential destination. Infill development is encouraged that promotes activity on the street and which responds to heritage items and contributory buildings. Views to and from Christ Church Cathedral and the foreshore are retained and enhanced. Foreshore access is improved.

Objectives

1. Strengthen the sense of place and urban character of the east end as a boutique retail, entertainment and residential destination.
2. Diversify the role of Hunter Street Mall precinct as a destination for many activities including retail, dining, entertainment, nightlife and events, additions to regular day-to-day services for local residents.
3. Promote active street frontages.
4. Protect heritage items and contributory buildings.
5. Protect views to and from Christ Church Cathedral.
6. Promote a permeable street network in Hunter Street Mall precinct with well connected easily accessible streets and lanes.
7. To create a space that is safe, comfortable and welcoming for pedestrians.'

KEY

- 18m maximum street wall height
- 16m maximum street wall height (typical)
- Proposed new open space / courtyard
- Important view corridor to Christ Church Cathedral
- Proposed new open pedestrian link (preferred location)
- Proposed new through site link / arcade (preferred location)
- Zone in which proposed new link should occur
- Connection to be retained and improved
- Shared zone to be retained and improved
- Special emphasis on corner building
- Active frontage required
- Heritage building
- Contributory building (desired re-use)



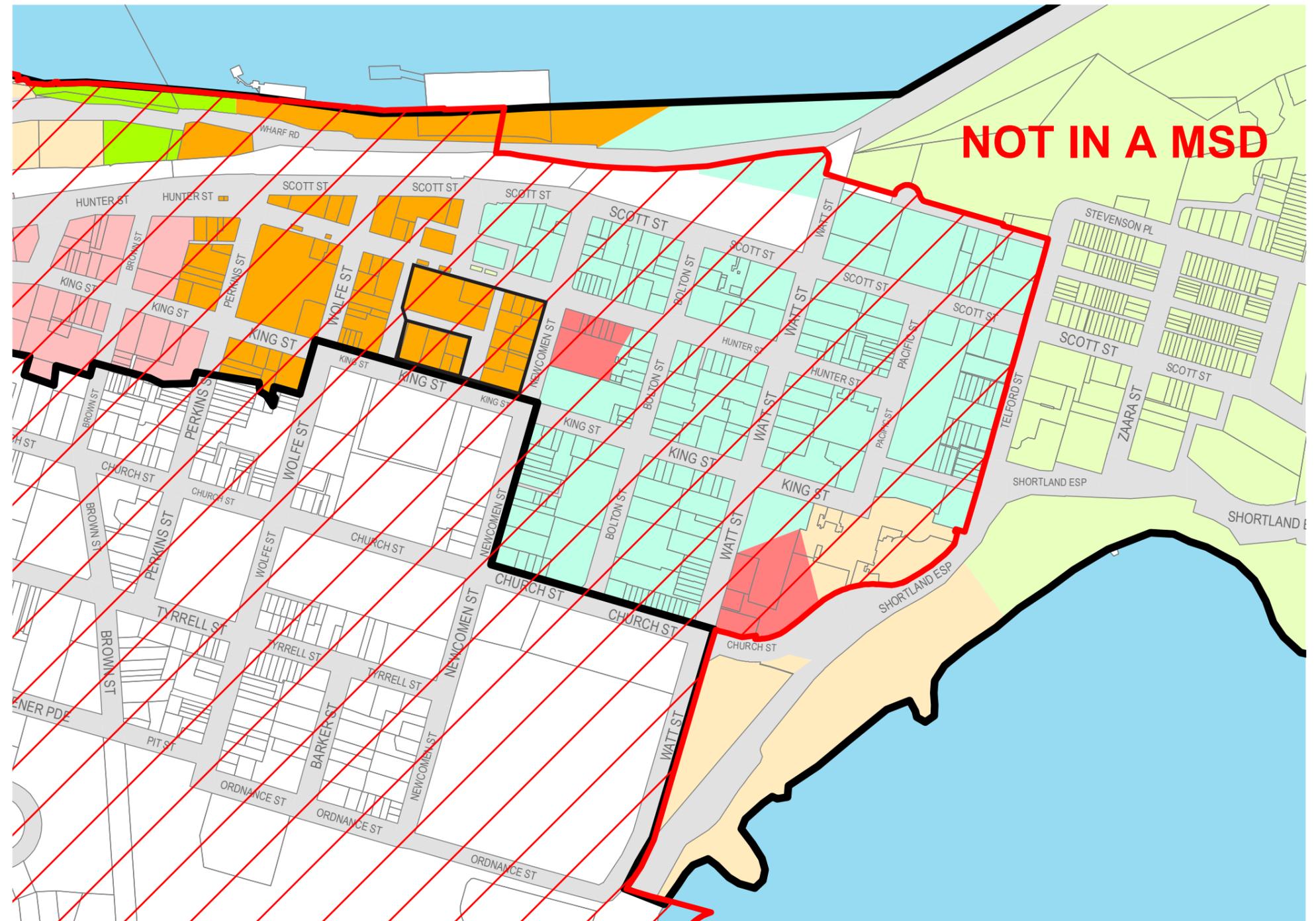
NDCP 2012 - 6.01 Newcastle City Centre - p53

Project Background

2.6 Mine Subsidence Areas

An appraisal of potential mine subsidence issues should be undertaken in due course by a suitably qualified consultant.

This may affect project costing as well as construction methodology.



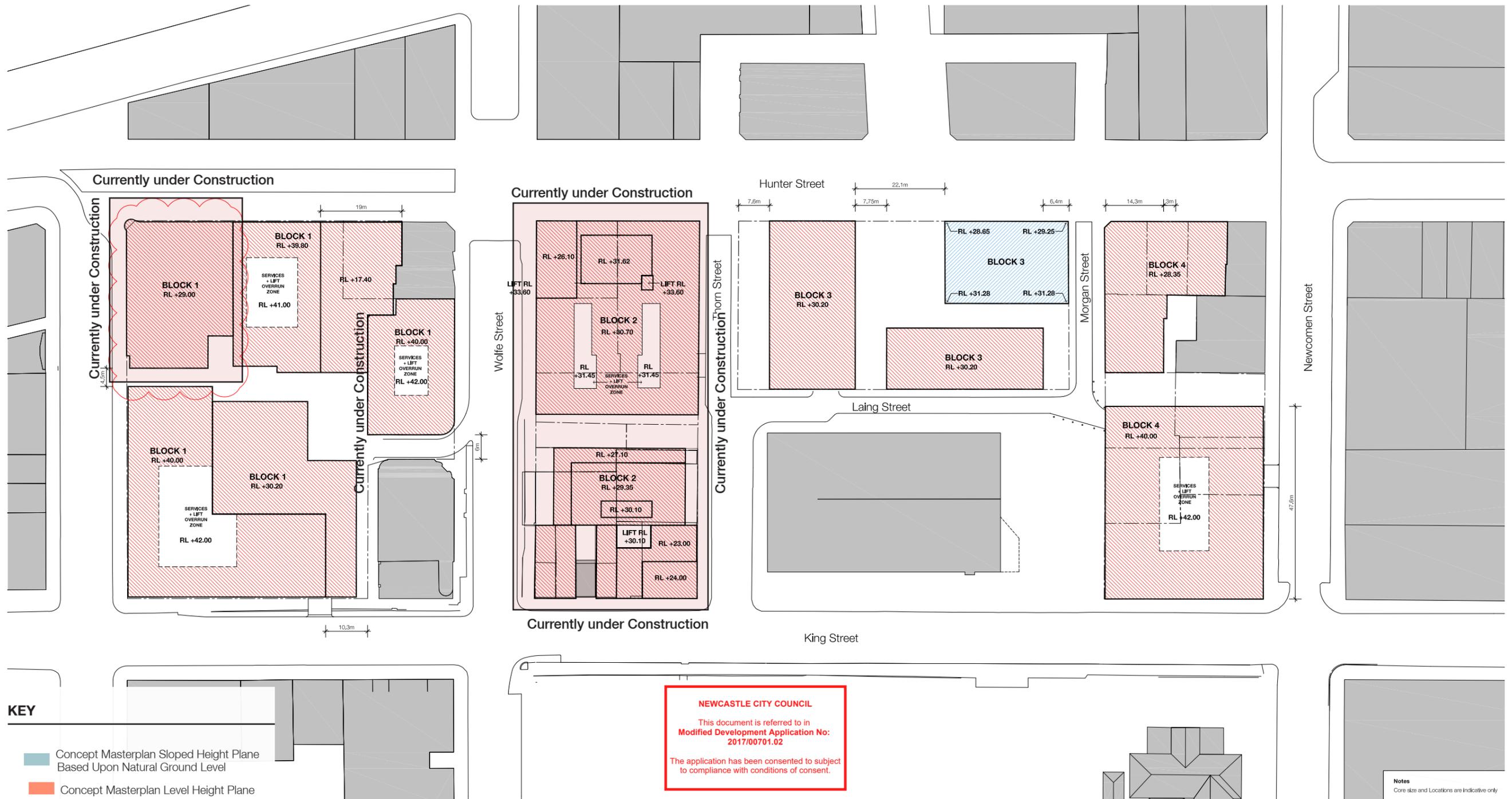
KEY

- No Restrictions
- Limited Restrictions
- Limited Restrictions - A
- Zone A
- Zone B
- Area of smaller dimension and relative uniform pillars. Geotechnical investigations required and high likelihood of coal seam grouting for high-rise and larger footprint structures.
- Zone C
- Zone D
- Grouting Strategy (HDC)
- Newcastle Mine Subsidence District Boundary

NSW Government Subsidence Advisory NSW - Sheet Number SA NSW-NEWC 3

Project Background

2.7 Approved Iris Capital Concept Masterplan Envelopes

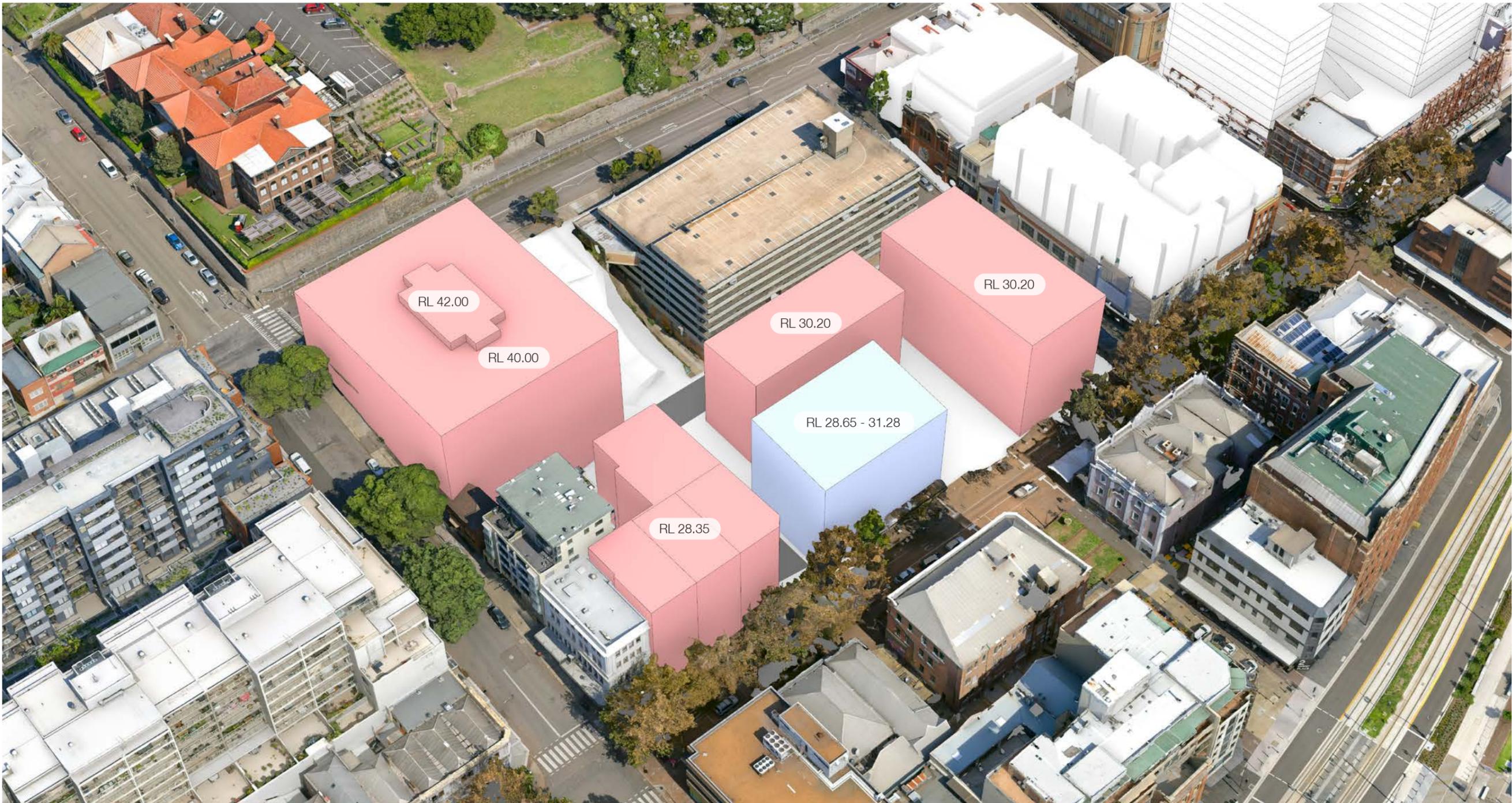


Project Background

KEY

- Concept Masterplan Sloped Height Plane Based Upon Natural Ground Level
- Concept Masterplan Level Height Plane

2.8 Approved Concept Masterplan Envelopes



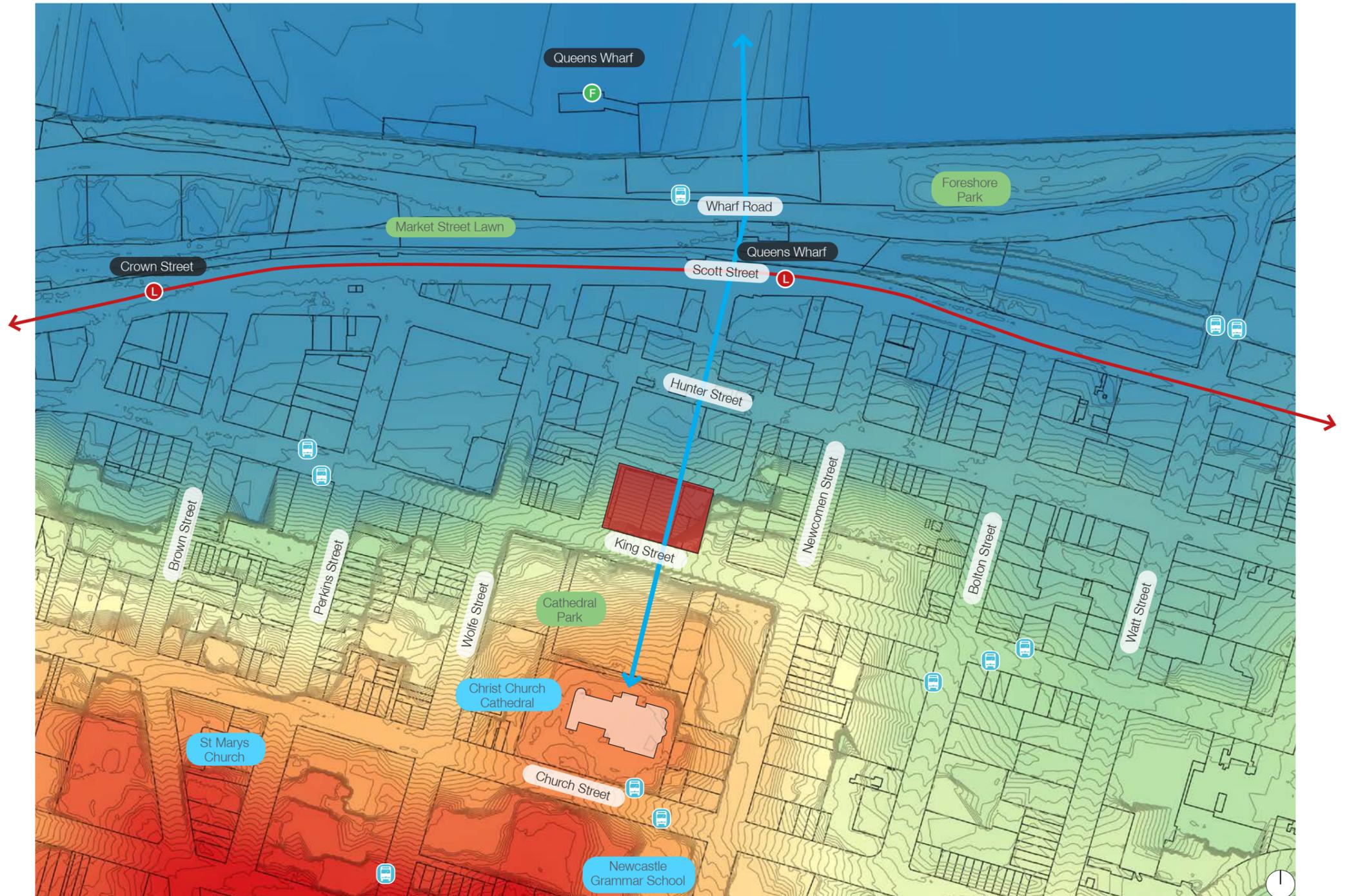
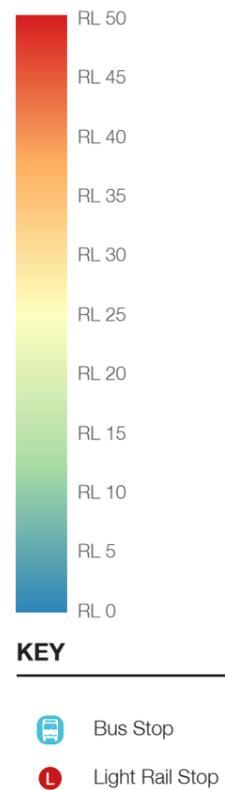
Project Background

2.9 Landform and topography

There is significant topographic change across the local context with approximately 50m of variation between the waterfront and the area to the south west of the Cathedral.

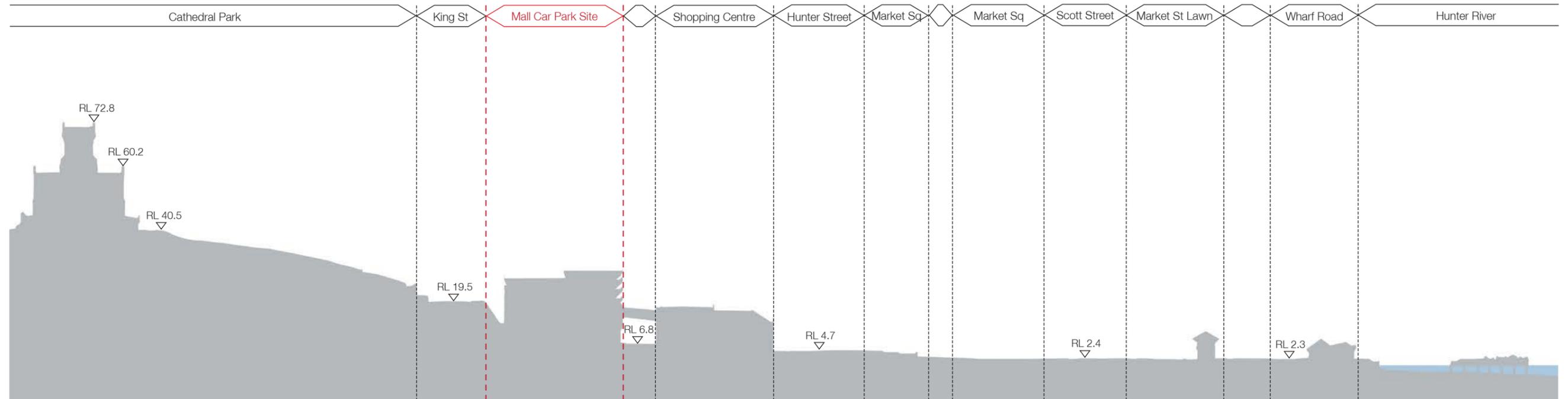
Christ Church Cathedral is approximately 40.5m above sea level.

More detailed surveys of the various sites and surrounding context(s) will be required in due course.



