

GYDE

Clause 4.6 Variation Request

Clause 16 of State Environmental Planning Policy (Housing)
2021

51-67 Reynolds Street, Neutral Bay

Submitted to North Sydney Council
on behalf of A Reynolds St Holdings Pty Ltd

20 November 2025

Acknowledgment of Country



Towards Harmony by Aboriginal Artist Adam Laws

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Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

This report was prepared by:

Approver: Tina Christy, Director
Author: Richard Kinninmont, Senior Associate & Orla McCafferty, Project Planner
Project: Clause 16 of State Environmental Planning Policy (Housing) 2021
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This report was reviewed by: Tina Christy, Director

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Glossary and Abbreviations

Term/Acronym	Description
Council	North Sydney Council
DA	Development Application
DCP	Development Control Plan
EP&A Act 1979	<i>Environmental Planning and Assessment Act 1979</i>
The Regulations	Environmental Planning and Assessment Regulations 2021
SEE	Statement of Environmental Effects
FSR	Floor Space Ratio
GFA	Gross Floor Area
LEP	Local Environmental Plan
LGA	Local Government Area
SEPP	State Environmental Planning Policy
Housing SEPP	<i>State Environmental Planning Policy (Housing) 2021</i>
LMR	<i>Low and mid-rise housing</i>
IAH	Infill Affordable Housing
HOB	Height of Building
STRA	Short Term Rental Accommodation
RL	Relative Level
AHD	Australian Height Datum
VSR	View Sharing Report

1. Introduction

This is a written request prepared in accordance with Clause 4.6 of the *North Sydney Local Environmental Plan 2013* (NSLEP) to justify a variation to the height of building development standard required under Clause 16 of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) in a Development Application (DA) submitted to North Sydney Council for a new residential flat building with in fill affordable housing at Nos 51-67 Reynolds Street, Neutral Bay (the **site**).

This request should be read in conjunction with the documents submitted in support of the DA including the Statement of Environmental Effects (SEE) prepared by Gyde and the architectural drawings prepared by PBD Architects. These documents form part of the request.

The proposed works (the **proposal**) involves the following:

- Demolition of existing structures and tree removal.
- Construction of an eight (8) storey residential flat building consisting of:
 - Thirty-two (32) apartments, including five (5) allocated as affordable housing
 - Two (2) levels of basement parking providing a total of fifty-one (51) car parking spaces and thirty-six (36) bicycle parking spaces
 - Rooftop communal open space on level 5 and level 7
 - Associated civil works and landscaping.

The proposed development is made pursuant to the provisions of the Housing SEPP. The standard that is proposed to be varied is the maximum height of building standard under clause 16(3) of the Housing SEPP.

The maximum height for the proposed development is a combination of the bonus permitted under clause 16(3), Chapter 2 Affordable Housing development for in-fill affordable housing and the base-rate provisions allowed under Chapter 6 (Low and mid-rise Housing) of the Housing SEPP. These controls provide for development standards that allow for higher density development in key locations that are located within walking distance of specified town centres or public entrances to railway, metro or light rail stations.

The provisions in Chapter 6 allow for a building height of up to 22m and a floor space ratio (FSR) of 2.2:1. The bonus height incentives under clause 16(3) allow up to 30% additional building height and floor space for development that incorporates the minimum required floor space for affordable housing. This results in the maximum height allowable being 28.6m.

The proposal seeks consent for a building with a height of up to 29.857m measured from existing ground level, resulting in a maximum exceedance of 1.257m or 4.39% of the development standard.

The departure from the standard is illustrated in **Section 3** (Extent of variation) of this Request. Importantly, the encroaching element when viewed from the skyline is indiscernible in appearance, does not result in any additional density and is thoughtfully integrated into the overall design of the upper levels of the building. Notwithstanding, the variable non-compliance is as follows:

- Lift overrun (RL 97,800) – 1.257 metres variation or 4.4%
- Parapet (RL 96,450) – 0.45 metres variation or 1.6%
- Roof (RL 96,300) – 0.28 metres variation or 0.98%

The proposed development provides a FSR of 2.86:1 and complies with the requirements of clause 16(3) of the Housing SEPP.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances. Some key points of this Clause 4.6 request are as follows:

- The proposed development is consistent with the aims, principles and underlying purpose and objectives of the Housing SEPP relevant to the height standard, notwithstanding the variation.

- The proposed variation is primarily limited to a lift overrun structure which primarily contains a lift and stairs therefore does not result in any habitable floor space above the maximum building height standard.
- The proposed variation to the standard relates to the provision of communal open space (CoS) located on the roof of the buildings and providing for equitable access (including disabled persons) to this area of the building. The provision of communal open space seeks to achieve high levels of amenity, and that is accessible to all residents of the building, is a better planning outcome than if compliance were to be achieved and this area to be removed/deleted.
- The variation of the height development standard maintains a scale, height and form of development that remains compatible with surrounding developments and consistent with statutory planning initiatives and the underpinning strategic framework that supports the Housing SEPP provisions. Much of the area that exceeds the development standard is not discernible as viewed from Reynolds Street, Gerard Lane or the public domain areas (from both the northern and southern side footpath and verge areas). The proposed elements that vary the height standard do not contribute to distinguishable bulk, scale or density of the building.
- The view analysis, shadow diagrams, and other technical studies appended to the DA have considered the proposed development with regard for the overall bulk, height, and massing of the proposed development. An acceptable design outcome has been demonstrated notwithstanding the proposed height variation, and in relation to all other aspects of the proposed development. Accordingly, the objective achieves objective 1.3 (g) of the EP&A Act, “to promote good design and amenity in the built environment”.
- The proposal will maximise the number of residential dwellings possible in response to the current housing crisis with little to no unacceptable, or adverse environmental impacts. Specifically, the areas above the height plane do not cause adverse amenity impacts.
- The proposed development and variation are consistent with the desired character of the locality. The new Infill Affordable Housing incentive provisions & Low to Mid Rise housing reforms and bonus (GFA & height allowances) adopted in the Housing SEPP bonus must be factored into any consideration of what constitutes the ‘desired future character’ of an area. These provisions enable up to a 30% increase in available height and floor space and will enable permissible development equivalent to 28.6m in height or approximately 8-9 storeys in scale within the R3 – Medium Density Residential Zone. The surrounding residential zones could also conceivably realise 22m in height or greater. Despite the variation proposed it is considered that the proposed development (inclusive of variation) is consistent with the future character envisaged under these planning reforms for this locality.
- The proposed variation enables the orderly and economic use and development of land through the redevelopment of an underutilised sites for vital housing in accordance with the low and mid-rise housing development program and Infill affordable housing incentive provisions of the Housing SEPP established by the NSW Government.
- Compliance with the development standard would result in a suboptimal and worse outcome
- There are Sufficient Environmental Planning Grounds to support the proposed variation.

This request has been prepared having regard to the Department of Planning and Environment’s Guidelines to Varying Development Standards (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

A detailed analysis and arguments in favour of the requisite preconditions relevant to Clause 4.6 of the NSLEP 2013 are contained within this written submission. In summary, the requirement to comply with the HOB development standard is unreasonable and unnecessary in the circumstances because on a first principles planning basis the underlying objectives are met.

Further, this written submission demonstrates that the relevant aims and principles of the Housing SEPP that provides guidance in relation to the intent of the development standard have been satisfactorily met, despite the minor noncompliance.

Further, the proposal is consistent with the objectives of the zone for the site and the development standard itself and is, therefore, in the public interest.

It is therefore considered appropriate in this circumstance to vary the development standard.

2. Standard to be Varied

The standard that is to be varied relates to the incentive (bonus) height allowable under Clause 16(3) of the Housing SEPP. This bonus height provisions are to be applied on top of the prescribed non-discretionary height standard under Clause 180, in Chapter 6 (*Low and mid-rise housing*) of the Housing SEPP, which encourages both additional housing density and affordable housing in these key areas.