Project Background

2.10 Cathedral to Waterfront Section

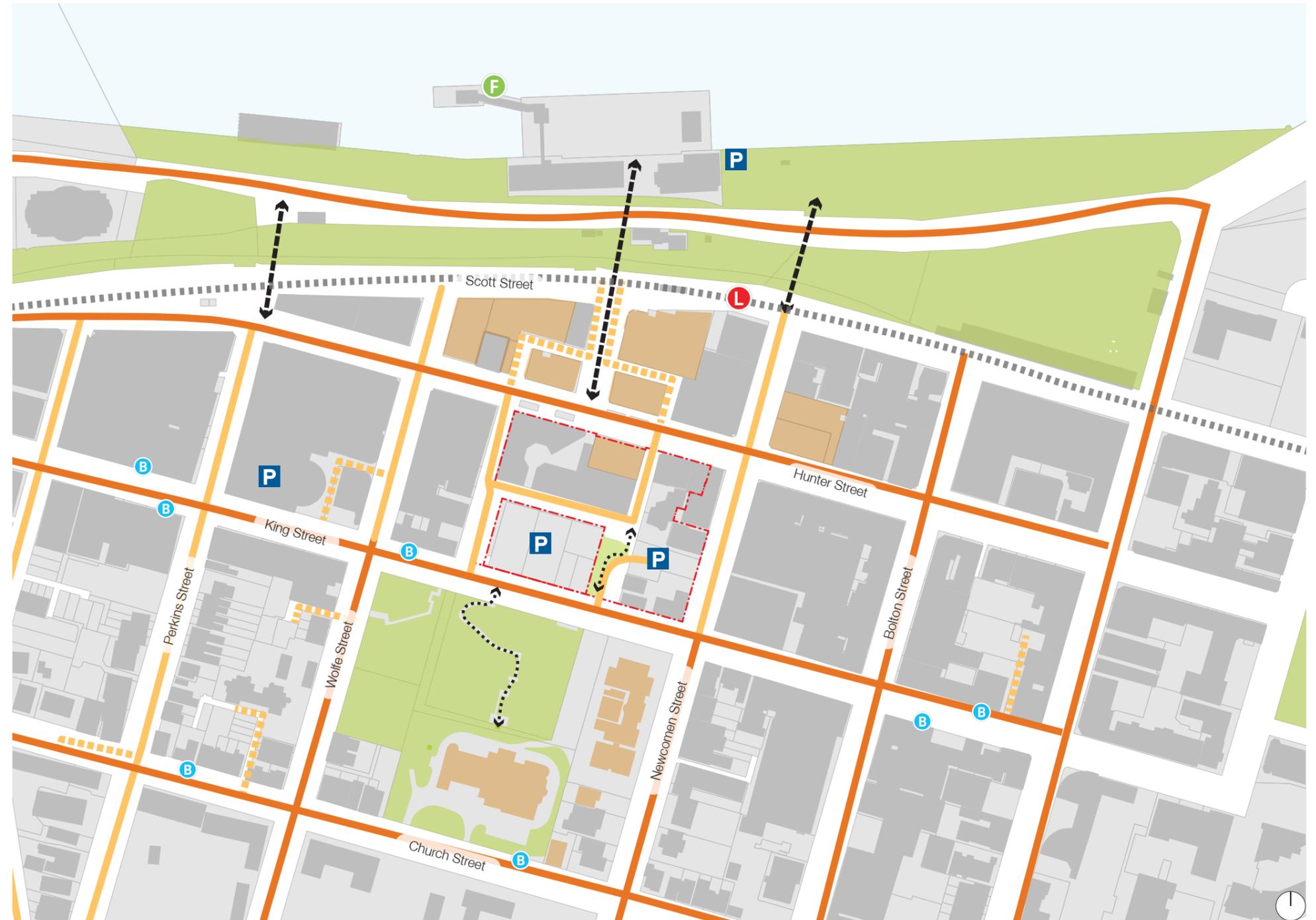


Project Background

2.11 Movement and access

The site is located within a strong existing movement network that features a number of primary and secondary roads, laneways, public transport services and pedestrian connections. While these movement corridors vary in scale, activity and quality, they provide a valuable contribution to the character of the city.

The north-south streets (Wolfe, Perkins, Newcomen), as well as pedestrian connections from the Cathedral and Queens Wharf, all intersect with the primary east-west routes (Scott, Hunter, King, rail corridor). A network of small laneways and service roads provide an important connection between Scott, Hunter and King Streets, and the retail properties surrounding the site. A number of north-south links also allow pedestrians to access the foreshore and cross the light rail corridor.



KEY

- Site boundary
- Primary road
- Secondary road
- Laneway
- Pedestrian link
- P Public parking facility

Project Background

2.12 Context Photographs



Site photo plan



01 - Waterfront looking north towards Griffith Park



02 - Signal Box Newcastle (refurbished)



03 - Market Street Lawn



04 - Existing Market Square



05 - Existing tree nature of Hunter Street



06 - Existing trees and steep footpaths of Newcomen Street



07 - Existing terrace buildings in the foreground



08 - Significant level change across Cathedral Park



09 - Numerous graves / gravestones in western portion of Cathedral Park

Project Background

2.13 Site Photographs



Site photo plan



01 - Mall car park viewed from Cathedral Park



02 - Mall car park (intersection of Morgan and King Street)



03 - Overgrown landscaping surrounding mall car park



04 - Laing Street



05 - Retaining wall adjacent to mall car park, start of existing stairway



06 - Residences along Morgan Street



07 - Vehicles along Hunter Street



08 - View towards Christ Church Cathedral from Market Square

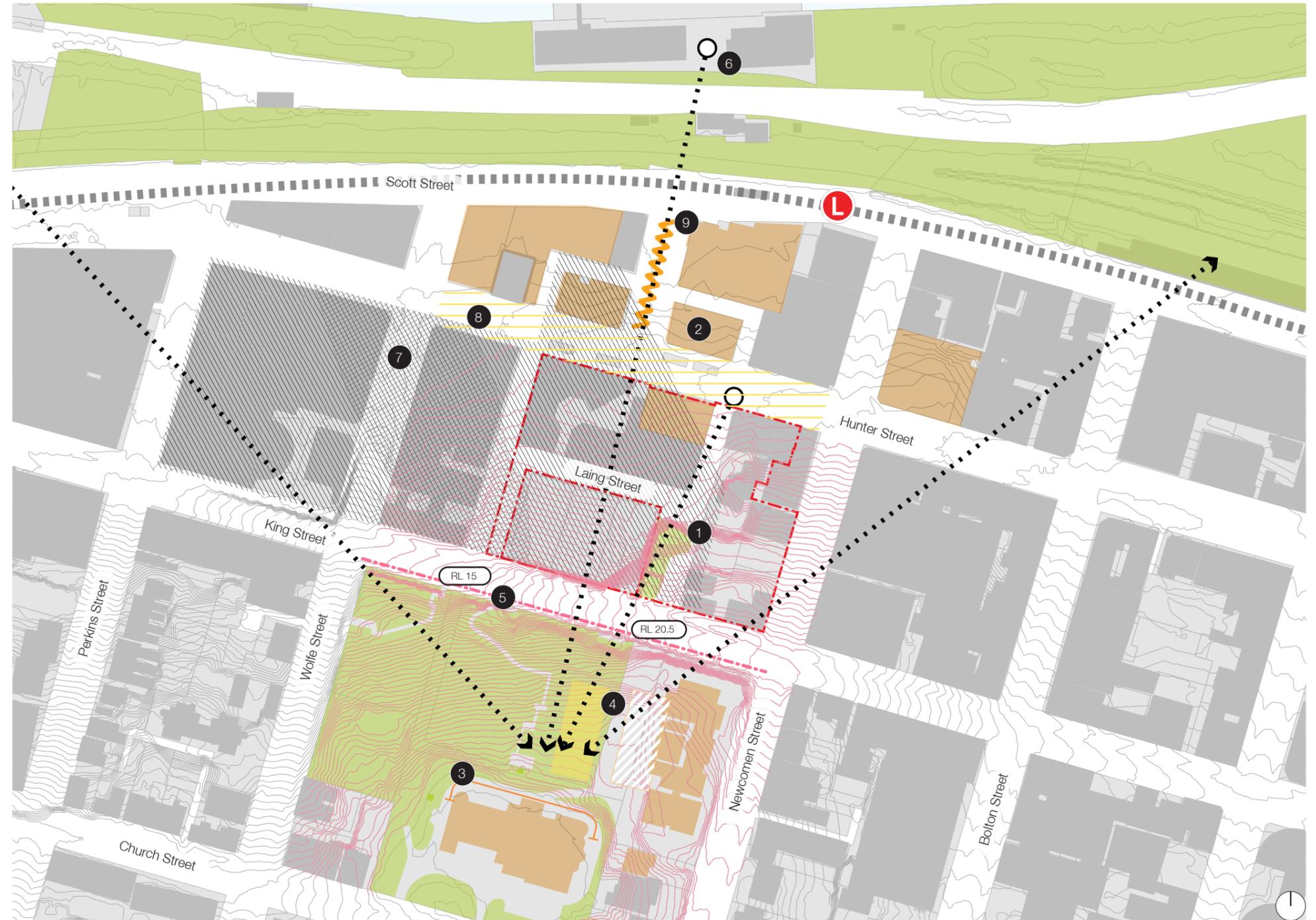


09 - View looking towards the waterfront on Morgan Street

Project Background

2.14 Site challenges

1. The site presents significant topographical challenges, with steep slopes to the west and down from the cathedral
2. The surrounding context contains a number of heritage buildings that should be maintained and preserved, and will dictate the alignment of the corridor
3. Publicly inaccessible frontage of the cathedral to the park
4. Extensive area of gravestones / burials in eastern portion of Cathedral Park
5. King Street is difficult to traverse, with heritage retaining walls creating barriers to pedestrian circulation on a north-south axis, and preventing level access from the carpark
6. Views and vistas required to be maintained
7. Risk of mine subsidence through the middle of the site where the network of tunnels are more dense and closer to the surface
8. Shared zone along Hunter Street- coordination of stairway should be aligned with the Hunter Street Mall Masterplan
9. Market Street (north-south connection between Scott and Hunter Street) is currently used for parking and the servicing of adjoining buildings



KEY

- Site boundary
- Heritage item
- Heritage/retaining wall
- Contour
- View/vista
- Shared zone
- Sensitive interface

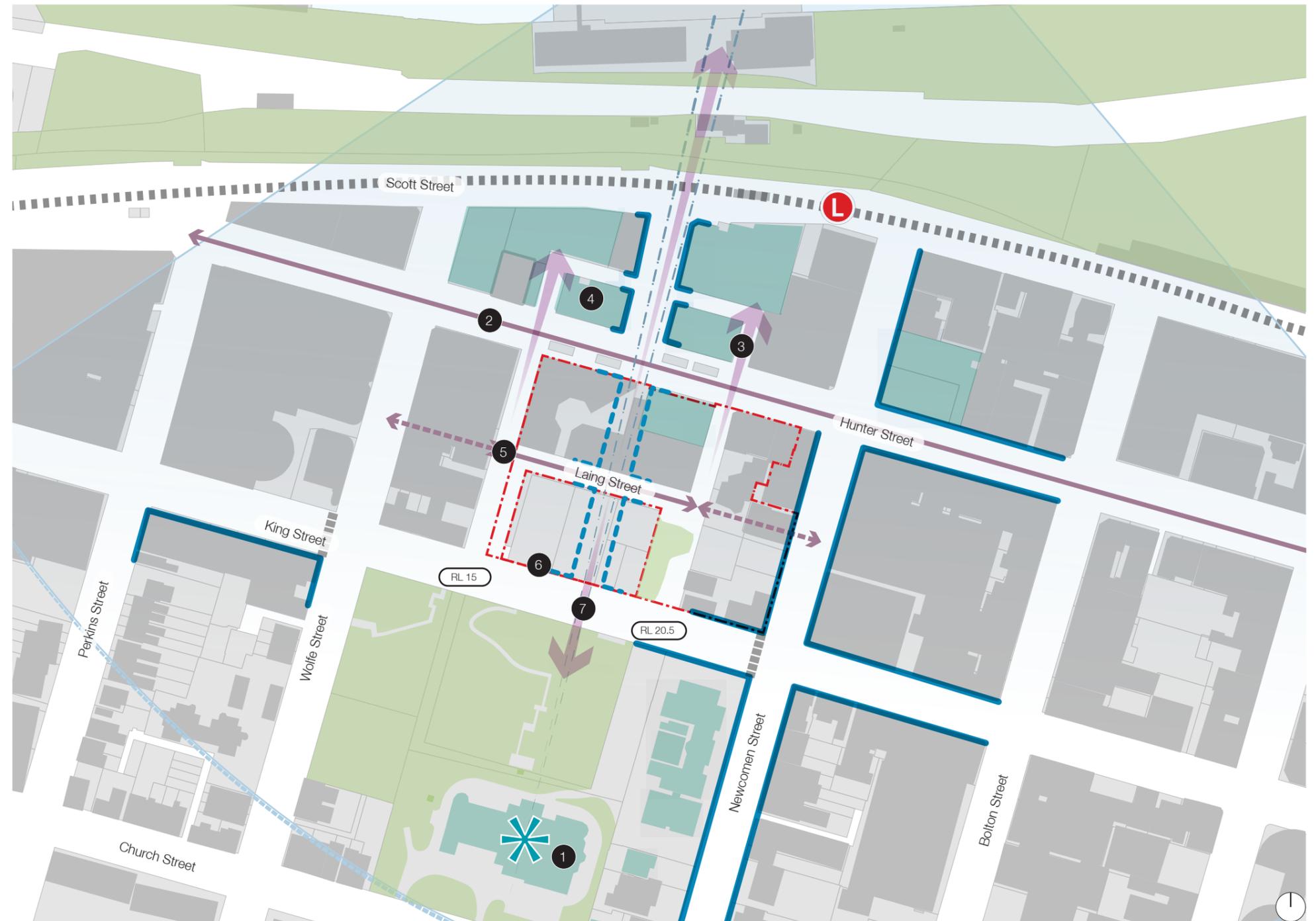
Project Background

2.15 Site opportunities

1. Celebrate and preserve views to the cathedral and park, situated at a topographical high point
2. Improve the appearance and function of Hunter Street Mall and its associated shared zones
3. Create improved links to the waterfront and transport amenity on a north-south axis
4. Utilise existing cluster of heritage buildings to create a distinct character area
5. Reinforce and create new pedestrian links through the site that are connected to the existing network
6. Opportunity to expand surrounding mixed-use frontages to create zones for continuous activation
7. Bridge over Laing Street providing a viewing platform over the staircase
8. Views of the city skyline and cathedral from across the Hunter River

KEY

-  Site boundary
-  Heritage item
-  Potential north-south link
-  Pedestrian connection
-  Proposed pedestrian connection
-  Active frontage
-  Potential active frontage
-  Views



Built Form Parameters

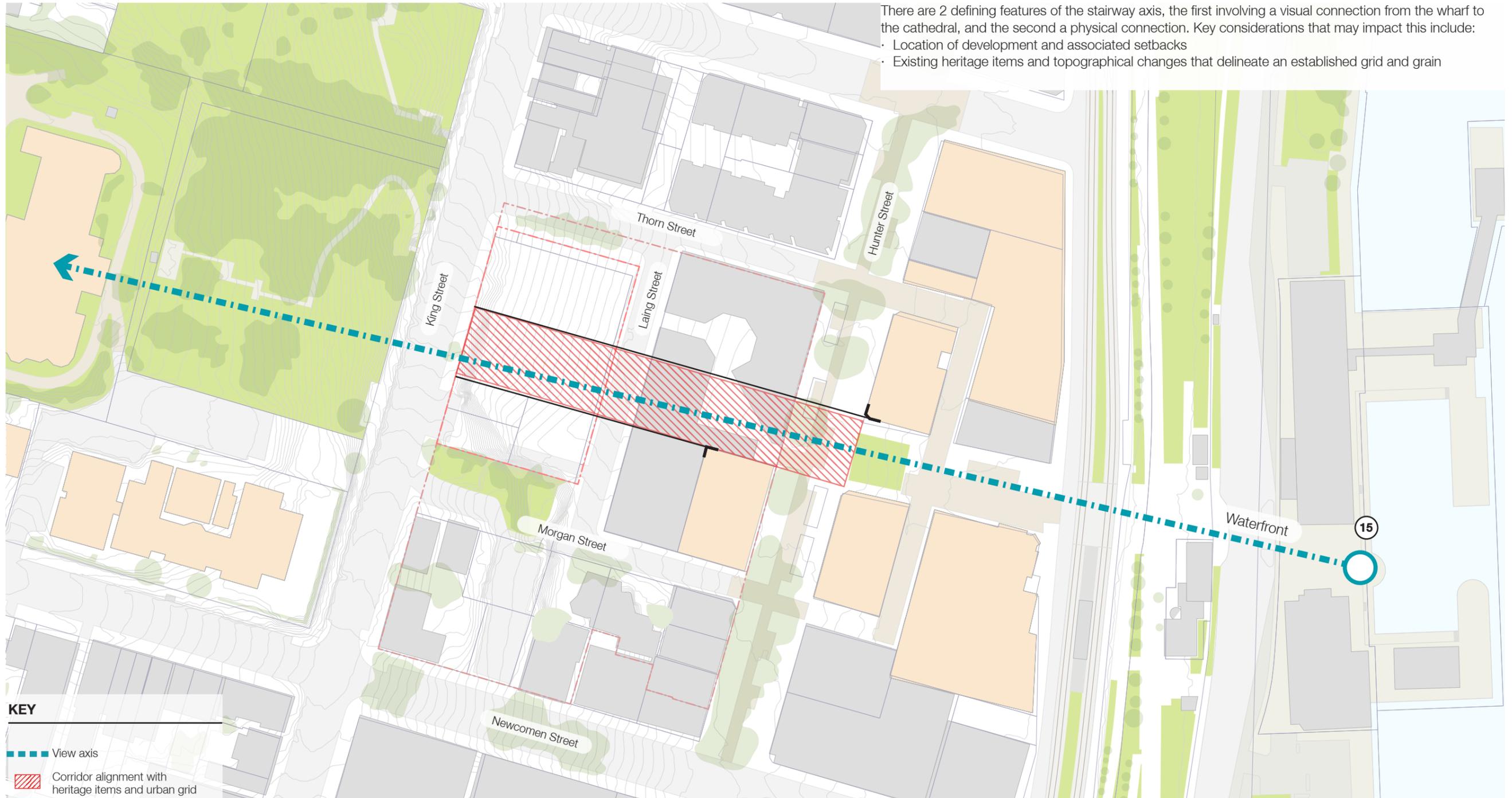
3

Built Form Parameters

3.1 Defining View Corridors - Established Axes

There are 2 defining features of the stairway axis, the first involving a visual connection from the wharf to the cathedral, and the second a physical connection. Key considerations that may impact this include:

- Location of development and associated setbacks
- Existing heritage items and topographical changes that delineate an established grid and grain



KEY

- View axis
- Corridor alignment with heritage items and urban grid

1:1,250 @ A3

Built Form Parameters

3.2 DCP View Corridors



DCP View Corridor 15 (Scott Street / Wharf Road looking south-west)



DCP View Corridor 15

The concept masterplan envelopes significantly protrude into the DCP view corridor and as a result block a large proportion of the view towards the Cathedral. This condition will only worsen as one moves closer.

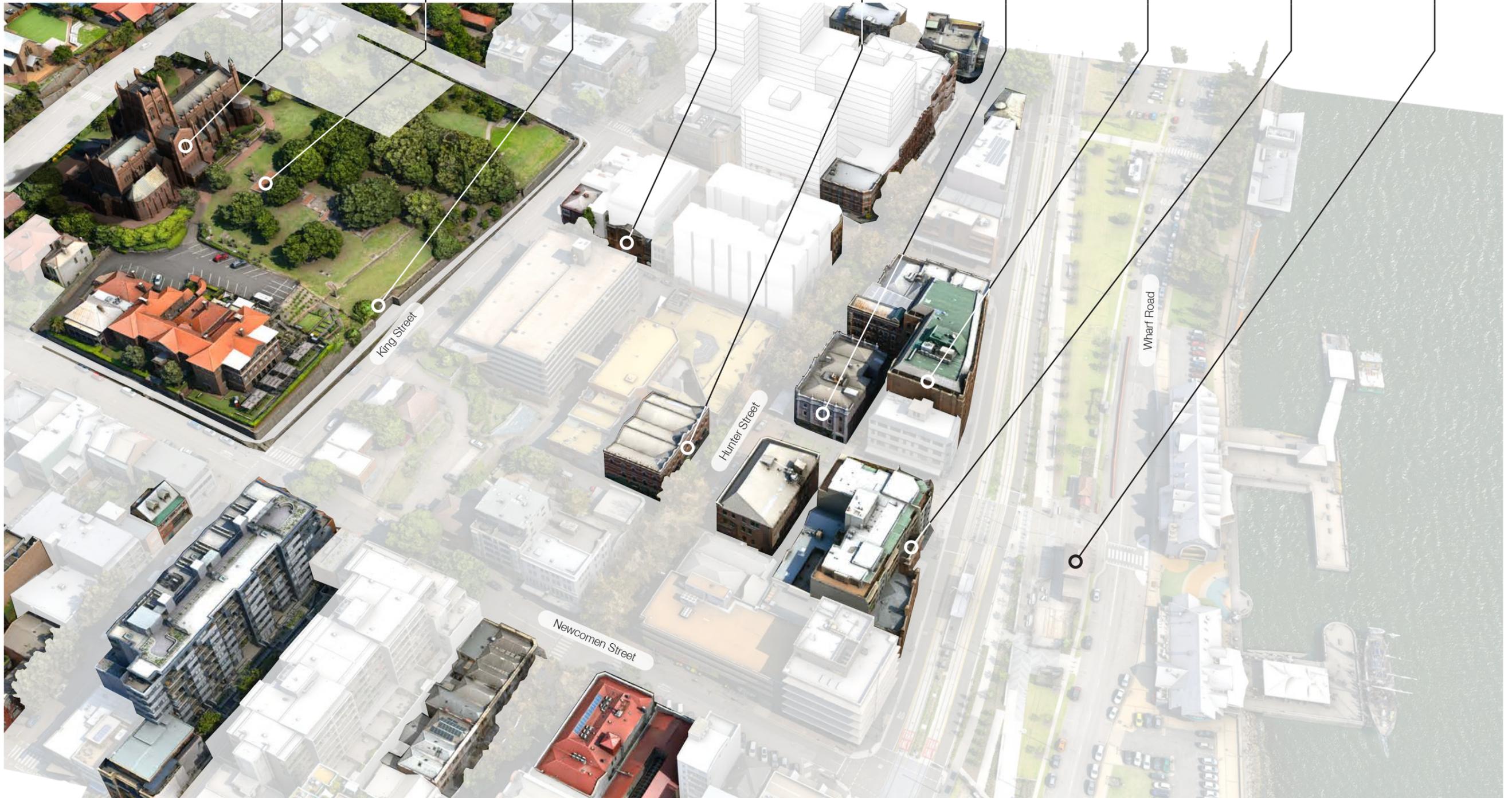


Built Form Parameters



3.3 NLEP 2012 Heritage Assets

(Unlisted)



Built Form Parameters

3.4 Site and context conditions



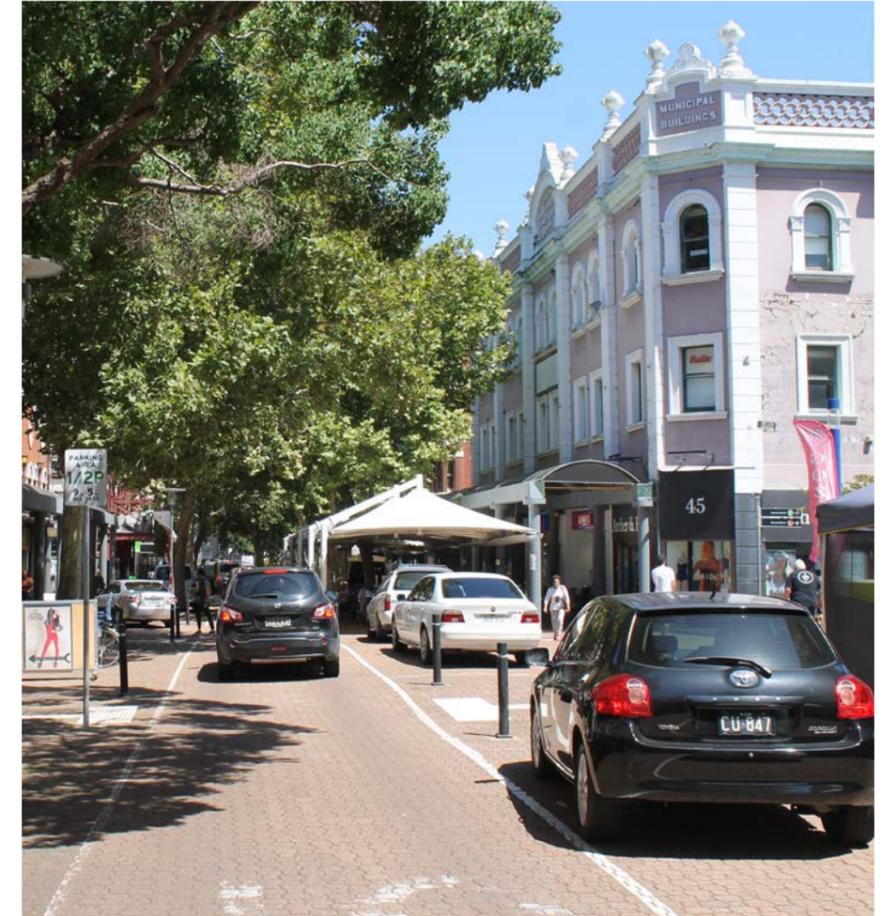
View from waterfront

- Demolition of Mall Car Park to benefit vista to Cathedral significantly
- Existing (deciduous) vegetation has some impact on the current view corridor
- Buildings in foreground (i.e. furthest away from Cathedral) have a large impact on line of sight



Revitalisation of Market Square

- The current Market Square is vehicle dominated with a limited number of car parking spaces, numerous bollards, several level changes, minimal active frontage and limited opportunities for people to gather.
- Soft landscaping is limited to the upper section of the square and is somewhat limited



Hunter Street character

- Hunter Street is cluttered, has limited visual permeability in a transverse or longitudinal direction and challenges balancing pedestrian and vehicle uses in the shared zone

Built Form Parameters



Laing Street alignment

- There is a large amount of level change across Laing Street and potential for it to be re-aligned with the new laneways of Stages 1 and 2 of the Iris East End development (seen in the distance)



Establish a fully accessible route

- What is the aspiration with regards to a fully accessible route given the surrounding Morgan / Thorn Streets have steps or steep slopes?
- Clearly delineate a termination point for the accessible route e.g. at King Street or the Cathedral



Traversing King Street

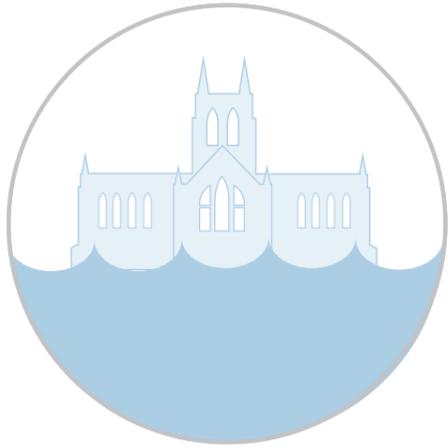
- King Street is a challenge to traverse- road ownership to be confirmed.
- Basement / subterranean / tunnel connection - public safety, accessibility, hours of operation and cost to be considered
- Existing street level connection- minimal works required but must deal with significant heritage / retaining walls / level change
- Bridged connection- must remain functionality for trucks / buses and consider economic cost and visual impact but likely to be the easiest way to deal with level change

Project Vision

4

Project Vision

4.1 Key Project Drivers



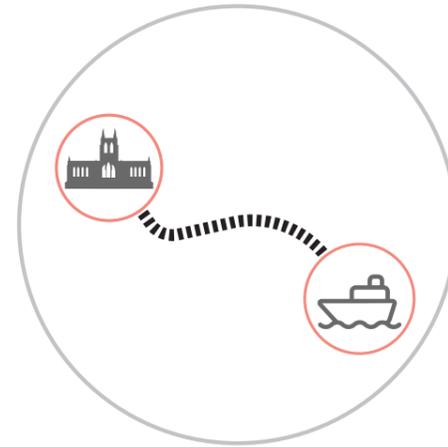
Connect the Cathedral to the Waterfront



Create an outcome that is iconic and unique for Newcastle



Provide opportunities for the highest and best uses of the site(s) as well as future flexibility



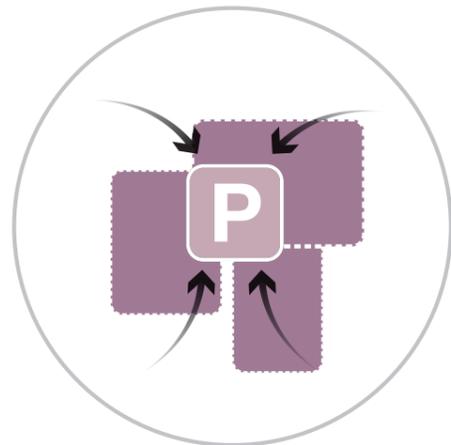
Provide a fully accessible route from the Waterfront to the Cathedral



Protect existing view corridors whilst exploring opportunities to realise density



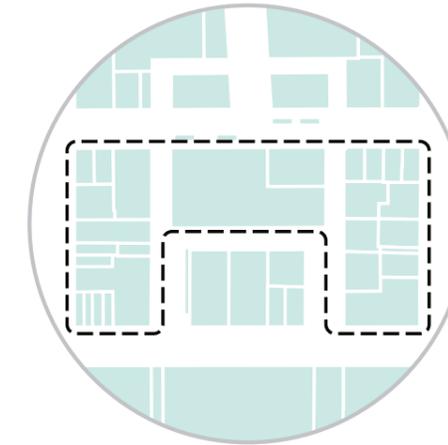
Focus street level uses, spaces and activation along a central thoroughfare



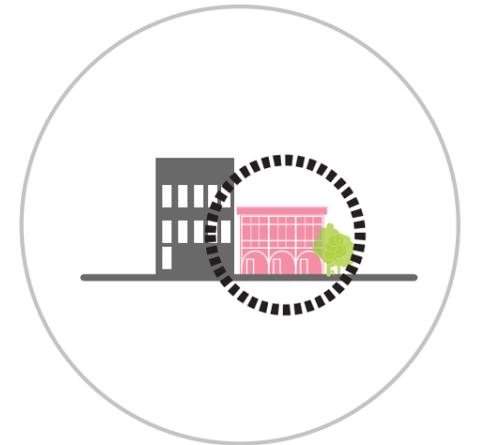
Consolidate car parking into a centralised and convenient location



Reduce potential conflicts between service vehicle, private vehicle and pedestrian movements



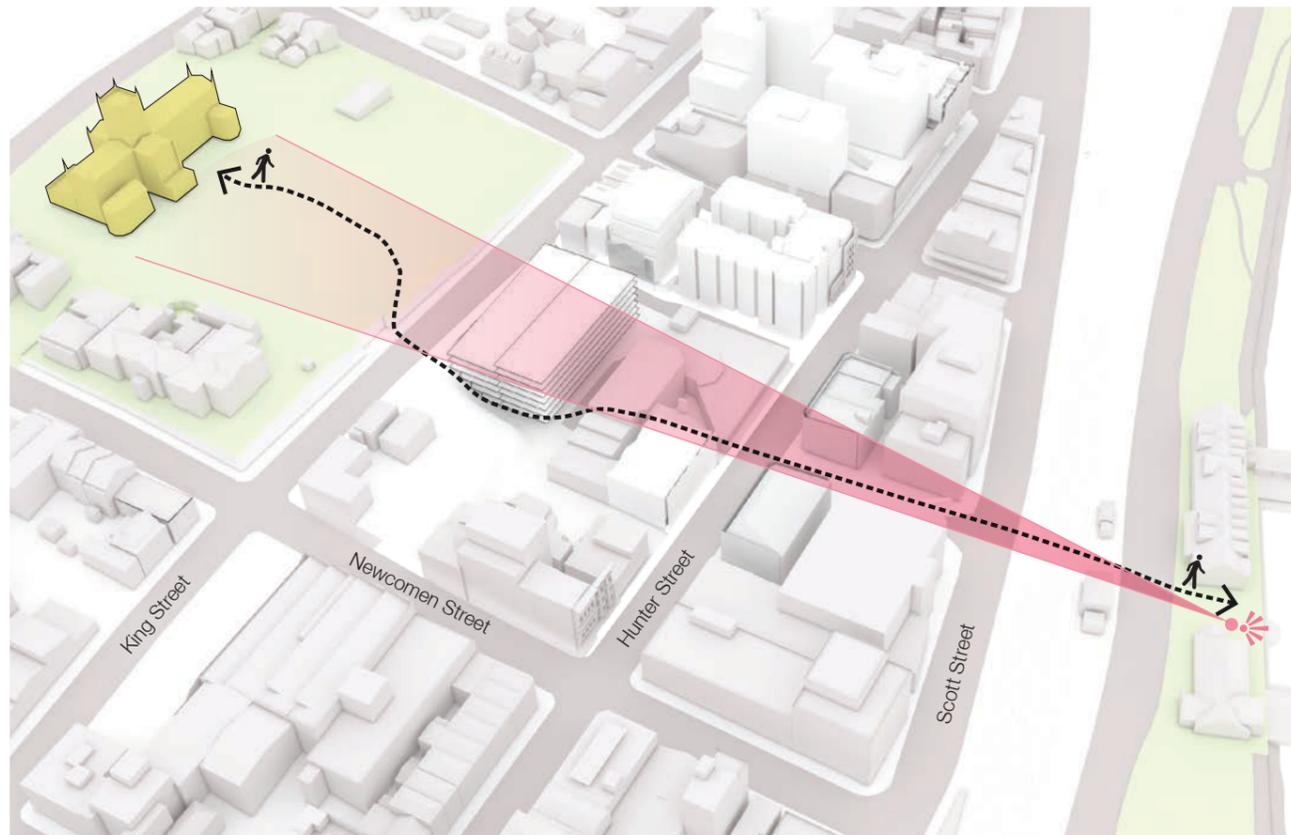
Enhance the Iris Capital proposals to ensure the best outcome for all



Retain, celebrate and embellish the surrounding heritage properties

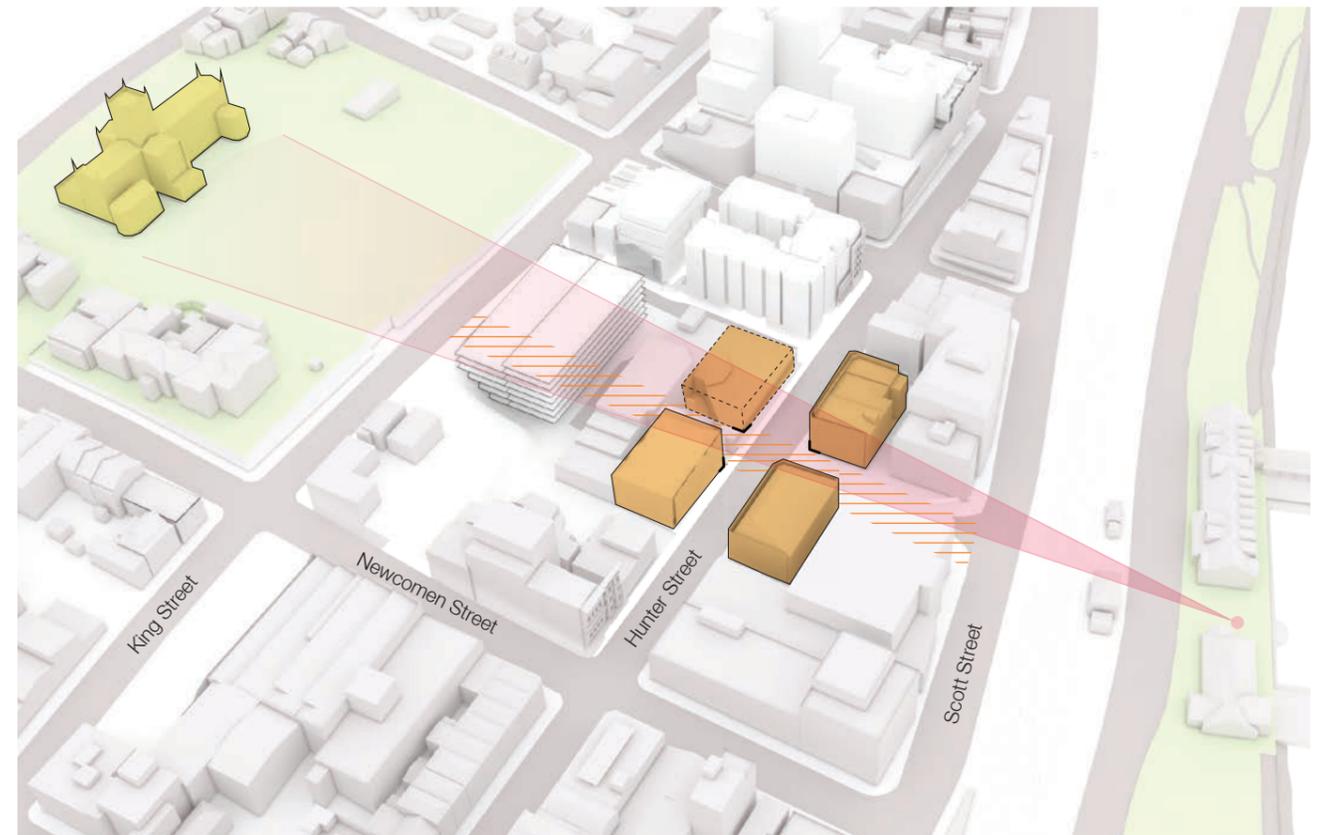
Project Vision

4.2 Concepts



Create a connection to the water

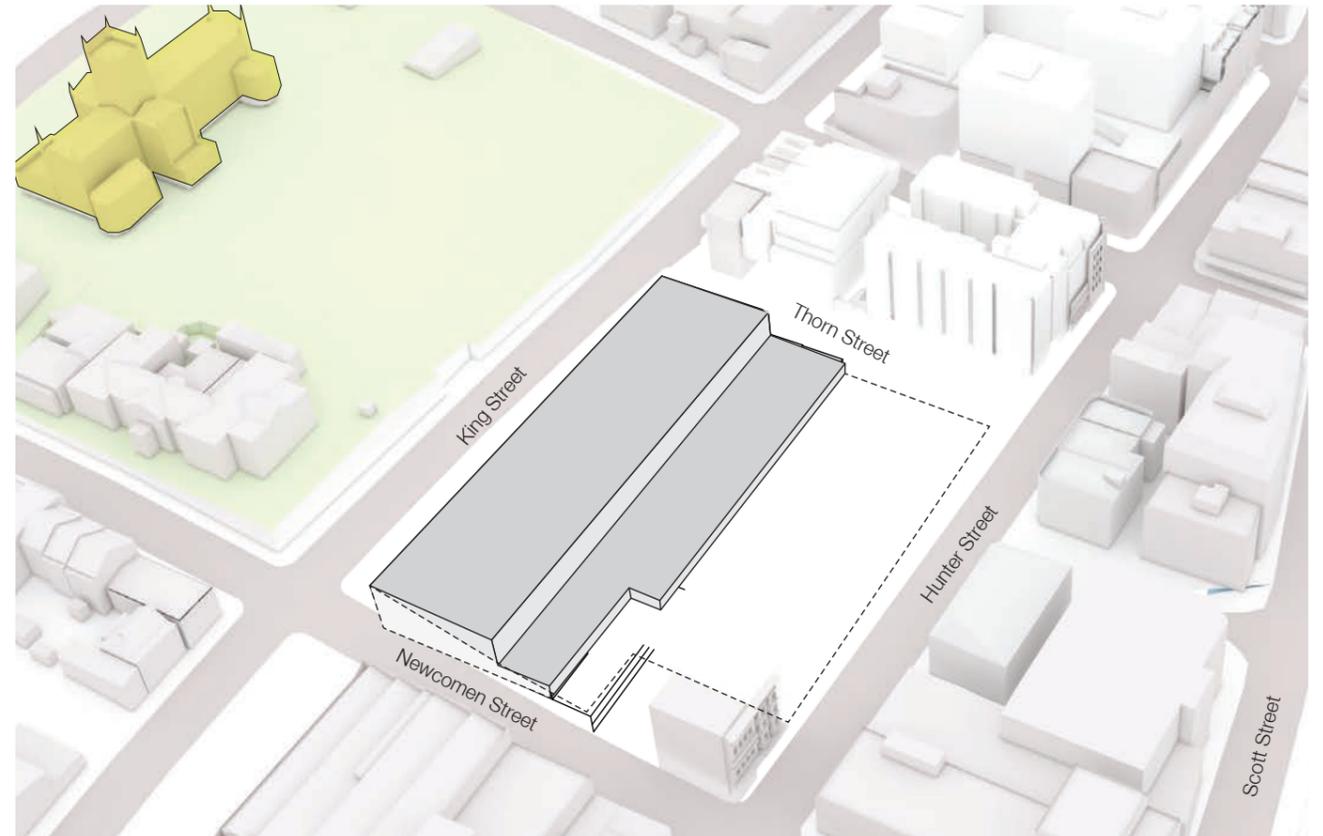
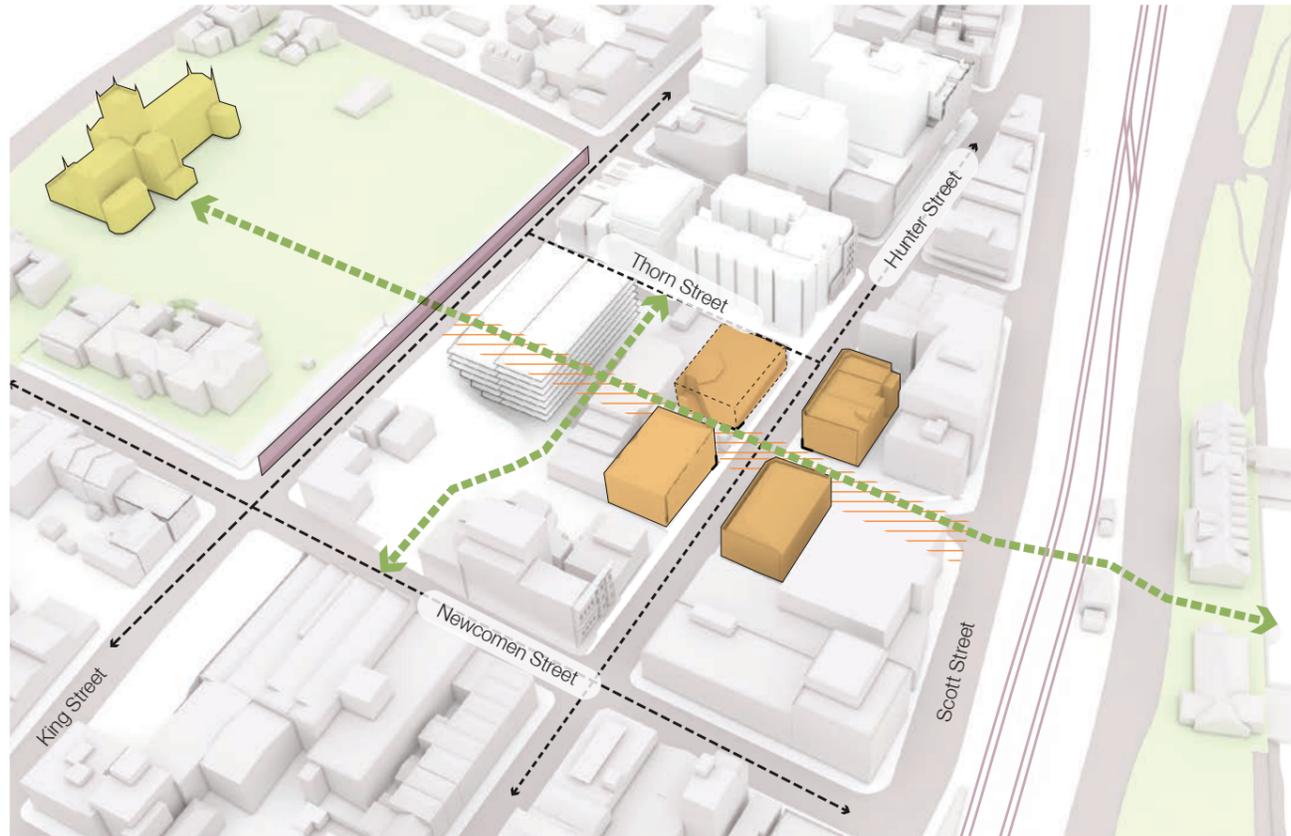
- Christ Church Cathedral, Hunter Street Mall and Queens Wharf function as key destinations and attractors within the East End Precinct, however are not directly connected or accessible
- Reinforce the existing view corridor and line of sight from the waterfront to the cathedral with a direct north-south pedestrian connection