Clause 180 in Chapter 6 of the Housing SEPP establishes a non-discretionary development standard under section 4.15(2) of the *EP & A Act 1979*, and sets a maximum building height of 22m and FSR of 2.2:1 for the subject site, which is located within the *low and mid rise housing inner area*, as follows:

180 Non-discretionary development standards—residential flat buildings and shop top housing in Zone R3 or R4

This section applies to development for the purposes of residential flat buildings or shop top housing on land in a low and mid rise housing area in Zone R3 Medium Density Residential or R4 High Density Residential.

The following non-discretionary development standards apply in relation to development on land in a low and mid rise housing inner area—

- a) a maximum floor space ratio of 2.2:1,*
- b) for residential flat buildings—a maximum building height of 22m,*
- c) for a building containing shop top housing—a maximum building height of 24m.*

Pursuant to a 2025 Housing SEPP Amendment, infill affordable housing bonus provisions do apply to Low and Mid-Rise (LMR) housing areas in NSW (*inserted -12A Limitation on additional floor space ratio*). In effect the bonus provisions can be applied on top of the non-discretionary standards outlined in the LMR sections of the Housing SEPP, encouraging affordable housing in these key areas.

The proposed development seeks to utilise the in-fill affordable housing provisions in Chapter 2, Part 2, Division 1 of the Housing SEPP which provide opportunity for up to 30% additional building height and FSR for developments that incorporate at least 10% affordable housing. Clause 16 in Chapter 2 of the Housing SEPP provides the following:

16 Affordable housing requirements for additional floor space ratio

- 1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).
- 2) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$

- 3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

Example—

Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.

- 4) This section does not apply to development on land for which there is no maximum permissible floor space ratio.

Based on the above, the maximum permissible FSR bonus for the development is 30% additional FSR on top of the maximum permissible FSR for development that includes residential development. The maximum permissible FSR for a building on the subject site is 2.2:1 and with an additional 30% FSR, the maximum permissible FSR on the site is 2.86:1. The proposal seeks consent for a development with an FSR of 2.86:1 and therefore relies on the additional floor space provided by clause 16.

In accordance with clause 16(3) the maximum building height for a building that is a residential flat building is the maximum permissible building height for the development on the land plus an additional building height of up to 30%. Therefore, an additional 30% on top of the maximum permissible building height of 22m results in an overall maximum permissible building height of 28.6m. The proposal seeks consent for a building with a height of up to 29.857m measured from existing ground level, resulting in an exceedance of 1.257m or 4.4% of the development standard.

Pursuant to the Court of Appeal decision of Australian Unity Funds Management Ltd v Boston Nepean Pty Ltd & Penrith Council [2023] NSWLEC 49 (AUF) the incentive (bonus) standard was held to be a development standard in its own right, capable of being varied subject to a cl 4.6 request. In compliance with the decision in AUF, as the DA satisfies the eligibility criteria at cl 16 of the Housing SEPP, this written request seeks to vary the development standard at 16(3).

The development standard to be varied is not excluded from the operation of Clause 4.6 of the North Sydney LEP and therefore, can be varied under Clause 4.6.

It is noted that Clause 175(2) of the Housing SEPP is considered to represent a development standard that introduces a storey control (6 storeys or fewer) in relation to residential flat buildings in a low- and mid-rise housing inner area in Zone R3 Medium Density zone with a building height of up to 22 metres. Importantly this storey control is specifically for buildings under 22 metres and do not apply to buildings that exceed this height limitation if relying on the additional height offered under the housing incentive in accordance with clause 16(3).

3. Extent of Variation

The Housing SEPP does not define building height and consequently the standard Instrument (SI) definition can be relied upon. The SI definition aligns with the building height definition provided in the NSLEP 2013. The definition is as follows:

Building height (or height of building) means –

(a) *In relation to the height of 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.