Maintain the view axis

- Maintain the view axis established by the existing and former heritage buildings in the immediate context
- Carve out a zone through which a corridor connection is able to occur utilising the existing alignment, ensuring that views from the waterfront are not infringed upon

Project Vision



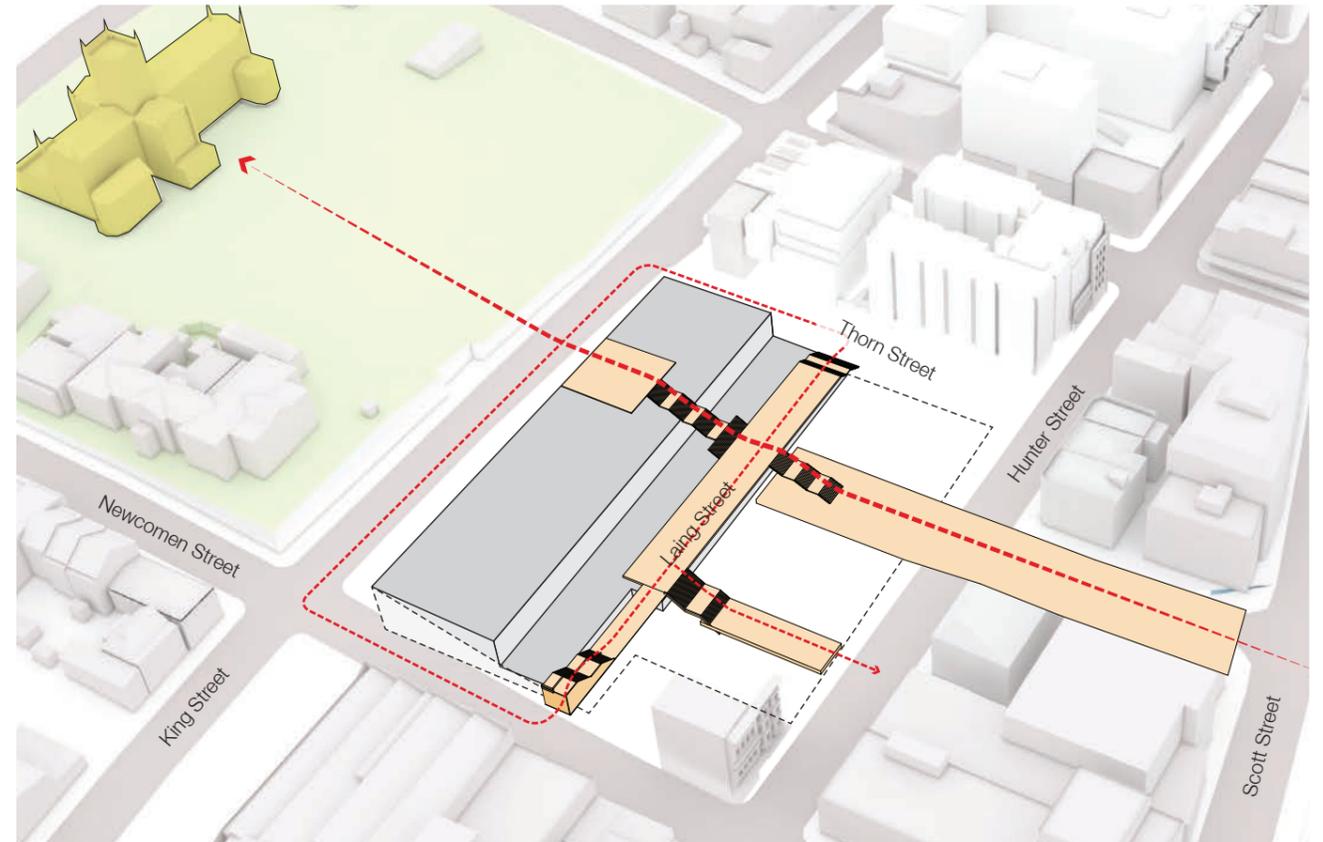
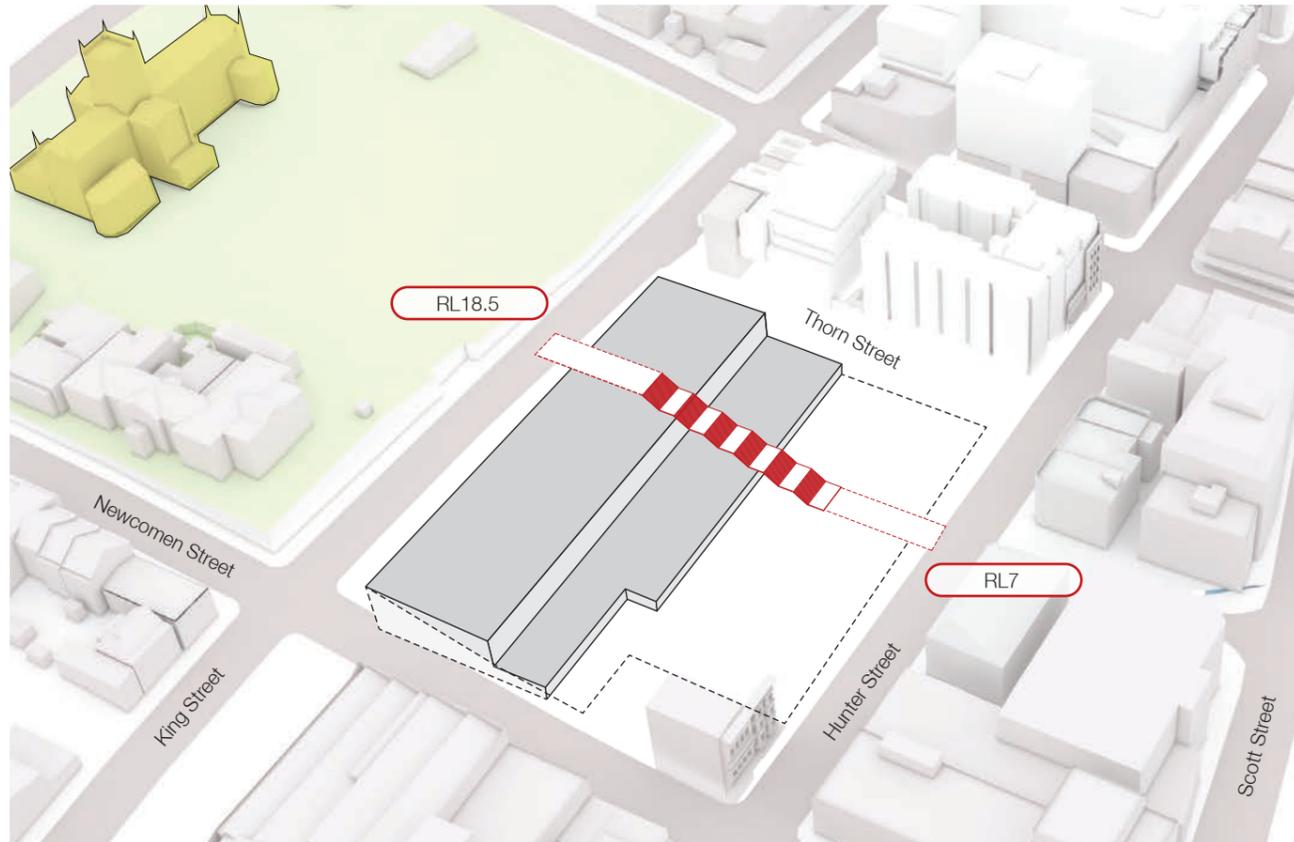
Enhance the existing street grid

- Clear east-west axes of movement exist along King Street, Hunter Street and Scott Street, with minimal north-south connections that can be found only on Newcomen Street and Thorn Street
- Establish new links that create a greater degree of permeability and improve access for pedestrians
- Traverse intersections and barriers including the heritage wall along King Street, and the light rail corridor

Reprovision of car parking

- Reprovide carparking on the site
- Minimise basement carparking by utilising the existing topographical changes, limiting parking to the northern portion of the site

Project Vision



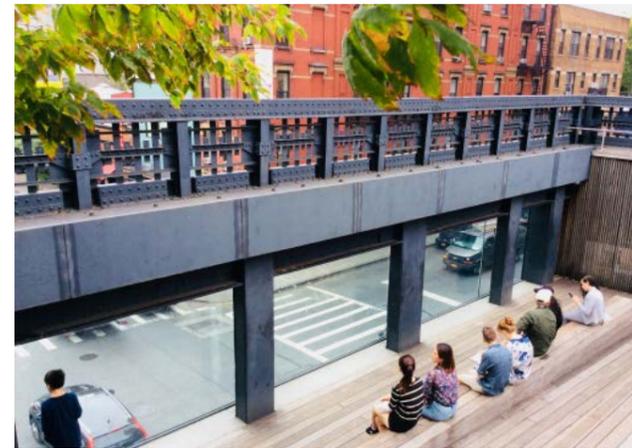
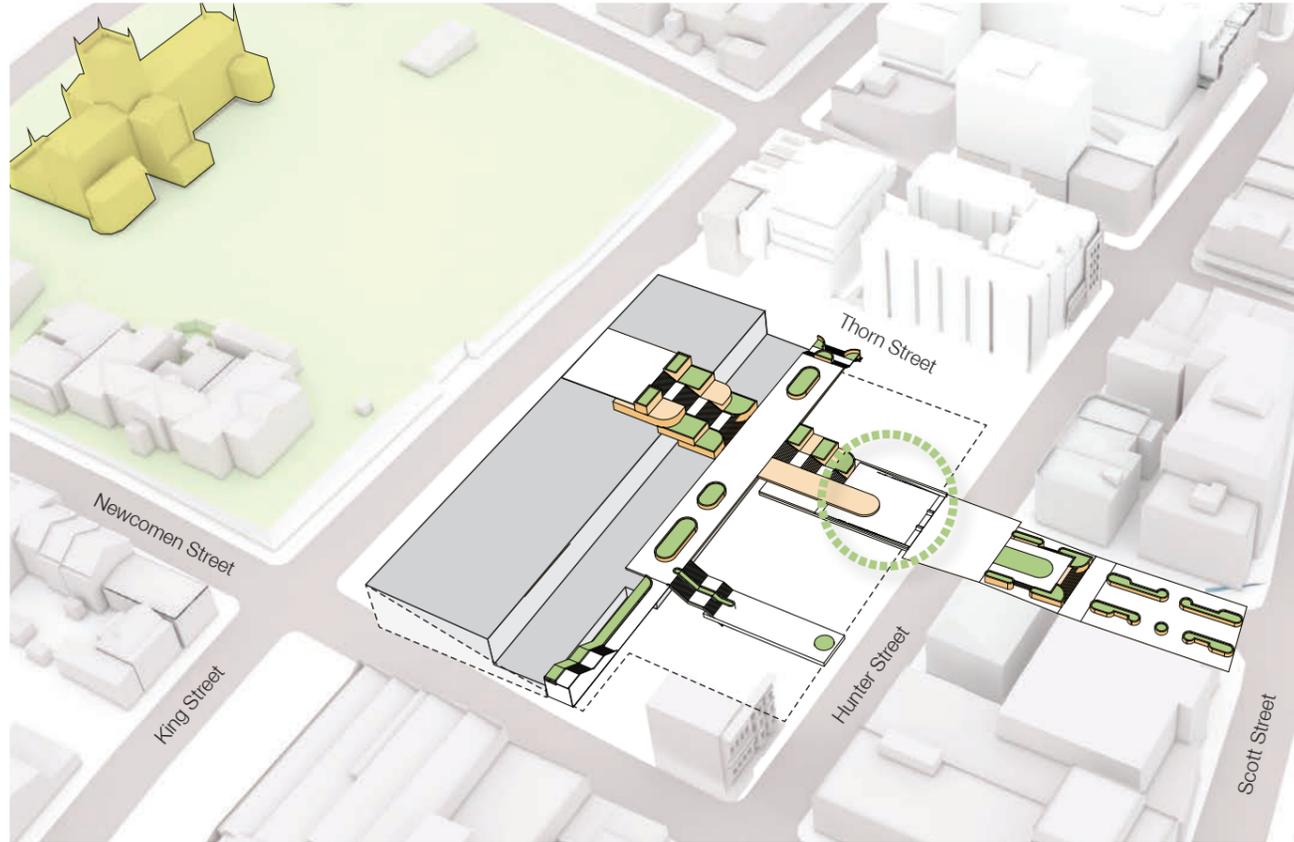
Traverse topographical changes

- The topography surrounding the site is steep and challenging, with a significant change from King Street to Hunter Street
- A north-south connection would require the introduction of a stairway in order to traverse the level changes

Reimagine Laing Street

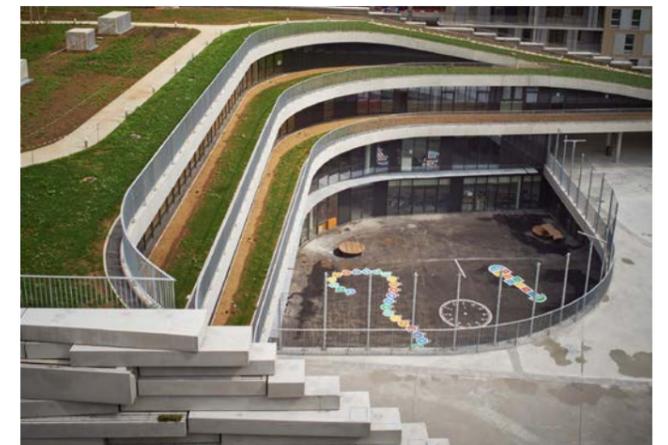
- Create a new raised pedestrian connection along Laing Street that is integrated with the stairway
- Extend the stairway to the north and south to create a further connection across King Street to the cathedral, and across Hunter Street to the waterfront

Project Vision

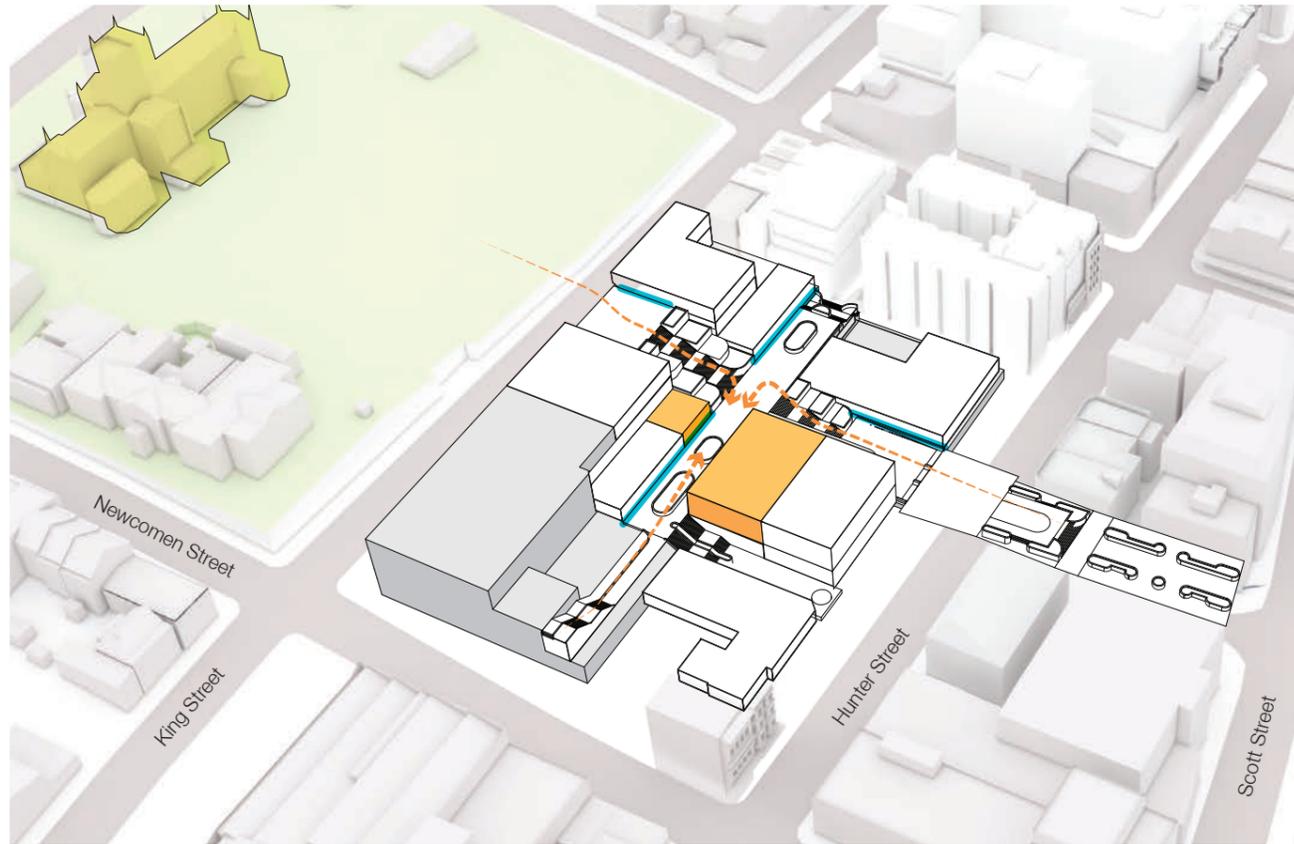


Encourage to dwell

- Embellish the stairway with a series of plaza spaces, providing places to gather and meet, as well as encouraging a sense of reverence through wide, landscaped terraces that allow people to stop, linger and observe
- Celebrate Market Square as a key meeting point that is directly connected to the shared zone along Hunter Street and the surrounding retail precinct



Project Vision

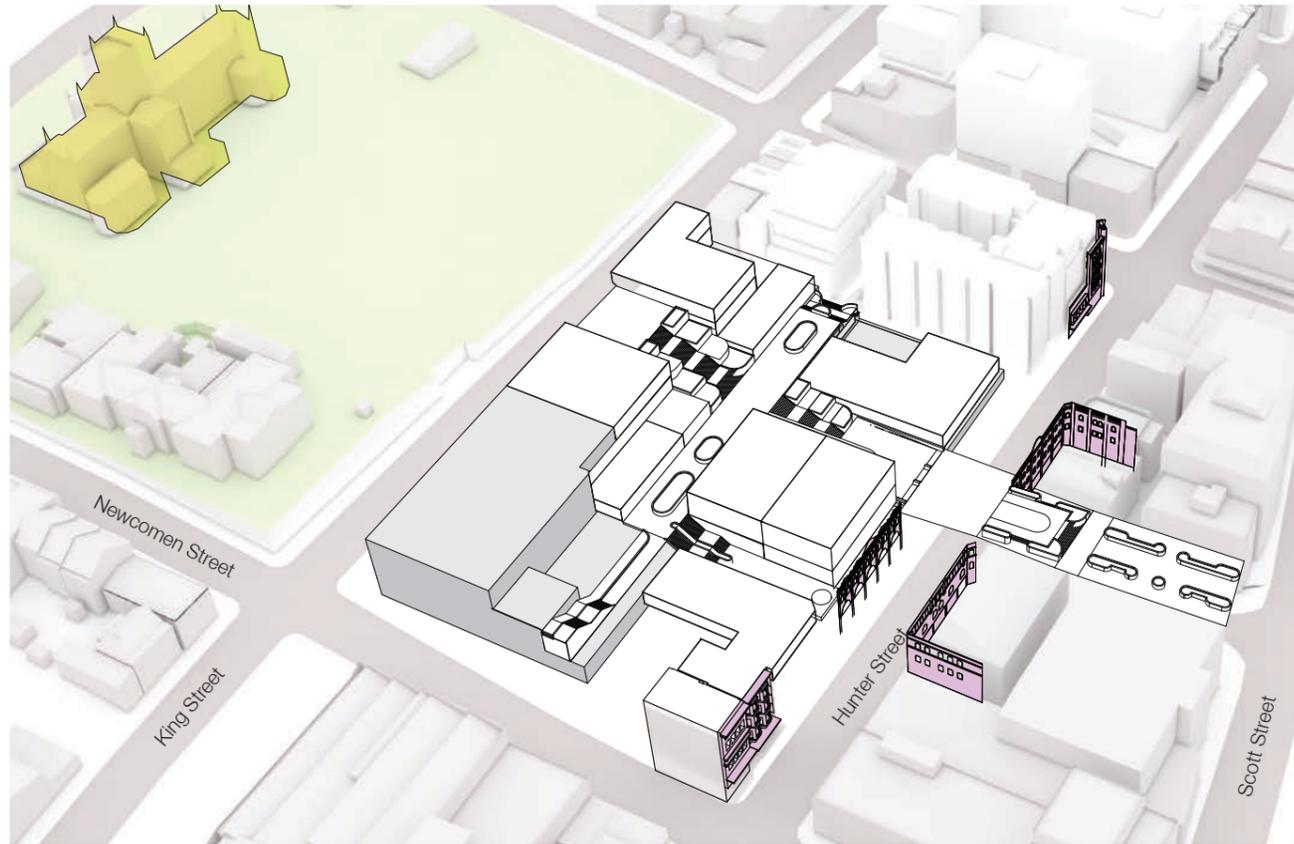


Activate with community uses

- Activate the stairway and Laing Street, creating a vibrant pedestrian link with variety of uses that is endowed with intrigue at all scales
- Anchor the stairway with community uses on the mid level, drawing people from up and down the stairway to a centralised zone



Project Vision

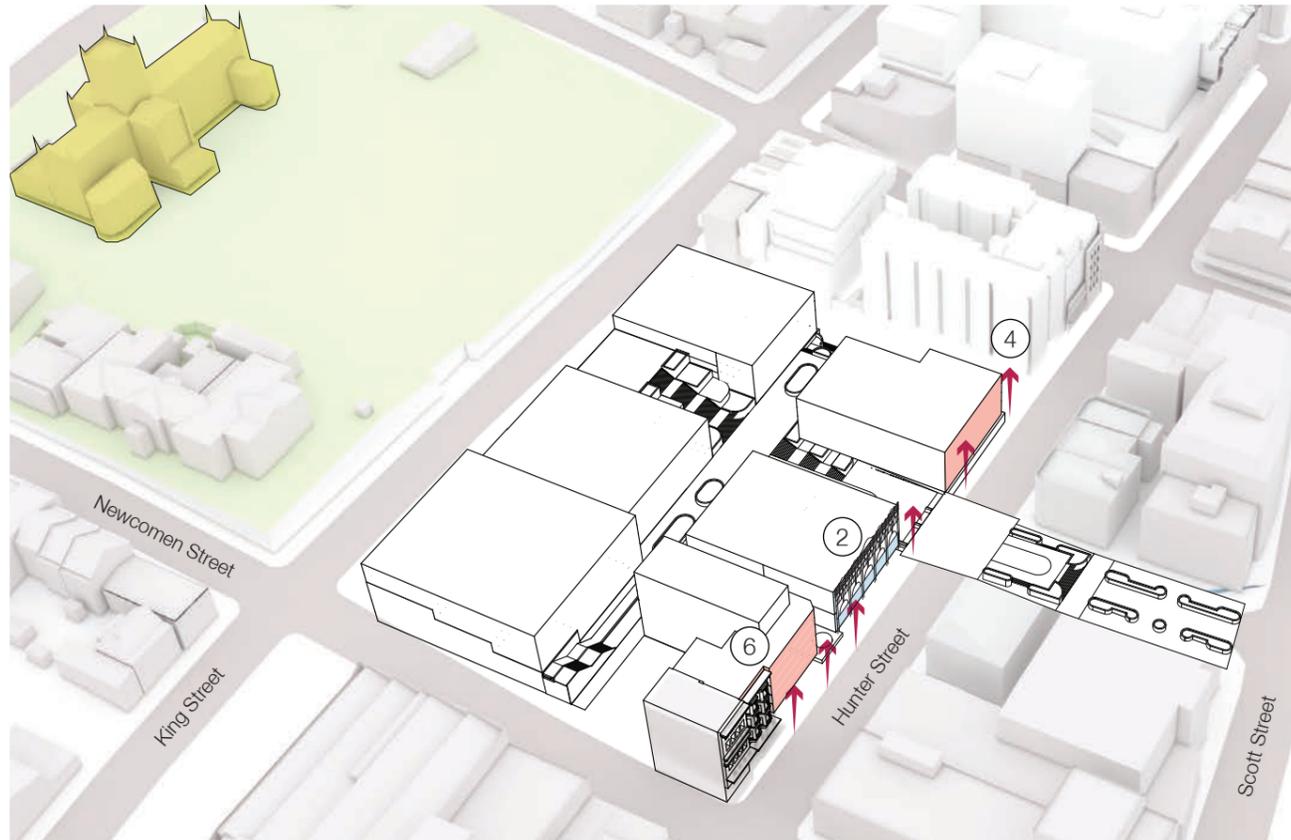


Infuse with heritage

- There is a strong heritage presence within the immediate context that should be maintained and celebrated
- Utilise landscape to overlay multiple histories; indigenous, colonial and contemporary
- Seek out material choices that reflect Newcastle's history and heritage to create a distinctive presence

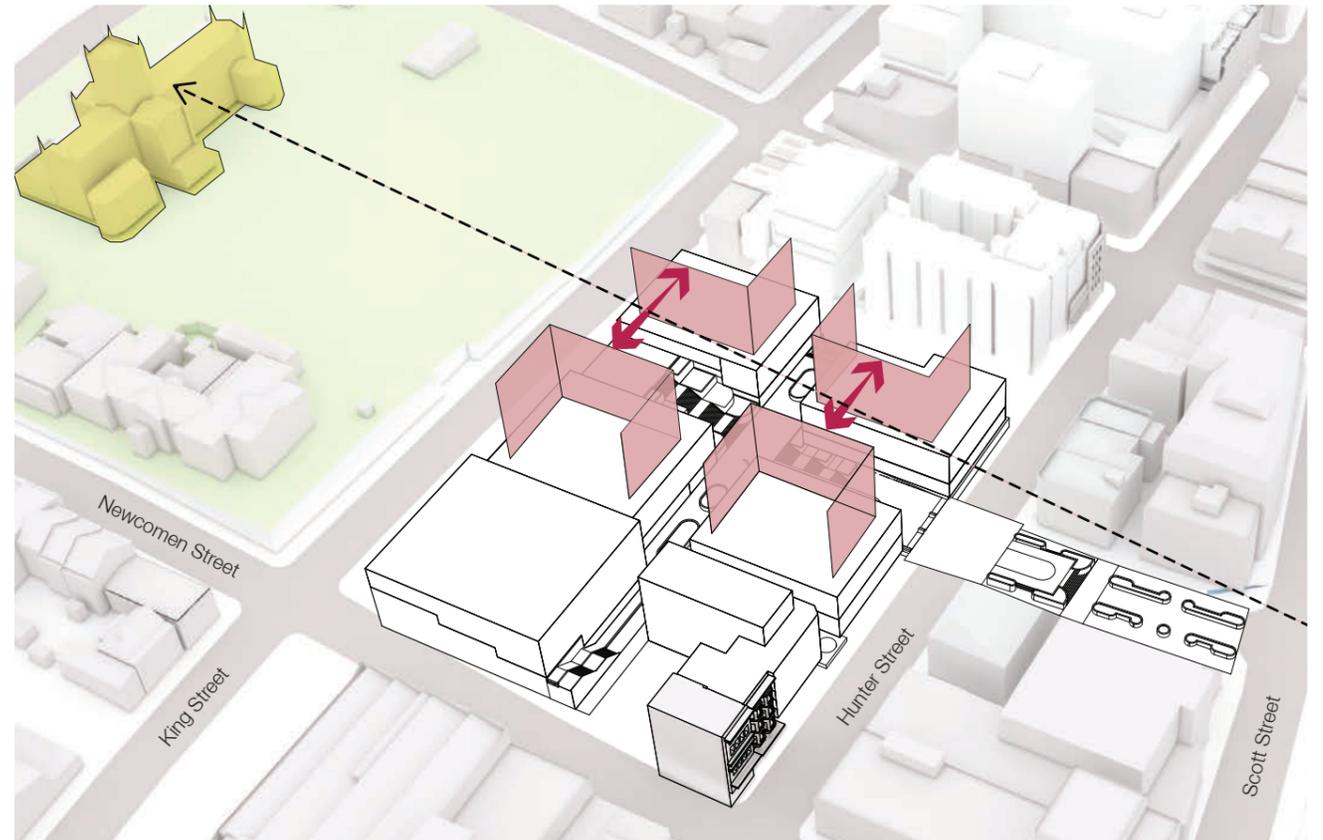


Project Vision



Street wall and facade

- Define the streets with consistent street wall heights
- Utilise the existing heritage items to aid in the establishment of street wall height, in keeping with DCP controls
- Reinforce Hunter Street with higher street walls of 4-6 storeys unless otherwise dictated by heritage



Height and the cityscape

- Buildings are not to exceed a certain width in order to maintain views to the cathedral and view corridors from the waterfront
- Concentrate height to the west, with lower heights along the stairway to the east, ensuring that visibility of the cathedral is maximised
- Integrate any new development with existing height where heritage items are proposed to be maintained

Project Vision

KEY

- Proposed buildings
- Stairway corridor

4.3 Key Metrics



1:1,250 @ A3

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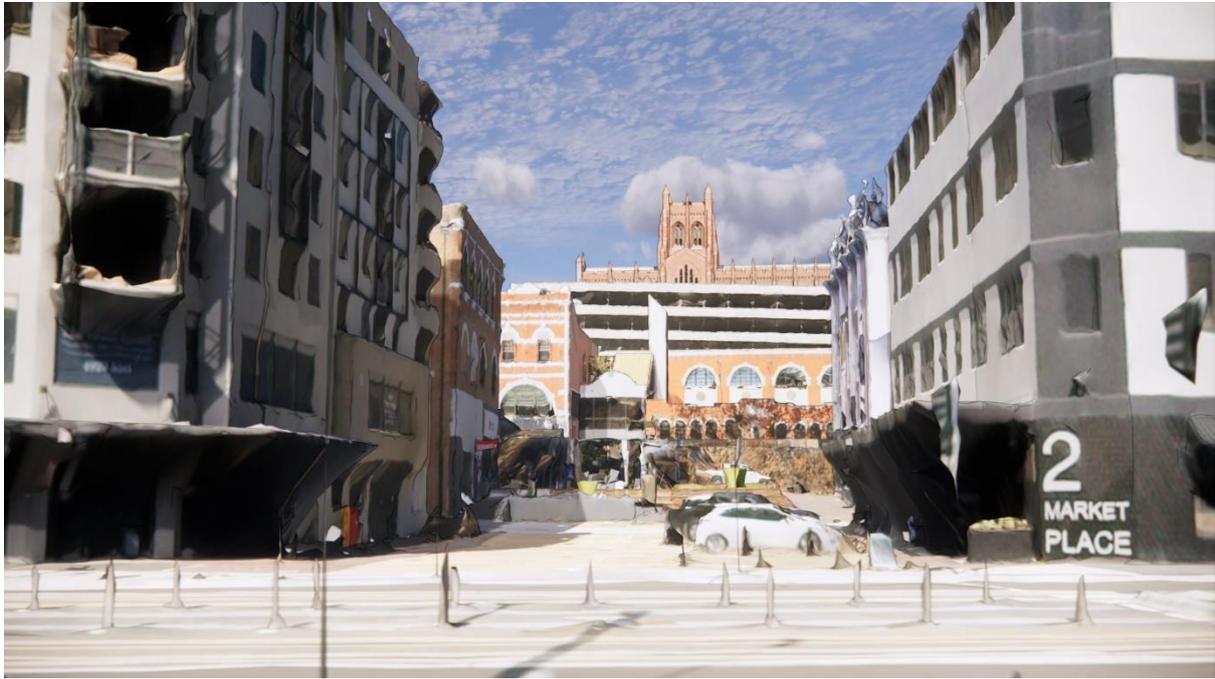
CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment C:** View Corridors to Christ Church Cathedral

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View Corridors to Christ Church Cathedral

Existing



If the existing approved Concept Masterplan for the Iris Capital Owned East End Development were to proceed.

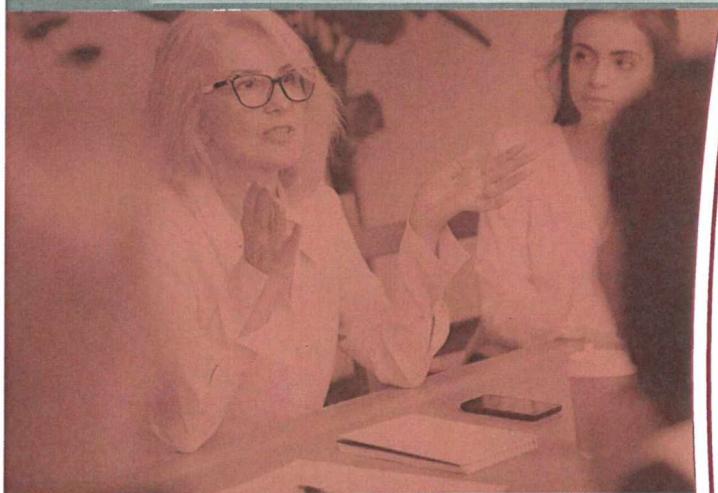
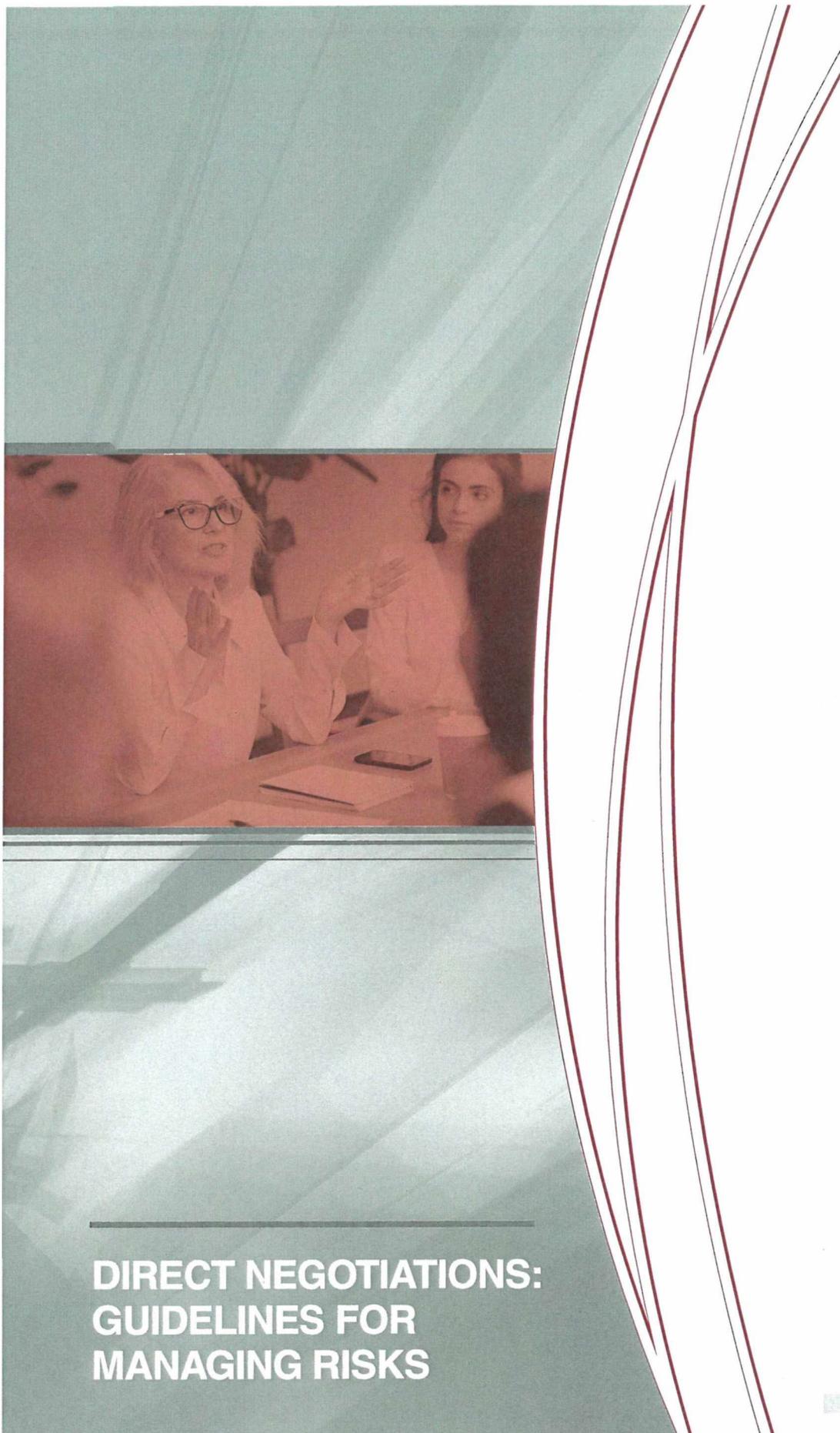


ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment D:** Independent Commission Against Corruption
(ICAC) Direct Negotiations: Guidelines for
Managing Risk (2018)

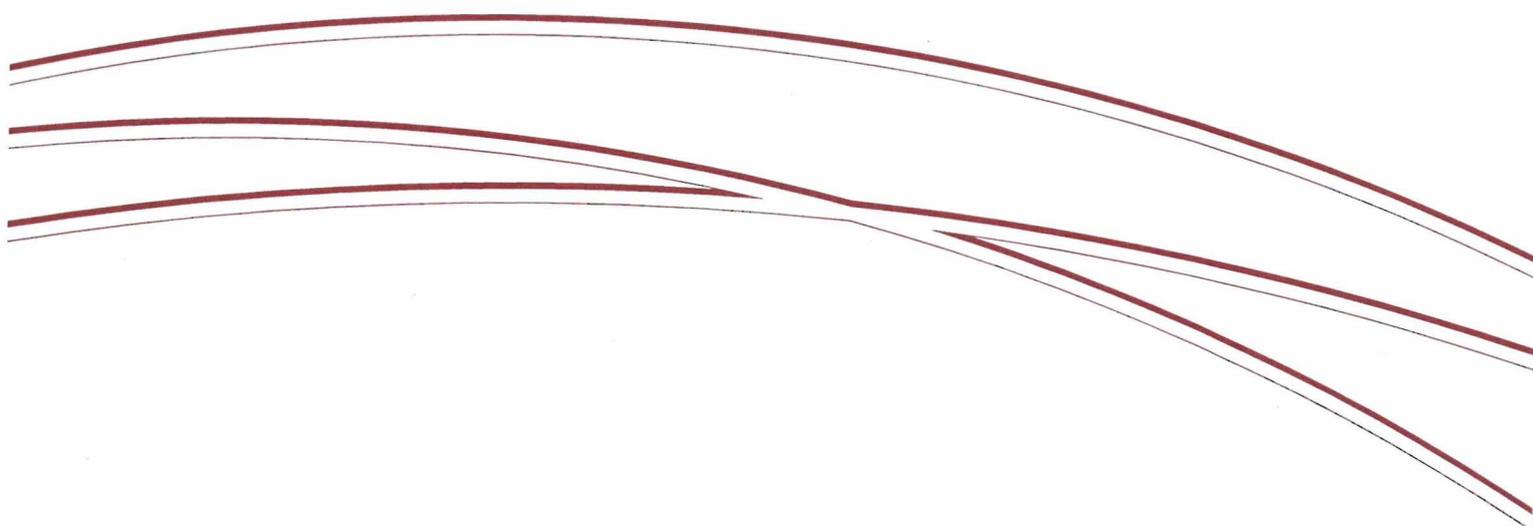
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**DIRECT NEGOTIATIONS:
GUIDELINES FOR
MANAGING RISKS**



INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES



**DIRECT NEGOTIATIONS:
GUIDELINES FOR
MANAGING RISKS**

AUGUST 2018

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This publication and further information about the Independent Commission Against Corruption can be found on the Commission’s website at www.icac.nsw.gov.au.