In accordance with this definition for determining overall height, the proposed development has a maximum height of building (HOB) of RL 97,800. As stated in the introduction this equates to a maximum variation of 1.257 metres or a 4.4% (lift overrun) beyond the numerical height standard.

Importantly, the encroaching element when viewed from the skyline is indiscernible in appearance and is thoughtfully integrated into the overall design of the upper levels of the building. Notwithstanding, the variable non-compliance is as follows:

- Lift overrun (RL 97,800) – 1.257 metres variation or 4.4%
- Parapet (RL 96,450) – 0.45 metres variation or 1.6%
- Roof (RL 96,300) – 0.28 metres variation or 0.98%

The below series of figures illustrates the extent of encroachment based on height measured from ground level (existing) in accordance with the SI definition.

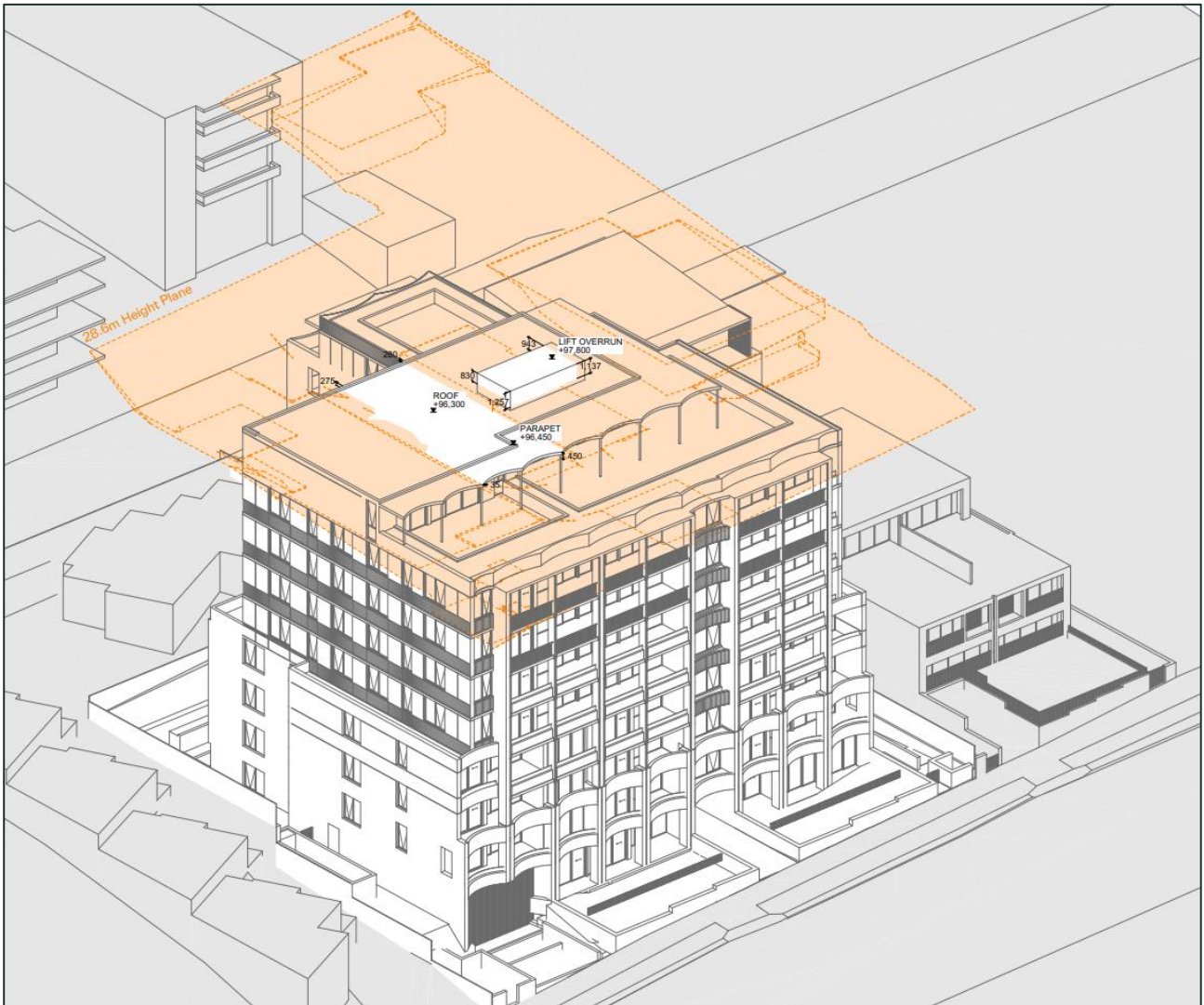


Figure 1 Height Plane and Building Height Details (Source: PBD Architects)

This extent of variation is predominately attributed to:

- The provision of a communal roof top open space at level 7 and associated lift overrun and parapet height have been designed to enable equitable access for all residents to the roof. Communal open space is required at a rate of 25% of the site area. To achieve the 25%, the design provides open space at the roof level in addition to the secondary space that is provided at Level 5. This arrangement of communal open space is encouraged in the Apartment Design Guidelines (ADG) where it achieves higher levels of amenity for residents, and where it is more accessible to all residents of the building and is a better planning outcome than if compliance were to be achieved and this area to be removed/deleted.
- Essential plant infrastructure is provided at roof level along with the lift overrun. Given the location of the communal roof top open space, the plant infrastructure and lift overrun are screened as appropriate. This infrastructure, along with the associated screening, results in a slight exceedance to the maximum permissible building height.

No habitable areas are located above the 28.6m height limit, and the variation only relates to essential plant infrastructure, lift overrun and a small part of the roof/parapet at roof level located in the centre of the site.