Public sector organisations are welcome to refer to this publication in their own publications. References to and all quotations from this publication must be fully referenced.



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The importance of strategic thinking	13
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Consider the probity principles	14
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Chapter 1: About direct negotiations

What are direct negotiations?

The term “direct negotiations” refers to exclusive dealings between an agency and a counterparty¹ without first undergoing a competitive process. Direct negotiations are sometimes referred to as directly sourced, single-sourced or non-competed contracts.

Direct negotiations and corruption risks

The closed nature of direct negotiations can create opportunities for dishonest and partial conduct and is more likely to lead to allegations and perceptions of corrupt conduct. Having to compete for a government contract, in a fair and transparent manner, is a significant obstacle for corrupt individuals.

Direct negotiations are highly sought after and many of the investigations undertaken by the NSW Independent Commission Against Corruption (“the Commission”) involve attempts to avoid competition (see the case study below). The corruption risks associated with direct negotiations are significantly higher than those associated with open processes such as tendering and other forms of market testing. Direct negotiations can also be detrimental to the public interest; for example, by undermining the potential for government to realise the full value of public assets.

However, direct negotiations are not, by themselves, corrupt.

¹ In this publication, the term “agency” is used to describe any public sector organisation. The term “counterparty” is used to describe the non-agency party to the transaction (typically, an individual or private or not-for-profit sector organisation).

Where it is considered appropriate to engage in direct negotiations, it is critical that greater attention be paid to measures to mitigate the risk of corruption and ensure adequate levels of integrity.

Direct negotiations can involve corrupt conduct

Winning a directly-negotiated contract with a government agency can be lucrative. Private sector organisations have a strong incentive to engage in a variety of tactics and techniques, which may or may not be ethical, in order to secure these benefits.

The Commission investigated a matter where a company, which provided infrastructure services to a public sector agency, sought exclusive rights to build water infrastructure in north-western Sydney. The company made repeated, strong representations in favour of direct negotiations, even though expert assessments showed that this represented poor value for money. Despite this, there was nothing corrupt about the company advancing its interests in this way.

However, the Commission eventually determined that a number of public officials, including one that had a hidden personal interest in the company, engaged in corrupt conduct by, among other things, preparing a misleading draft Cabinet minute that favoured the direct negotiations.

Source: *Investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters*, August 2017.

The Commission's position

As a general rule, direct negotiations should be avoided unless they clearly fall within the government's legislative and policy framework and/or the risk of corrupt conduct has been managed in accordance with these guidelines. Agency policies, procedures and customs should discourage the use of direct negotiations and impose strict obligations on officers who seek exemptions.

There are, nevertheless, some circumstances in which direct negotiations may be considered.

Where might direct negotiations arise?

Direct negotiations typically accompany a discretionary transaction or dealing that confers something of potential benefit on a counterparty. Transactions or dealings that cannot be conceived of in terms of an open or competitive process, do not give rise to direct negotiations. For instance, a citizen applying for a driver's licence is obviously a direct dealing but it does not make any sense to think of this transaction as something that could be conducted as a competitive process.²

The potential for direct negotiations can arise from a range of contexts; from small, verbal agreements to large multi-million dollar agreements. The areas where they can occur are set out below.

² Public sector agencies are party to a range of transactions that do not technically meet the Commission's definition of a direct negotiation but, nonetheless, carry some of the same risks (for example, assessing a complicated development application, a contract variation or voluntary planning agreement). The advice in this publication may also be of general assistance in these situations.

Procurement

Direct negotiations most commonly arise as part of some form of government procurement. This can range from small credit card purchases and purchase orders through to the largest and most complex infrastructure projects in the state. Most of the examples and concepts in this publication are related to procurement.

Investment activity

Private financing of public infrastructure and amenities has emerged as an alternative to more traditional forms of procurement. This has led to private sector financiers taking debt and/or equity positions in public projects. Similarly, in some circumstances, public sector agencies may invest or lend funds in the private sector.

Delivery of government services

Under mechanisms such as public-private partnerships and more recent commissioning and contestability reforms,³ a wide variety of government services can potentially be delivered by non-government providers. In many ways, this is a form of procurement but it does represent a fundamentally different approach to delivering services.

Joint ventures

Where an agency cannot deliver a project or service with its own resources, it may choose to enter into a joint venture arrangement with another entity. In this situation, the joint venture partner is not working for the agency under a traditional procurement contract as much as it is working with the agency to co-produce an

³ *NSW Government Commissioning and Contestability Policy*, TPP 16-05, NSW Treasury, November 2016.

outcome. In some cases, a separate entity with a board and shareholders is established to manage the joint venture.

Disposal

This can refer to more than just disposal of surplus goods or property. Agencies can also dispose of intangible assets such as intellectual property, leases, airspace, management rights and advertising space.

Employment

Most agencies have recruitment and labour hire policies that require vacancies to be advertised or made available to a range of candidates. However, on occasion, the need for direct appointment can arise; for example, to cover emergencies on a short-term basis.

Licences and rights to use natural resources

Government agencies often licence, sell or award the right to use natural resources such as water, fisheries and mineral deposits. On occasion, these entitlements are also bought back by government. All of these transactions can potentially involve direct negotiations.

Sponsorships

Agencies sometimes approach, or are approached by, companies or groups seeking to enter into a sponsorship arrangement.

Grants

Many agencies regularly make cash or in-kind grants to the private and not-for-profit sectors, such as grants for community projects.

Business proposals

It is not uncommon for a counterparty to approach an agency with an innovative idea or business proposal that may have a commercial or entrepreneurial component. This could come from an incumbent contractor (for example, with an idea to uplift the value of an existing deal), a counterparty that has no association with the agency, or even a member of staff. On occasion, business opportunities may also be agency-led. These proposals may not require public funds (and therefore would not be classed as procurement or a grant) but may entail a form of government endorsement, concession or input.⁴

Example of direct negotiations arising from a business proposal

A software developer might approach a government agency with an idea for a new smartphone app that purports to assist the agency's customers in some way. The software developer might not ask for any of the agency's funds but could seek its advice and endorsement.

Data

Many agencies hold significant volumes of data that could be of value to a counterparty. Quite apart from the privacy consideration involved in providing data, agencies may find themselves in a situation where access to data is sought by direct negotiation.

Bartering arrangements

Agencies sometimes enter into agreements to exchange assets, goods and services in kind, rather than transacting in cash.

⁴ Additional guidance can be found in the NSW Government's *Unsolicited Proposals – Guide for submission and assessment*, August 2017.

Chapter 2: Deciding whether to undertake direct negotiations

As noted in chapter 1, direct negotiations should generally be avoided. However, there are situations where it may be impossible to test the market or to use a competitive process. In other cases, while a competitive process may be possible, it may be so impractical or expensive that direct negotiations are the most acceptable way to transact.

The Commission has identified a number of circumstances where direct negotiations may be appropriate. Agencies should, however, use these only as a guide to decision-making and always bear in mind that, just because these circumstances apply, direct negotiations may still not be the best way to proceed. Agencies can often avoid direct negotiations, simply by opening up the process to some degree of competition.

The *Market Approaches Guide*⁵ published by the NSW Procurement Board ("the Procurement Board") assists agencies to identify the approach that best fits their procurement needs. Procurement Board Direction 2013-02, *Statement on the Promotion of Competition*, directs agencies to promote competition.

Criteria for undertaking direct negotiations

Agencies should ensure they fully examine claims that direct negotiations are the most suitable course of action and that they explore any alternative courses of action. In addition to the following, agencies should also rely on the probity principles (see chapter 3) to guide their decisions.

The changing nature of competitive processes

Some people equate "competition" with completely open processes, where offers are sought by placing advertisements in newspapers and on the internet and any party can submit a proposal (for example, an open tender or public job advertisement). Experienced procurement officers are, of course, familiar with the numerous alternatives to open tendering, which still maintain a level of competition.

For clarity, when the Commission states that direct negotiations should be avoided in general, this does not mean that all transactions need to be subject to completely open, advertised processes.

It should be noted that a number of non-traditional contracting models have emerged that lie between open tendering and direct negotiations (see chapter 1).

Exemption by statute or government policy

There are areas where direct negotiations are either permitted or required by statute or government policy. This publication is not intended to provide a complete list of these statutory or policy exemptions but some examples are listed below.⁶ See also page 11, which deals with low-value transactions.

- The NSW Department of Premier and Cabinet's *Unsolicited Proposals: Guide for Submission and Assessment*⁷ sets out a framework for considering certain transactions initiated by a counterparty.

⁶ Accurate at the time of publication. Agencies should check for updates.

⁷ Published August 2017.

⁵ Last updated April 2015.

The NSW Treasury's *Public Private Partnership Guidelines 2017* also contain guidance on direct negotiations.

- From time-to-time, the Procurement Board issues directions that permit direct negotiations.⁸ These include procurement thresholds under which just one valid quotation is required. The Procurement Board also maintains a number of panels that agencies can use (in some circumstances, without seeking multiple quotes). Individual agencies may also be accredited by the Procurement Board to conduct certain directly-negotiated transactions.
- Section 55(3) of the *Local Government Act 1993* sets out some exemptions to the general requirement to invite tenders for contracts. Individual local councils have their own policies setting out when multiple quotations are required for certain transactions.
- Section 348 of the *Local Government Act 1993* states that job vacancies must be advertised but there are exceptions for reappointments and short-term appointments.
- The *Government Sector Employment (General) Rules 2014* include some situations where direct negotiations are permissible in employment-related matters.
- NSW Treasury occasionally issues guidance regarding the disposal of assets, some of which can be sold directly to an interested party.

Uniqueness

Where a counterparty is in a unique position to offer a solution that cannot be offered by competitors, it may be reasonable to consider direct negotiations. In order to be suitable for direct negotiations both the counterparty and its proposal should be unique.

The agency might assess if the entire proposal or significant aspects of it are unique. In relation to its unsolicited proposals framework, the NSW Department of Premier and Cabinet has advised:

This may include genuinely innovative ideas, including financial arrangements or solutions that are otherwise unlikely to be defined and put to market (e.g. alternatives to providing a Government service or substantive processes,

⁸ Examples include the *Aboriginal Procurement Policy* (May 2018), which contains provisions for direct negotiations, and Procurement Board Direction 2016-05, *Procurement Innovation Scheme*, which permits direct negotiations for certain feasibility or proof-of-concept trials.

*products or methods for delivering a service that is offered by other service providers and constitute a significant departure from traditional service delivery).*⁹

Before agreeing to direct negotiations, the agency should ensure that the "unique" solution offered by a counterparty is the only viable solution to its requirements. Even if a counterparty claims an apparent unique ability to deliver a particular project, the agency can keep competition open and transparent by seeking expressions of interest in outcome-based terms. This approach may require more dialogue with proponents to avoid vague or ambiguous tenders.

Agencies should also be wary of approaching the market with highly prescriptive requirements, which may unnecessarily narrow the field of potential counterparties. Again, in order to prevent this, in some cases, it may be appropriate to use outcome-based criteria.

Another approach is for an agency to pilot innovative solutions through a short-term proof-of-concept contract with a supplier, in accordance with Procurement Board Direction 2016-05, *Procurement Innovation Scheme*. Under such arrangements, the counterparty agrees that the agency is permitted to publish the outcome of the trial. In situations where proof-of-concept testing or a trial is directly negotiated with a supplier, any subsequent procurement of goods or services must be through a competitive procurement process, allowing other potential suppliers scope to compete.¹⁰

Monopolies

When it is beyond doubt that there is only one counterparty that can meet an agency's well-defined needs, direct negotiations can be justified. Where there is any doubt, or the agency has assumed rather than demonstrated that there is no competition, it should test the market.

Agencies need to verify the existence of a monopoly market with an adequate fact-finding process and justify how value for money can still be achieved through a direct negotiation. For obvious reasons, an agency should never rely on claims by a counterparty that it is the only provider in the market.

⁹ *Unsolicited Proposals – Guide for Submissions and Assessments*, NSW Department of Premier and Cabinet, August 2017, p. 5.

¹⁰ Procurement Board Direction 2016-05, *Procurement Innovation Scheme*, requires accredited agencies, amongst other things, to undertake a comprehensive market analysis demonstrating that a competitive process need not be conducted, to assess the risk arising from the use of direct negotiation and to have high-level approval of the procurement activity.

A questionable assertion

A NSW government agency hired a project manager to oversee a software development project. The project manager was tasked with appointing a number of temporary programmers to complete the project. He claimed that there was only one company – Company X – that had the staff with the necessary skills and availability to undertake the project. This argument was accepted and programmers from Company X were directly appointed.

The project manager's assertion was false. A subsequent investigation showed that a number of organisations, besides Company X, were able to undertake the project and employment agencies could have provided qualified programmers on a contract basis.

The investigation also found that the project manager had a hidden financial interest in Company X, which obviously motivated his desire to avoid a competitive process.

Intellectual property rights

Where intellectual property forms a necessary part of a project and ownership of that property can be demonstrated, agencies may have to agree to direct negotiations. Before making the decision to enter into direct negotiations, it is essential that the agency verifies that the counterparty is the only holder of the intellectual property, that similar intellectual property held by others would not be a reasonable solution, and that the intellectual property really is core to the agency's needs for the project. Claims that a counterparty makes about its intellectual property rights should be verified.

A counterparty that claims ownership of significant intellectual property might – as a precondition to providing details of its proposal – ask the agency to sign a confidentiality agreement. Agencies should take great care to ensure that the wording of such an agreement does not inadvertently confer exclusive rights on the counterparty.

Expert legal advice should generally be sought before an agency enters into any agreement that relates to the ownership and use of another party's intellectual property.

Real property rights

If a particular counterparty owns a parcel of real property that is on, or near, the site of a proposed project, direct negotiations may be justified on the basis that the land is necessary to the project. Real property includes not only land, but also airspace, long-term leases, mining rights, easements, options and other rights over land. In some cases, it may be practical for an agency to purchase or

compulsorily acquire the property, but these processes can be time-consuming and expensive. Using the same rationale, there may also be situations in which an agency sells or leases real property via direct negotiations.

Interface with an existing facility or product

On occasion, a public project or acquisition needs to interface with an existing piece of equipment, technology or facility. Acquisitions of replacement parts, minor extensions, continuing services for existing equipment and minor software upgrades may not be amenable to a competitive process. Direct negotiations may therefore be unavoidable where the purchased items must be compatible with an existing product. As noted elsewhere in this publication, agencies should be mindful of the whole-of-life costs of their activities, including maintenance and repair costs.

The need for a project to interface with an existing facility should not, however, give a counterparty an automatic right to direct negotiation. The agency should assess whether alternative contractors could potentially undertake the work at a competitive price. Agencies should be cautious about misusing the interface criterion either as a basis for agreeing to direct negotiations at the behest of an incumbent or to avoid the short-term time and expense associated with the competitive process.

Transactions that derive from an earlier competitive process

Rather than enter into a principal-agent relationship with a counterparty, agencies sometimes create joint-venture relationships or similar partnering arrangements. Selecting a joint-venture partner should be a competitive process. However, the venture itself, once established, may entail direct negotiations between partners for the sourcing of goods and services and other transactions that fall within the scope of the joint venture. This can be justified provided the parties anticipate it during the original selection process.

Similarly, agencies may enter into an outcome-based contract in which it is expected that parties will need to complete a number of individual transactions in order to achieve the contracted outcome. It may be appropriate to use direct negotiations to complete some of the smaller transactions that derive from the broader outcome-based contract.

Agencies should be wary, however, of contract variations that confer unnecessary benefits on a counterparty. While these may be the product of legitimate needs, they occasionally involve corrupt conduct. Contract variations

can also be a mechanism by which the counterparty increases revenue received or reallocates risks back to the public sector. Sometimes claims for contract variations are more appropriately dealt with by agencies as new contracts that are offered to the market. Certain issues, such as whether a proposed contract variation constitutes a significant change in project scope, and the value of the variation compared to the original contract value, are relevant in deciding whether to establish a new contract.

To avoid damaging the public interest

Sometimes, for reasons beyond its control, an agency changes its policy or commercial direction while a transaction is under way. This could arise in a variety of circumstances, including a sudden gain or loss of funding, a legal judgment or new legislation, a serious mistake or even a change in government.

These changes have the potential to cause losses to affected parties, which in turn may create liabilities for taxpayers or damage the public interest in other ways. In some cases, going back to the market or restarting the process might aggravate these liabilities, without any net gain to the public. Where it can be demonstrated that this is the case and value for money has been considered, direct negotiations may be warranted. This criteria, however, should not be used to justify poor planning or to excuse ad-hoc decision making.

Emergency circumstances

In situations where a delay would threaten public health and safety, damage the environment or create a serious legal or financial risk to the agency or the government, direct negotiations may be warranted. For example, if a critical supplier unexpectedly fails to deliver goods and services, direct negotiations with an alternative supplier may be necessary. Poor planning or looming deadlines do not constitute emergency circumstances.

Clause 4 of the Public Works and Procurement Regulation 2014 sets out circumstances in which emergency procurement can occur and s 55(3)(k) of the *Local Government Act 1993* states that local councils are not required to invite tenders for contracts in emergency circumstances. Other legislation may include similar exemptions.

A false emergency

The Commission investigated an alleged abuse of emergency procurement in a public sector agency. The agency's normal procurement activities were conducted via an electronic system that aligned with prescribed delegations and process flows. However, during emergencies, purchases could be made outside the normal system using a manual approach.

The Commission found that an officer placed millions of dollars of emergency orders with a supplier without a tender process or a contract. This was achieved by placing multiple orders over an extended period of time.

Ultimately, some of the invoiced goods were never supplied, and the Commission made corrupt conduct findings against both the supplier and the purchasing officer based on evidence of collusion and corrupt payments.

Competitive process too expensive

It is usually appropriate to engage in a direct-negotiation process when the value of the contract or transaction is very low relative to the cost of conducting a competitive process. Most agencies have procurement policies and/or accreditation arrangements that allow low-cost purchases to be made on the basis of one quotation or by corporate credit card. However, agencies should be alert to the risk of splitting transactions so that they fall under the relevant threshold. Where practical, small regular purchases should be made from a catalogue, pre-qualified panel or period contractor. Minor variations to an existing contract may also fall into this category.

Similarly, disposal of low-value surplus items or short-term employment opportunities may justify direct negotiations.

Order-splitting

This is the practice of dividing a transaction into multiple, smaller parts to avoid competition and scrutiny; most commonly done to avoid a tender or requirement for three quotations. Sometimes, order-splitting derives from poor planning, convenience or laziness.

The Commission has found evidence of order-splitting in many investigations, and that the practice is sometimes associated with corrupt conduct. For this reason, it is important that internal controls, management supervision and post-transaction review be used to identify order-splitting.

Competitive process not successful

A direct negotiation may be appropriate when a legitimate and recently completed competitive process has failed to produce an advantageous or satisfactory offer and the agency does not expect a repeat of the process to produce a better result. In such circumstances, the agency may choose to negotiate directly with the “least unsatisfactory” of the available proponents, or another counterparty that has expressed a genuine interest.

Ideally, the initial competitive process should articulate the right of the agency to enter into direct negotiations in the absence of an advantageous or satisfactory offer.

Tips for dealing with a foregone conclusion

From time-to-time, when agencies go to market, it becomes apparent that there is just one party that has the potential to win the tender and the process has become a foregone conclusion. This situation is obviously not a direct negotiation but it does carry some probity risks.

The Commission advises agencies to consider the points below.

- The tendering process should be designed so that clearly inferior bids can be identified and culled as soon as possible. It is not fair to keep a tenderer in contention if it has no chance of success, especially if it continues to incur costs as a result.
- If only one tenderer can potentially succeed and the agency expected a better response from the market, it might question its market approach, scope of work and the risk of being locked-in to doing business with a single counterparty. That said, the agency should not refuse to transact with a counterparty just because it happens to be the only viable tenderer. In addition, agencies should not invite offers without a firm intention and capacity to proceed at the time.
- Even if just one tenderer remains in contention, the agency should still adhere to its proposed evaluation methodology. This is consistent with the public sector expectations of accountability and transparency.

Maintaining a temporary source of supply

Direct negotiations may be undertaken when it is necessary to maintain a temporary source of supply while a planned competitive process is yet to be finalised. The temporary appointment of a counterparty via direct negotiations is preferable to rushing the bidding process or automatically renewing the incumbent’s contract for a lengthy period of time.

Sponsorships

Unsolicited sponsorship offers may not be amenable to market testing. For this reason, the Commission recommends that all agencies disseminate sponsorship opportunities widely; for example, by outlining these opportunities on their websites. Only when an agency has publicised these general sponsorship opportunities and has established its criteria for accepting sponsorship, may direct negotiations with potential sponsors be appropriate.

Similarly, if an agency wishes to become a sponsor, or is approached by a party seeking sponsorship, it should satisfy itself that it is obtaining value for money and that other, more advantageous, alternatives to sponsorship do not exist.

Other legal rights

In some cases, a counterparty might have some form of legal right to direct negotiations –these are typically set out in an existing contract (for example, the right to be sole supplier of a particular service). Where this is the case, the contract should be honoured and direct negotiations should take place.

Do high-performing incumbents have a right to direct re-appointment?

The Commission is sometimes asked whether it is permissible to automatically reappoint a reliable, high-performing incumbent without going back to market.

In cases where the contract already contains options permitting extension, agencies should be entitled (but not obliged) to exercise them based on a proper assessment of need and performance. However, it is preferable and fair that these options be contemplated during the original process that awarded the contract.

If the contract does not contain any conditions allowing extension, agencies should avoid direct negotiations unless other criteria in this chapter are met.

Avoiding the need for direct negotiations

Agencies sometimes find themselves in a situation where they really have no alternative but to enter into direct negotiations. With improved planning, this can potentially be avoided. Consider the following points.

Establishing and using panels

Panels of pre-qualified or approved suppliers, which have been established through competitive processes, can be

used in situations that may constitute an emergency but are in no way unprecedented. For example, a local council may have a pre-established panel to provide services during severe flooding events. A properly constituted and run panel can, therefore, be used to directly award work to panel members.

While this publication focuses on direct negotiations, rather than how to create and manage a panel, the Commission's experience is that panel arrangements are, themselves, prone to misuse. The Commission often receives complaints that a particular panel member is being corruptly favoured or that the panel is otherwise operating unfairly. It is therefore important to ensure that the panel operates effectively. For example, there should be regular reporting on the performance of panel members and which panel members are receiving work.

Avoiding lock-in

In some situations, agencies may find that once they have selected a counterparty, it can subsequently be very costly to switch to an alternative. This may occur if there are significant establishment or customisation costs, if the agency relies heavily on the counterparty's physical or intellectual property or if ancillary work such as maintenance also has to be awarded to the counterparty. This can lock an agency in to future direct negotiations with an incumbent. For this reason, agencies should always factor the whole-of-life costs of a particular course of action, including transaction and exit costs, into their planning. One of the key things to be addressed in a contract should be how to end or renew it.

There is also danger in relying on a contractor to generate and retain data that is required by the agency to operate. If the agency does not control its own data, it is at higher risk of being locked into direct negotiations.

Some agencies avoid lock-in by adopting a two-supplier arrangement, even if one of them is a little more expensive.

Bundling and unbundling contracts

Contracts can be bundled together to create larger contracts or unbundled to reduce the size of the contracts. Depending on the nature of the market, either of these options could be used to encourage additional competition and avoid the need for direct negotiations.

Agencies can also consider unbundling a contract in order to reduce its exposure to a single counterparty. For example, if an information and communications technology (ICT) supplier sells six products that an agency wants to buy, it might be the sole or monopoly provider of four of those products. The agency may have to consider direct negotiations for those four products, but it can go

to market for the other two (at this time or a later stage) either alone or as part of a broader ICT procurement strategy implementation.

Finally, agencies should be mindful of the risk that a contract is split for the purpose of lowering its value to the point where competitive processes are not required.

Considering the contractor's risk and reward

The Commission spoke with some agencies about contracts that require the counterparty to make sizeable financial investments. For example, a private sector operator of a government-owned facility might need to invest millions of dollars, both upfront and over the life of the contract. In these situations, the operator may require a very long contract or argue for contract extensions (perhaps over a number of decades) in order to obtain the necessary finance and make a reasonable profit. Contractors in this situation might also have an incentive to under-invest towards the end of the contract if they do not have certainty about the future.

The Commission's position is that the length of a contract should be determined by commercial factors including the counterparty's reasonable investment horizon. However, to the extent possible, these factors should be assessed at the outset and factored into a market approach. This minimises the chances that the agency will have to directly renegotiate the contract on the basis of unforeseen circumstances.

Because lengthy contracts can be highly sought after, agencies may also be exposed to forceful lobbying techniques by incumbent parties seeking a directly negotiated renewal or extension. This can be a source of corruption risk; for example, when lobbying activities lack transparency or result in preferential consideration.

Lowering bidding costs

If the bidding costs for a particular project are high, relative to the total value of the contract, it may be difficult to generate private sector interest. Where an agency considers that additional competition and overall value for money can be achieved, it should explore the lawful opportunities for lowering the costs of bidding. This may include reducing the number of stages or iterations, reducing the amount of detail required in responses to market-facing documents, or even reimbursing proponents' reasonable bidding costs.

Develop alternative sources

In areas where there is a private sector monopolist or a lack of competition, agencies may be able to facilitate an

in-house bid or some other form of internal provision. The competitive tension provided by an in-house bid may create savings even where the bid itself is unsuccessful.

In situations where there is a shortage of available contractors, agencies may be able to encourage a provider in a related field to expand its operations. In some situations, it may even be practical to invite an international contractor to participate in the process.

The Procurement Board's *Industry Engagement Guide*¹¹ provides helpful advice for agencies about how to explore the capabilities of potential suppliers while maintaining high standards of probity.

Postpone or cancel the transaction

Agencies should preserve the option of not proceeding with a transaction if direct negotiations cannot be avoided or if the exchange cannot be undertaken on acceptable terms.

The importance of strategic thinking

The criteria set out in this chapter primarily relate to the consideration of factors at a transactional level. However, agencies should also have regard to their overall strategic direction, business strategy and the stated priorities of the NSW Government when considering whether or not to undertake a direct negotiation for a significant transaction or proposal.

To help clarify why a direct negotiation is being contemplated and its purpose, consider the core functions of your agency, the outcomes that are most important to your agency and your agency's goals.

It is the Commission's experience that direct negotiations are less likely to involve corrupt conduct if they are justified in writing; for example, through the development of a business case or procurement strategy. The development of such documents provides a beneficial opportunity for an agency to:

- "take a step back" before any commercial activity takes place
- consider the outcome it is hoping to achieve
- deliberate on the available alternative courses of action
- consider its overall risk appetite, including the risk of reputational damage, counterparty failure and potential impacts on service delivery.

Developing a clear, evidence-based justification for a course of action, that is agreed to early on, will reduce the likelihood of probity concerns arising at later stages of the transaction lifecycle.

An additional concern is that any criteria concerning whether it is appropriate to undertake direct negotiations is open to abuse. Public officials have, at times, made (or been persuaded by) false claims about the existence of monopolies, unique proposals, intellectual property and so on, in order to create the appearance of conformance with the Commission's guidance. Often, this conduct is driven by laziness, lack of imagination or poor planning but sometimes the behaviour is corrupt.

When it comes to the decision to undertake direct negotiations, an agency can defend its decision by:

- ensuring its reasoning is supported by evidence and is not based on mere assertion
- applying its reasoning before the decision and not as a post-hoc device
- considering other approaches and explaining why they are not appropriate in the circumstances
- publishing a notice of its intention to enter into direct negotiations
- documenting the decision-making process, including evidence of research, discussions and communication with senior officers.

The following chapter expands on the practices that agencies should take in order to manage the risks associated with direct negotiations.

¹¹ Published June 2018.

Chapter 3: How to undertake direct negotiations

Despite the known corruption risks, there may be justification to undertake direct negotiations, as outlined in the preceding chapters. This chapter provides *general* guidance on how direct negotiations can be undertaken in order to reduce those risks.

Before an agency considers the information below, it should have considered and applied the criteria set out in chapter 2 and documented its reasons for undertaking a direct negotiation as part of a procurement strategy or business case.

Consider the probity principles

Direct negotiations can arise in a variety of circumstances, and it is impractical to prescribe detailed procedures for each occasion. In particular, there is a considerable difference in approach that would need to be taken for high- and low-value transactions. However, it is always possible to take a principles-based approach, and the following “probity principles” should govern decisions about direct negotiations:

- fairness
- impartiality
- accountability
- transparency
- value for money.

In the context of direct negotiations, **fairness** requires having regard to all potential parties to the transaction, including any parties that are being excluded by the decision to enter into direct negotiations.

A counterparty should not automatically benefit from direct negotiations just because it is the incumbent,

because it is known to the agency, or because it claims to be making the best offer.

Impartiality requires that the process is free of, or at least not adversely affected by, a conflict of interest. In addition to being unencumbered by any private interests, public officials should ensure the decision-making process is free of any actual or apprehended bias. This might require public officials to confront any untested assumptions or latent biases (for example, an assumption that a competitor has no chance of replacing an incumbent).

Accountability entails demonstrating how discretion and resources are used. Most people equate this with being answerable to management but it also involves providing explanations to a range of internal and external stakeholders (which can extend to institutions such as the Procurement Board, NSW Parliament, the courts, the NSW Ombudsman or the Commission) and the general public. Accountability also means that decisions ought to be based on cogent reasoning and that they are consistent with legislation, policy, agency strategy and accepted precedent.

Transparency is a related concept that requires exposing the process to internal and external scrutiny, or at least the possibility of scrutiny. In practice, this involves things like keeping complete and accurate records of meetings and key decisions, cooperating with steering committees, auditors and audit committees and complying with the *Government Information (Public Access) Act 2009*. In addition to being complete and accurate, records also need to be discoverable, which means that they need to be properly titled, classified and stored. It also means that data should be machine-searchable where possible.

The Commission’s experience is that officials and counterparties involved in corrupt transactions strongly resist accountability and transparency measures. They fail to give reasons for their decisions, fail to keep or provide records and seek to minimise the number of people that have visibility over the process.

It should be remembered, however, that some direct negotiations involve managing commercial-in-confidence material or other confidential information such as the government's bargaining position, budget or costings. Transparency, therefore, does not necessarily involve promptly and publicly divulging *all* information about the process.

Obtaining value for money is regarded as a probity principle but it is also a sound commercial practice. By their nature, corrupt deals generally confer unearned or undeserved benefits on parties to the deal – usually to the financial detriment of the public sector. Therefore, to the extent that direct negotiations achieve value for money, corrupt conduct can be minimised.

Naturally, **value for money** is not the same as least upfront cost. The whole-of-life costs and benefits of the transaction should be the agency's primary consideration.¹²

Manage the risks

The Commission's advice for managing direct negotiations is divided into the following sections:

1. seeking authority
2. documenting the process
3. performing due diligence
4. managing conflicts of interest and segregating duties
5. conducting the negotiations
6. agreeing on the price and executing the agreement

¹² The Procurement Board defines value for money as total lifetime benefits less total lifetime costs. Benefits and costs include both monetary and non-monetary factors including opportunity costs. See *Statement on Value for Money* issued by the Procurement Board.

7. monitoring the counterparty
8. undertaking post-completion steps.

It should be noted that much of the guidance set out below can be applied to any high-risk transaction.

Seeking authority

Agencies should ensure that the decision to enter into direct negotiations is made at a senior level. Preferably, the decision to negotiate directly should not be made by the person(s) or team that will be performing the negotiations or managing the project or transaction. Because of the gravity of entering into direct negotiations, the Commission suggests that agencies modify their financial delegation policies so that these decisions are elevated to a higher level than would be the case for more routine transactions.

If the transaction is particularly sensitive or controversial, the decision to negotiate directly should be approved by the principal officer of the agency, steering/governance group or the minister or local council, as appropriate.

As noted in the previous chapter, the process is also easier to justify if the proposal to directly negotiate a transaction can be tied to the agency's relevant strategic plan and a procurement strategy or business case. Conversely, a direct negotiation that has no apparent connection with the agency's overall purpose and is not justified by a key document is likely to be viewed as highly suspicious.

Documenting the process

As a general rule, corrupt or unethical officials try to avoid making records that could be used to expose their conduct. Thorough documentation in direct negotiations is therefore critical. All of the key events and decisions described in this chapter and chapter 2 should be documented. Most importantly, however, an agency's course of action can be more easily defended if the following are documented:

- the rationale for deciding to enter into direct negotiations (as per the criteria in chapter 2)
- the agency's relevant cost estimates, public sector comparator, valuations or other evidence that value for money has been achieved
- the progress of the negotiation process itself and the personnel involved
- the disclosure and management of conflicts of interest
- all other key decisions and the reasons for those decisions.

Agencies should also be aware of the broad requirements in the *Government Information (Public Access) Act 2009* to publish information about various contracts. In particular, s 30(1)(a) of the Act requires the publication of specified information concerning certain contracts for which:

there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor.

The need to demonstrate accountability and transparency

By definition, direct negotiation means that formal processes like tenders, expressions of interest or public advertising do not take place. This also means that procedures such as documented scoring and ranking of proposals do not occur. Therefore, agencies entering into directly-negotiated deals often neglect to create many of the documents that can be used to demonstrate accountability and transparency.

What is the Open Contracting Data Standard (OCDS)?

The OCDS, which is published by the Open Contracting Partnership, facilitates the disclosure of data and documents during contracting stages. The aim of the standard is to encourage transparency and allow analysis of contracting data. It includes a "codelist" requiring compliant organisations to indicate which of its contracts have been awarded without competition (among other transparency obligations).

The OCDS was first published in 2014 and has started to gain in prominence. At the time of writing, the Commonwealth Government was investigating alignment to the OCDS principles. Agencies that are interested in addressing corruption risks should consider voluntarily conforming to the OCDS.

Performing due diligence

It is important to conduct due diligence on the counterparty, its key staff and its offer. In many situations, this should commence before the agency decides to enter into direct negotiations. The level of due diligence performed will typically depend on factors such as the value and complexity of the transaction, the risk to the agency if the counterparty fails, and the agency's reliance on information provided by the counterparty.

Basic due diligence checks¹³ involve making enquiries about an entity's:

- structure, ownership, location and trading history
- requisite experience
- senior management
- finances, insurance and credit history
- history of regulatory or legal action, including adverse findings against key personnel
- relevant licences, certifications and accreditations
- supply chain
- media and social media profile.

Among other things, due diligence checks should seek to determine whether any agency staff have a concealed interest in the counterparty (this point is discussed in more detail in the next section).

Due diligence can also entail, for instance, requiring the counterparty to produce information about its internal policies, procedures and anti-corruption controls. The process could also involve making contact with other agencies, regulators or customers that have previously worked with the counterparty. An inspection of the counterparty's premises may also be warranted.

Criminal history checks or detailed security vetting may also be required, which usually requires written consent from the individuals concerned.

¹³ This list is illustrative only. There are a number of private sector companies that specialise in conducting due diligence assessments in varying levels of detail.

Tips for dealing with other parties

One agency told the Commission that it conducts a detailed “fit-and-proper-person” assessment of individuals associated with the counterparty when entering into directly-negotiated contracts.

For some transactions, various parties may stand to be paid a finder’s or success fee if the deal is completed. Even if an agency is not a direct party to them, it should be cognisant of the risky behaviour that these fees can encourage. A finder’s or success fee gives the payee a strong incentive to complete the deal, irrespective of the public interest or the probity principles outlined in this chapter.

Managing conflicts of interest and segregating duties

A majority of the Commission’s investigations have involved some sort of a conflict of interest that has been either concealed or mismanaged. A mismanaged conflict of interest coupled with direct negotiations represents a combination of two significant, and possibly inter-related, risks.

Agencies can manage conflicts of interest in a variety of ways. Sometimes simply documenting the conflict is sufficient. However, given the heightened risks associated with direct negotiations, the Commission recommends that agencies seek to exclude conflicted officials from involvement in the process where possible – or at least minimise their involvement.

Some standard methods for identifying and managing conflicts of interest include:

- requiring relevant staff and advisers (from both the agency and the counterparty) to disclose, in writing, any conflicts or confirm that no conflicts exist
- requiring staff to complete relevant training in integrity/probity issues
- incorporating conflict of interest management obligations into the contract (that is, which create rights, obligations and penalties if conflicts of interest are concealed)
- using due diligence checks (discussed above) or data analytics techniques to identify any conflicts of interest
- increasing oversight and tightening governance mechanisms
- requiring the counterparty to refrain from making offers of employment to agency staff members or related parties (or at least requiring all such offers to be promptly disclosed)
- strictly enforcing policies relating to gifts, benefits and hospitality
- confining information to those with a clear need-to-know.

Agencies should also be mindful of the related issue of “capture” or “familiarity bias”. If staff members have previously worked with the counterparty, they may be favourably disposed to its interests, even if no conflict of interest exists.

Similarly, agencies should consider biases that might arise from conflicting duties (as opposed to conflicting interests) or key performance indicators (KPIs) that drive unproductive behaviour. For example, a procurement officer might have a delivery timeframe KPI that strongly influences their judgment in favour of finalising a quick deal.

Getting to the truth

It is common for individuals undertaking direct negotiations to be asked to make a written undertaking that they do not have a relevant conflict of interest. Regrettably, this process is sometimes regarded as a “tick-and-flick” compliance exercise, since staff may be concerned that the transaction would be jeopardised if a conflict were to be disclosed. Parties might also be tempted to understate the nature of a conflict (for example, characterising a relationship as a “business acquaintance” instead of a “close friendship”).

To address this problem, agencies can consider:

- focusing on personal interests, which can be easier to understand than conflicts of interest
- interviewing key staff in addition to simply asking them to sign a form
- providing face-to-face explanations of what amounts to a personal interest or conflict of interest
- reviewing other sources of information, such as conflict of interest or personal interest registers, gift registers and social media.

Since conflicts of interest are sometimes concealed or understated, it is important that certain duties be segregated to ensure accountability and that no individual has end-to-end control over the process. Each situation will be different but for more complex direct negotiations, agencies might consider segregating the:

- decision to enter into direct negotiations (that is, consideration of the criteria listed in chapter 2)
- performance of due diligence activities
- performance of any benchmarking, price discovery or estimation of a public sector comparator
- formulation of any negotiation strategy
- approval of the price and terms and conditions, or termination of the proposed transaction
- drafting of relevant contracts
- execution of relevant contracts
- final approval of the proposal
- management of performance issues by the counterparty and determination of any penalties for non-performance of the contract.
- agreeing the scope of work and any As-Is and To-Be analysis¹⁵
- agreeing how variations will be managed
- agreeing terms for non-performance of the contract, including dispute resolution and termination
- obtaining security (such as a bank guarantee or bond) and obtaining proof of necessary insurances.

A simple way to assess whether an individual has excessive control is to prepare a flow chart or process map depicting the various steps in the process and who performs them.

For large or risky transactions, engaging an internal or external probity adviser may also be warranted.¹⁴ Alternatively, formation of a steering committee to oversee the transaction and make key decisions may be appropriate. In some cases, a multi-agency oversight group may be appropriate.

Conducting the negotiations

Agencies sometimes forget to consider the “negotiation” aspect of direct negotiations. Since direct negotiations do not involve a competitive process and, in some cases, involve dealing with a counterparty that has substantial market power, agencies may assume that they cannot pursue favourable terms or develop a mindset that facilitates the granting of unnecessary concessions.

The Commission recommends that agencies adopt many of the same techniques that would be used in a competitive process such as a formal tender. This includes:

- developing an evaluation protocol and formally evaluating, or even scoring, the counterparty’s offer
- requiring the counterparty to demonstrate the merits of its product or solution
- developing a budget, cost estimate or public sector comparator
- apportioning risk between parties

¹⁴ It should be noted, however, that engaging a probity adviser should in no way diminish the responsibility that other team members have in maintaining high levels of probity.

Negotiations may produce poor value for money if the agency does not have a clearly formulated desired outcome. Again, while the agency may not be in a strong negotiating position if dealing with a monopolist, it is recommended that some form of negotiation plan be prepared.¹⁶ The plan should set out the structure, format, timing and location of negotiations, who will be present and the agency’s bargaining strategy.

The table opposite sets out some of the integrity and commercial issues that could be considered.

In addition to benchmarking the price, the agency should obtain benchmarks for other contract deliverables such as the timeframe, materials used, environmental impact, and so on. Without such project benchmarks, the agency may weaken its bargaining position or unintentionally agree to undesirable concessions that reduce value for money.