4. Unreasonable or Unnecessary

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

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*.

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council [2007] NSWLEC 827, Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22] and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]*) and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]*).

Nonetheless, we have considered each of the ways as follows.

4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The proposed development relies on Clause 180 in Chapter 6 of the Housing SEPP that establishes a maximum building height of 22 metres and a FSR of 2.2:1 for sites located within the *low and mid rise housing inner area* in conjunction with the in-fill affordable housing provisions in Chapter 2, Part 2, Division 1 of the Housing SEPP which provide opportunity for up to 30% additional building height and FSR for developments that incorporate at least 10% affordable housing.

Clause 16(3) sets the maximum permissible floor space ratio of 2.86:1 and building height of 28.6metres for development on the site where development includes affordable housing.

There are no specific objectives identified for this development standard.


In circumstances where the objectives of development standards are absent from an Environmental Planning Instrument (EPI) or are unclear or allow more than one interpretation; the underlying objectives of a particular standard can be assumed on a first principles planning basis. In some circumstances, the aims or principles of a planning policies can provide guidance in relation to the intent of the development standards and can be adopted as fundamental tenets used to support the attainment of the standards. On this basis, this written objection will consider the relevant principles, aims and objectives relevant to the standard.

SEPP (Housing) 2021, Chapter 1, Section 3 (Principles of SEPP)

Chapter 1, Section 3 of the Housing SEPP identifies overarching principles relevant to all development types permitted under the Policy and are summarised in the below table.

Table 1 Consistency with SEPP (Housing) 2021 Principles

Principles	Demonstration of Principle
<p>SEPP (Housing) 2021, Chapter 1, Section 3 (Infill Affordable housing)</p>	
<p>3. The principles are as follows –</p>	
<p>(a) enabling the development of diverse housing types, including purpose-built rental housing,</p>	<p>The proposal will include a mix of apartment types, with a variety of physical layouts, sizes and characteristics offering convenience and a vibrant blend of living.</p> <p>Five (5) affordable dwellings are provided that can accommodate essential workers and vulnerable members of the community. The proposal is therefore consistent with this principle.</p> <p>The proposed development will also meet the requirements of providing accessible and liveable apartments that will meet the needs of more vulnerable members of the community, including seniors and people with a disability.</p>
<p>(b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability.</p>	<p>Existing development at the site does not contribute towards the provision of diverse, affordable housing options in the local area. The proposed Affordable Housing Component is proportionate to the site’s development capacity in accordance with the required provision rate under the Housing SEPP</p> <p>This principle is considered to have been satisfied as the proposed development provides 15% of the overall unit mix as affordable Housing in accordance with seeking the maximum 30% allowable height and FSR bonus.</p> <p>The proposed development provides 32 units. Consequently, the development is required to provide 5 Affordable housing units and a floor space of 725.1sqm dedicated to the provision of these units.</p> <p>The provision of these affordable units will meet the needs of very low-, low- and moderate-income households.</p>
<p>(c) ensuring new housing development provides residents with a reasonable level of amenity.</p>	<p>The proposed development will also meet the requirements of providing accessible and liveable apartments that will meet the needs of more vulnerable members of the community, including seniors and people with a disability.</p> <p>The development facilitates a high quality environmentally, socially, and economically sustainable development by providing vital, well-designed contemporary apartments in accordance with the NSW Apartment Design Guidelines in an appropriate and highly accessible location. The design responds to the local context and the design principles in Schedule 9 of the Housing SEPP (as set out in the Design Report). The proposed units exhibit generous balcony sizes, living areas and the development provides good landscape design including generous setbacks with deep soil planting that meets the objectives set out within the ADG.</p> <p>The proposal is in proximity to public parks and recreational opportunities that will offer exceptional amenity. The location of the site will positively encourage sustainable modes of transport and increase employment opportunities locally.</p>

Principles	Demonstration of Principle
	<p>There will be no unreasonable adverse impacts on the residential amenity of neighbouring properties because of the height non-compliance. As stated above, the proposed development will not give rise to additional adverse impacts on neighbouring development above what could be anticipated for a compliant development under the provisions of the Housing SEPP.</p> <p>The height variation does not result in any additional adverse visual or acoustic privacy impacts on neighbouring properties given that the proposed development and non-compliant aspects have been carefully designed to relate and respond to adjoining development.</p>
<p>(d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,</p>	<p>The proposed development meets the locational requirements identified in Chapter 2 and 6 of the State Environmental Planning Policy (Housing) 2021. The site is located within the low and mid-rise housing inner area, which is defined in clause 163 as:</p> <p><i>“land within 400m walking distance of—</i></p> <p><i>land identified as “Town Centre” on the Town Centres Map, or</i></p> <p><i>a public entrance to a railway, metro or light rail station listed in Schedule 11,</i></p> <p><i>or</i></p> <p><i>for a light rail station listed in Schedule 11 with no public entrance —a platform of the light rail station”.</i></p> <p>The site is located approximately 300m walking distance from the Cremorne Town Centre as illustrated in the below figure.</p>  <p>Figure 2 Walking Distance to Cremorne town centre (Source: NSW Planning Portal Spatial Viewer)</p> <p>The site is located within a Low and Mid-Rise Housing designated “inner area” and these areas have been selected by NSW planning due to their availability to a wide range of frequently needed goods and services, frequent public transport, and infrastructure. The technical studies appended to the DA have considered the requirements of Chapter 2 and 6 of the Housing SEPP and determined that the site will make good use of existing and planned infrastructure and services. The location of the proposed development will be suitable having regard to the following criteria:</p> <ul style="list-style-type: none"> • Access to goods and services – supermarkets and a wide range of shops and services are available to meet daily needs.