For high-value or high-risk direct negotiations it may be appropriate to develop a formal process deed that sets out the agreed steps and behaviours to be followed during the negotiation. Any such deed should be based on legal advice but it could address some of the issues in the table above, measures designed to preserve probity, and a requirement to negotiate in good faith. For simple processes, a basic agreement about the rules of engagement may be all that is required.

Some agencies that regularly undertake complex commercial negotiations have experience in establishing quite formal and comprehensive negotiation processes that entail virtual or physical data rooms, extensive legal advice and multiple rounds of bargaining. It is beyond the scope of this publication to comment on these types of arrangements; however, the relevant point is that complex transactions require additional risk management controls and scrutiny.

¹⁵ An As-Is process is its current state; a To-Be process is how it will be in the future.

¹⁶ A useful template is available from the Procurement Board’s website. While this template is designed for procurement activities, it can be adapted for any type of negotiation.

Agencies should also be aware that acting in the public interest involves considering both the financial side of any deal as well as those harder to measure social benefits (for example, the benefits of open space, healthier communities or reductions in crime). Typically, a private sector counterparty will not place as much emphasis on these social outcomes.

Agreeing on the price and executing the agreement

Once the negotiation phase is complete and successful, the agency needs to finalise a formal agreement with the counterparty (usually in the form of a contract).

The Commission often receives complaints about directly-negotiated transactions that allegedly confer significant financial benefits on the counterparty.

Integrity issues	Commercial issues
<ul style="list-style-type: none"> • Ensuring that the negotiations are accurately minuted, or even recorded, and that at least two agency representatives are present. • Ensuring that the negotiations proceed with the necessary degree of formality and are not, for instance, conducted in a social setting. • Requiring any staff with probity-related duties to be present. • Following up on key points in writing. • Ensuring that the agency's budget, valuation, public sector comparator, Best Alternative to a Negotiated Agreement (BATNA)¹⁷ or other bargaining-related information is not divulged or compromised. • Ensuring that the counterparty's intellectual property is adequately safeguarded and confidentiality agreements are in place where appropriate. • Ensuring that any contracted members of the agency's team are properly screened and do not have conflicts of interest or that a conflict of interest is declared. • Agreeing on the precise roles and delegations of the members of the negotiating team. • Conducting basic due diligence on the members of the counterparty's team. • Requiring the counterparty to refrain from lobbying or approaching other agency personnel (or elected representatives) outside of the agreed negotiation protocol. • Where lobbyists are used, ensuring that both the <i>Lobbying of Government Officials Act 2011</i> and related code of conduct are adhered to.¹⁸ 	<ul style="list-style-type: none"> • Addressing any gap in seniority, experience and knowledge between the agency's negotiating team and the counterparty's team (including both technical skills relating to the transaction as well as negotiation skills). • Agreeing to items that are on or off the table. • Developing a walking-away point and a BATNA. • Addressing budget issues such as developing cost benchmarks and setting cost upper limits. • Requiring the counterparty to provide relevant documentation ahead of any meetings so that it can be analysed by agency staff. • Refraining from making any verbal, binding commitments during face-to-face negotiations. • Determining who will own intellectual property and how it will be paid for and used. • Where feasible, preparing for the likely arguments and supporting material that the counterparty will rely on.

¹⁷ BATNA is an agency's Plan B or best course of action if negotiations fail.

¹⁸ The Lobbyists Code of Conduct established under the Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 contains principles that could be applied even where registered lobbyists are not involved in the negotiation process.

This often involves complaints about leases and tenancies, land sales and grants as well as more routine procurement activities.

Before signing any contract, the agency should satisfy itself that the consideration to be paid is consistent with its original budget, estimate or valuation. Where an agency can demonstrate that attempts have been made to secure reasonable value for money, despite the apparent absence of competition, it can more easily counter perceptions of corrupt conduct.

The Commission also recommends that, wherever possible, agencies use their own contract templates or government-endorsed templates (such as those approved or referenced by the Procurement Board) instead of contracts prepared by the counterparty.

In any case, the executed agreement should ensure that the counterparty:

- is bound by the agency's relevant standards of conduct, as set out in documents such as the code of conduct or statement of business ethics
- does not seek to avoid or dilute accountability mechanisms, such as compliance with the *Government Information (Public Access) Act 2009*
- cannot unreasonably resist attempts by the agency to verify performance or obtain relevant information (for example, by including a right-to-audit clause)
- cannot novate, subcontract or reassign functions under the contract without the agency's consent.

As noted in the section above, the risk of corruption can be lowered by segregating the personnel that negotiate the terms of the transaction from those that draft and execute the contract.

The point at which a direct negotiation is finalised can also serve as a final gateway point at which the agency can obtain assurance that probity principles have been adhered to and that the proposed outcome is consistent with the initial approval to enter into direct negotiations.

Monitoring the counterparty

Some direct negotiations relate to discrete, time-limited transactions that do not require the behaviour of the counterparty to be closely monitored (for example, sale of a parcel of land). However, in situations where the counterparty is delivering an ongoing service for, or on behalf of, the agency it is important for the terms of the contract to be monitored and enforced.

This is important because, in situations where the agency cannot realistically award the work to any other party, it may be tempted to relax its normal contract management standards.

Monitoring the work carried out by contractors is always important. However, in cases where a counterparty has little to fear in terms of competition, the need to scrutinise performance is especially important. For some projects, it may be practical to impose a number of stage gates or "go / no-go" decision points that can be used to track progress and prevent the risk of scope creep.

Agencies should also ensure that an apparent lack of competition or bargaining power is not reason to forgo the usual recordkeeping and documentation processes. Any proposed variations to the project should be carefully scrutinised, especially if initiated by the contractor.

Negotiation skills matter

Since most public officials are used to transacting with the private sector as part of an open and arm's length competitive process, they may not have well-developed negotiation skills. Among other things, successful negotiation can involve dealing with assertive counterparties, the need to de-escalate conflict and address tendentious arguments.

Where this is the case, an agency may wish to engage professional negotiators to advise or act on its behalf. However, as noted elsewhere in this publication, agencies should satisfy themselves that any contracted advisers are not affected by conflicts of interest and do not have access to confidential information that is not required for their job.

The Commission also recommends that the fees paid to professional negotiators not be contingent on finalisation of a contract. Negotiators should not have a financial incentive to make a deal that is not in the public interest.

Undertaking post-completion steps

Just like any other aspect of an agency's business, high-risk direct negotiations should be subject to various types of scrutiny, including:

- inclusion in the internal audit program, which could include triggering right-to-audit or open-book clauses in the contract that require the counterparty to produce information and cooperate with auditors
- review by the audit and risk committee

- review as part of routine management reporting, risk management procedures and/or project management office oversight
- financial reconciliation
- post-implementation reviews or lessons-learned processes
- benefits realisation assessment or other methodology for determining benefits over the life of the contract.

Due to the significant benefits conferred by direct negotiations, it is important that counterparties understand that they have something to lose should they engage in any form of misconduct.

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ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment E:** Urban Design Consultative Group Minutes

DISTRIBUTED UNDER SEPARATE COVER

**ITEM No: 4.3**

Date of Panel Assessment:	24 February 2021
Address of Project:	92 King Street Newcastle
Briefing by	Director Governance - David Clarke
Declaration of Conflict of Interest:	Philip Pollard indicated that he had been invited to join two of David Clarke's on-line community briefings of NICRA No conflict arising
Attendees:	David Clarke – CN Director Governance Michelle Bisson – CN Manager RPA

Background Summary

This item was presented to the Panel for its advice.

In December 2020, Council endorsed the 'Stairway to Heaven' (S2H) concept which seeks to open up connections and view lines from Newcastle foreshore and the Hunter Street Mall to Christ Church Cathedral. The 'S2H' concept (*'Le Scale alla Chiesa di Christ'*) was originally proposed in 2006 by a group of prominent Novocastrians who proposed a public space from the Harbour to Cathedral Park, by introducing a grand staircase full of activity and purpose.

City of Newcastle's 59-year-old Mall Car Park is in poor structural condition, and given the significant costs to rectify, it is not proposed to repair or reconstruct the Mall Car Park. A development application (DA) has been lodged seeking approval to demolish the car park.

Adjoining the Mall Car Park is Iris Capital's East End development site. Stages 1 and 2 of the development are approved and in construction, with Stage 1 scheduled for completion in 2021 and Stage 2 in 2022. Iris Capital is currently preparing its plans to seek approval for Stages 3 and 4.

Proposal

A feasibility study, commissioned by CN, is currently underway to:

- explore the potential for the CN owned Mall Car Park site to be redeveloped to deliver the 'S2H concept (*'Le Scale alla Chiesa di Christ'*).
- Enter into without-prejudice discussions with Iris Capital regarding the

potential for its adjoining development to integrate with redevelopment of the Mall Car Park site to deliver the concept.

Key Issues involve:

- Public car parking (including providing 380 public car parking spaces in lieu of the demolition of the Mall Car Park),
- Planning controls (including Iris' existing approved concept plan and height limits) The planform and height of Stages 3 & 4 are critical issues.
- Ensuring an appropriate financial return and arrangements for CN and ratepayers.

HillPDA are undertaking the feasibility study, including Cardno (planning) and SJB (architects). A draft of the feasibility study has been received by CN last week, and it is hoped to present the completed study to elected Council in March 2021, following which it is intended that the UDRP will be consulted.

UDCG Response

The Panel welcomed the briefing and reiterated its support for the potentially outstanding outcomes that can be achieved. It agreed that it was crucial for an excellent design response to be delivered in this prominent, highly valued, heritage area. There is no place for mediocrity in the precinct, and the built outcome in the area must be of an equally high standard to the unique context it will occupy.

The view southwards from the foreshore opposite Market Street along the axis of the transept of the Cathedral is a critical issue as are the sight lines to the cathedral as the viewer moves southwards towards it.

It was also noted that the current approved Concept Plan, which assumes retention of the CN car park, includes a building on its northern side that is somewhat taller than the car park structure and that will obscure the view to the Cathedral to a greater extent than the car park currently does. It is highly desirable to create and enhance views to the Cathedral, and in particular its transept axis. These views should be maintained as one ascends the rise from Scott St. Stages 3 & 4 will need reconsideration in relation to location and height of both components.

There are reservations about any increase in height, although there may be some areas where it could be accommodated without obscuring critical views. The amalgamation of the car-park site should result in considerable efficiencies in layout of parking in the new buildings so that higher FSR can be achieved without needing to increase height. Residential developments should be able to achieve better outlooks, whether to the north, to side streets or towards the cathedral. Any significant height increase is likely to attract opposition from the residents. The Applicant is encouraged to ensure that parking layouts are efficient, and residential apartments have attractive views to public spaces, without needing to increase heights.

It was suggested that the “stairway” need not be a continuous ascent in a north-south direction but could connect a series of rising piazzas by a variety of means that interconnect as they reflect the rising topography. Convenient, accessible routes, including lifts capable of carrying larger groups of people, are an important element. Outlook from such lifts could also provide spectacular views. Likewise, the Market St Axis need not be of a uniform width but should maintain the view to the northern facade of the transept.

As the design is developed in detail some way to celebrate the contribution of the citizens of Newcastle who first envisioned the ‘Stairway’ should be included. If realized as now proposed it is likely to be a focal point in the City for local people and tourists, and it may also be an appropriate location to acknowledge the First Nation’s people who lived in the area.

The Panel was advised that the Diocese had responded positively to the broad proposal and were keen to encourage visitors to the Cathedral.

The Panel noted that with attendances at mainstream churches generally falling due to an ageing demographic, the administrative branches of the major traditional Christian churches have been forced to rationalize asset holdings and address the substantial expense involved in maintaining significant heritage buildings. This has necessitated broadening of the income base.

Summary

The Panel was appreciative of the briefing, and continued to be highly enthused in respect to the possible community benefits that appear achievable via what would have to be, an excellent revised master plan design, that integrates the CN landholding with the broader Stage 3 and Stage 4 East End Project. This is a once in a lifetime opportunity to create a significant public place, and the Panel agrees that any revision to the Concept Plan needs to hold excellence at its core. Sensitive issues, including view corridors, vistas, public spaces, heritage and development height are among the many concerns to be addressed.

ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment F:** Submission from Newcastle Inner City Residents Alliance

DISTRIBUTED UNDER SEPARATE COVER

NICRA

Newcastle Inner City Residents Alliance

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0400 598 450

16 March 2021

Lord Mayor Nelmes and Newcastle City Councillors
City of Newcastle Council
12 Stewart Avenue
Newcastle NSW 2300

RE: PROPOSED MARKET STREET EXTENSION — ‘STAIRWAY TO HEAVEN’

The **Newcastle Inner City Residents Alliance (NICRA)** appreciates the opportunity to respond to the invitation to make a submission directly to City of Newcastle (CN) Councillors about the proposed Market Street extension. NICRA sees potential in creating a new pedestrian link between Newcastle’s existing Market Street and King Street, visually leading to the landmark Christ Church Cathedral on the ridge of The Hill. If planned well, NICRA could support creating a large stairway extending Market Street, near the Hunter Street Mall, through to King Street, opposite Cathedral Park. However, NICRA urges CN to address sensitive community concerns about this proposal, as expressed so far:

Valuing Newcastle’s Heritage

NICRA urges CN to move cautiously over a proposal to create yet another so-called “icon”, i.e., the *Stairway to Heaven*. CN must value, protect and enhance its existing heritage icons.

Newcastle’s former CBD holds an extraordinary legacy of important colonial era and early 20th century commercial and residential buildings. This rich inheritance includes the magnificent Christ Church Cathedral and curtilage, Cathedral Park, and the topography and streets of the Hill, as well as the early colonial street layout of Newcastle’s east end and former CBD. These city “icons” greatly contribute to Newcastle’s identity and character. NICRA is pleased that many of these historic structures are now being restored and creative adaptive re-uses found.

If a large stairway is to be constructed, NICRA urges CN to lead developers, planners and architects towards sensitive, “*low impact*” solutions to any new development in the city’s heritage precinct. The principle of *Low Impact* means that a new building or structure, including a stairway, should harmonise and complement existing heritage structures in its vicinity. This can be achieved through sensitive design; appropriate proportions and scale; in design details, and through the use of matching exterior building materials with those found on nearby heritage structures. Incorporating set-backs of new taller structures behind historic facades, also respects the heritage item.

Any plan to extend Market Street should ensure that existing heritage buildings, the historic character of the area and major public vistas of the Christ Church Cathedral, will be protected and enhanced. This is a key objective in CN’s Heritage Policy document. This can only happen if the existing Local Environment Plan (LEP 2012) planning controls are, and continue to be, respected.



Keep Newcastle ♥ Low - Rise

NICRA

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Maintain current building height limits

NICRA understands that the *Stairway to Heaven* project is only possible if the King Street Car Park is demolished, to free up land to extend Market Street through to King Street. However, the developer Iris Capital also holds land in the pathway of a Market Street extension.

NICRA is adamant that any redevelopment of all or part of the King Street Car Park site, must not permit an increase in the approved maximum building heights on the *Newcastle East End - Stage Three and Stage Four* sites. The developer currently has approval for RL 30 height limits (approximately 8 storeys) in the immediate vicinity of the Market Street extension and a taller apartment tower (directly opposite the Newcastle Club) has approval for RL 40 (approximately 12 storeys).

The maximum building height limits across all the *Newcastle East End* sites were agreed to after many Novocastrians fought a campaign to overcome excessive property developer influence in 2014 and 2015. The current maximum height limits protect public vistas of the Christ Church Cathedral and the Hill precinct when viewed from the southern harbour foreshore and the Hunter Street Mall.

CN must hold firm on the hard-fought current building height limits over the *Newcastle East End* sites. Future height limits for buildings in the vicinity of the proposed *Stairway to Heaven* must adhere to earlier commitments, which were endorsed by the NSW Minister for Planning, Rob Stokes, UrbanGrowth NSW, Lord Mayor Nelmes and CN. When Iris Capital acquired the *Newcastle East End* project, it also agreed to adhere to those height limits. There must be no “swaps” or “deals” for increased site heights.

Public Car Park

NICRA believes a new inner-city car park with a capacity of approximately 400 car spaces is essential to replace the CN’s King Street Car Park. Constructing another car park must be considered core to any plan to extend Market Street or to re-develop the King Street Car Park site.

Access

If a large stairway is to be added to this precinct it must address the needs of all Novocastrians, including those with mobility issues. Consideration should be given to incorporating all-weather outdoor escalators or elevators to meet these requirements.

What if... the bargaining with Iris Capital fails to provide for the basic requirements that NICRA has outlined here. CN should consider walking away from negotiations with Iris Capital and fund a major repair of the existing King Street Car Park.

Regards,

Brian Ladd

Spokesperson, Newcastle Inner City Residents Alliance – NICRA

Keep Newcastle ♥ Low – Rise

ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 23/03/21 – STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

ITEM-22 **Attachment G:** Submission from Iris Capital

DISTRIBUTED UNDER SEPARATE COVER



9 March 2021

David Clarke
Director Governance
City of Newcastle
12 Stewart Avenue
Newcastle NSW 2300

Without Prejudice

Dear David

RE: Future uses of King Street, Council Car Park site

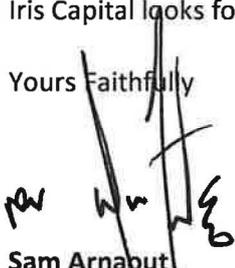
Following recent discussions between City of Newcastle (CN) and Iris Capital in the matter of the above and construction of a "Stairway to Heaven" linking Lang and King Streets, Iris Capital confirms its strong support to continue negotiations to develop a scheme and deliver an outcome to the benefit of all stakeholders.

Iris Capital is committed to delivering places that exhibit design excellence as can be seen in our recently completed East End stage 1 project that retained key heritage elements giving those buildings an immediate link to the history of the City. This dedication to design excellence is repeated in our East End stage 2 development which has retained heritage elements of the Lyrique, Royal Exchange and Soul Pattinson buildings – Iris Capital acknowledges that the stair connection to the Cathedral is a once only landmark opportunity to deliver a special piece of public infrastructure to Newcastle that is currently missing which will endure as part of the City forever.

Whilst we note there is still much to progress to make this vision feasible, Iris Capital at this stage of negotiations remain committed and willing to work with CN to make the stairway become a reality. We see the next steps to develop and enter into a Heads of Agreement, proceeding then to direct negotiations between Iris Capital and CN.

Iris Capital looks forward to continuing to work with CN to progress this exciting opportunity.

Yours Faithfully



Sam Arnaput
CEO, Iris Capital

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CITY OF NEWCASTLE

Excerpt of Minutes of the Ordinary Council Meeting held in the Council Chambers, Level 1, City Administration Centre, 12 Stewart Avenue, Newcastle West on Tuesday 23 March 2021 at 6.03pm.

PRESENT

The Lord Mayor (Councillor N Nelmes), Councillors M Byrne, J Church, D Clausen, C Duncan, J Dunn (*arrived 6.08pm*), K Elliott (*retired 8.38pm*), B Luke, J Mackenzie, A Rufo, E White and P Winney-Baartz.

IN ATTENDANCE

J Bath (Chief Executive Officer), D Clarke (Director Governance), B Smith (Director Strategy and Engagement), F Leatham (Director People and Culture), K Liddell (Director Infrastructure and Property), A Jones (Director City Wide Services), S Moore (Acting Chief Financial Officer), E Kolatchew (Manager Legal), M Bisson (Manager Regulatory, Planning and Assessment), M Murray (Chief of Staff), E Dowswell (Media Officer), A Knowles (Councillor Services/Minutes), K Sullivan (Councillor Services/Meeting Support) and G Axelsson (Information Technology Support).

APOLOGIES

Nil.

ITEM-22 CCL 23/03/21 - STAIRWAY TO HEAVEN FEASIBILITY ANALYSIS

MOTION

Moved by Cr Duncan, seconded by Cr Luke

That Council:

- 1 Authorises the Chief Executive Officer (CEO) to enter into a Heads of Agreement (HoA) with Iris Capital to reach in-principle agreement on the terms and conditions under which the parties might progress the Stairway to Heaven concept to create a landmark public space to enhance the visual and physical connections to Christ Church Cathedral (Cathedral), through an integrated approach incorporating City of Newcastle (CN) owned land and Iris Capital owned land as outlined at **Attachment A**.
- 2 Endorses entering into exclusive discussions with Iris Capital to develop the HoA in accordance with the Independent Commission Against Corruption (ICAC) Guidelines as outlined at **Attachment D**, and considers this report as providing public notice of CN's intention to enter into exclusive discussions with Iris Capital.

AMENDMENT

Moved by Cr Elliott, seconded by Cr Church

That the Heads of Agreement be brought back to Council before being ratified.

Defeated

The motion moved by Councillor Duncan, seconded by Councillor Luke was put to the meeting.

For the Motion:

Lord Mayor, Cr Nelmes and Councillors Byrne, Church, Clausen, Duncan, Dunn, Luke, Mackenzie, Rufo, White, and Winney-Baartz.

Against the Motion:

Councillor Elliott.

Carried