Principles	Demonstration of Principle
	<ul style="list-style-type: none"> • Access to public transport service – how often trains, light rail, metro and buses service the area. • Travel times on public transport – time it takes to travel to a major centre. • Critical infrastructure capacity – water, sewer, roads and public transport. • Hazard and constraints – such as flood, bushfire and emergency evacuation <p>Promoting more housing within this area aligns with the Housing Accord's commitment to delivering well-located housing and will fill the gap between freestanding homes and high-rise apartment buildings, so that everyone can have a choice in the type of homes they live in.</p>
<p>(e) minimising adverse climate and environmental impacts of new housing development,</p>	<p>The subject site does not fall within the excluded land under the Low and Mid-Rise Housing reforms.</p> <p>The proposed development will meet the aims of State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP) and the DA will be supported by a BASIX certificate and report. The documentation will ensure the following aims:</p> <ul style="list-style-type: none"> • to encourage the design and delivery of sustainable buildings, • to ensure consistent assessment of the sustainability of buildings, • to record accurate data about the sustainability of buildings, to enable improvements to be monitored, • to monitor the embodied emissions of materials used in construction of buildings, • to minimise the consumption of energy, • to reduce greenhouse gas emissions, • to minimise the consumption of mains-supplied potable water, • to ensure good thermal performance of buildings. <p>The proposed developments will also integrate passive design and water-saving measures, while carefully considering waste management.</p> <p>The design has responded to the requirements of the ADG and provide compliant solar access and natural ventilation. Deep soil planting will be provided to the development.</p> <p>These energy efficiency measures will reduce emissions and costs, sustainable materials prevent harm to health and ecosystems, and water conservation protects scarce resources.</p> <p>Additionally, the proposed development will incorporate green roof areas, shading, and local vegetation that will improve thermal performance. These measures align with addressing and adapting to adverse climate effects.</p>
<p>(f) reinforcing the importance of designing housing in a way that reflects and enhances its locality.</p>	<p>The proposal provides a high-quality architecturally built form consistent with the requirements of Chapter 4, SEPP (Housing) 2021, the Apartment Design Guidelines and Councils planning controls.</p> <p>The scale and bulk of the building is complementary to neighbouring development, and the resulting envelope is a product of the new controls that now apply to sites located in well-connected low and mid-rise housing areas. The proposal presents well-articulated façades to Reynolds Street and Gerard Lane and reinforces the established</p>

Principles	Demonstration of Principle
	<p>and desired character of the locality. The overall development is also softened by landscaping to provide screening and visual relief at upper levels.</p> <p>There will be no material or adverse visual impact from adjoining properties or the public domain. As stated above, the resulting envelope is a product of the new controls that now apply to the site and surrounding context.</p>
(g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use.	<p>The proposed development will provide a mix of private property apartments available for immediate market sale along with affordable housing for a minimum period of 15 years.</p> <p>The type of tenancy or investment status will be unknown, however it is likely that many of the apartments may be made available to support short-term rental accommodation (STRA) or home sharing and will play a role in the sharing economy, providing rental income and investment income for residents, boosting local economies through visitor spending in areas less traditional to tourism, and promoting flexible use of underutilized property.</p> <p>Negative social impacts like noise, anti-social behaviour, and loss of community feelings are generally managed by a body corporate structure.</p>
(h) mitigating the loss of existing affordable rental housing.	<p>The proposed development replaces three dwellings and provides 5 affordable housing apartments.</p>

SEPP (Housing) 2021, Part 2, Division 1 Objective-Infill Affordable housing

The objective of the SEPP (Housing) 2021 (Division) for In-fill affordable housing relating to Clause 16(3) represents an underlying objective of this clause and is summarised in the below table.

Table 2 Consistency with Objectives of clause 16(3)

Objective	Demonstration
Clause 16(3)- Infill Affordable Housing	
4. The objectives of this Division are as follows –	
The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.	<p>The objective of this clause is considered to have been satisfied as the proposed development provides 15% of the overall unit mix as affordable Housing in accordance with seeking the maximum 30% allowable height and FSR bonus.</p> <p>The proposed development provides 32 units. Consequently, the development is required to provide 5 Affordable housing units and a Floor space of 725.1sqm dedicated to the provision of these units.</p> <p>The overall development provides 5 Affordable housing units which includes one (1) two-bed apartment and four (4) three-bed apartments at level 1.</p> <p>The Affordable housing units provide a floor space of 725.1sqm and complies with this requirement. The provision of these affordable units will meet the needs of very low, low and moderate income households.</p>

SEPP (Housing) 2021, Chapter 6 (Low- and mid-rise housing)

Chapter 6, of the Housing SEPP identifies the following aim relevant to the development types permitted under this section of the Policy.

Table 2 Consistency with Chapter 6 Aims (Low and mid rise housing)

Objective	Demonstration
Chapter 6 Low and mid-rise housing	
5. The aim of this Chapter are as follows –	
<p><i>“Encourage the development of low and mid-rise housing in areas that are well located with regard to goods, services and public transport.”</i></p>	<p>The proposal is compliant with this aim, as the site is located approximately 300m walking distance from Cremorne town centre. This centre provides regular bus network to the northern suburbs but in particular North Sydney, Chatswood and Hornsby, which are large centres with access to shops and medical services. Neary bus services also provide connectivity to Sydney CBD via Wynyard.</p> <p>As such, the proposal is considered to meet the aims and objectives of both Infill Affordable Housing and Low and mid-rise housing sections of the SEPP (Housing) 2021, notwithstanding the variation from the development standard.</p>

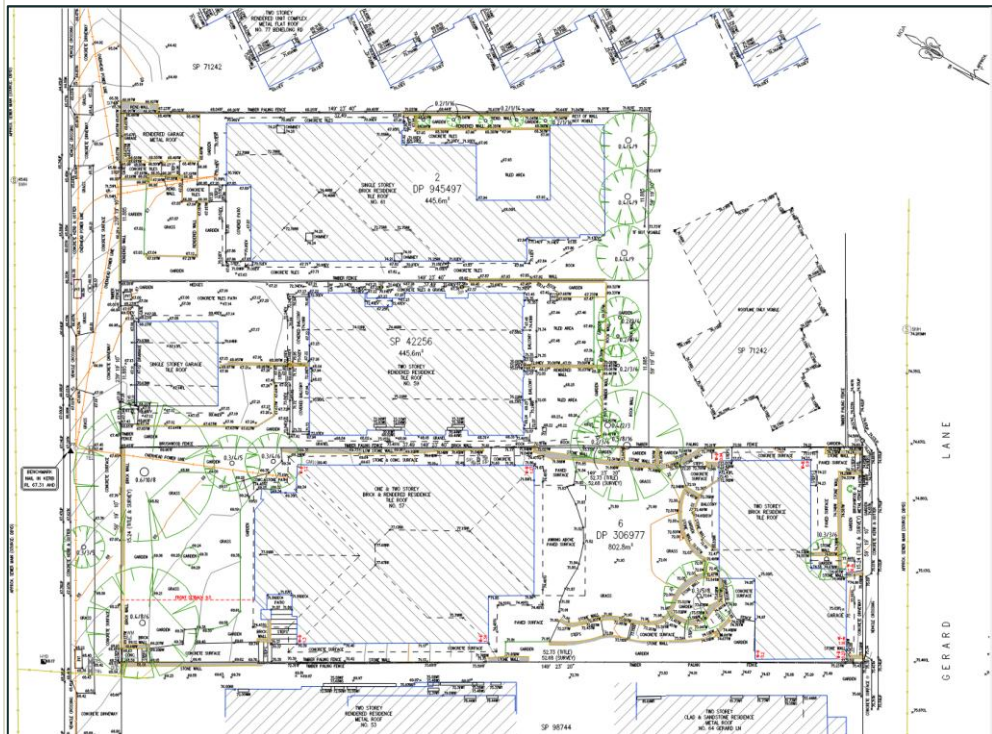
NSLEP 2013 Clause 4.3 (height)

It is well known that these provisions prevail over an equivalent standard set out in a local environmental plan (LEP) or development control plan (DCP) that is more onerous. Notwithstanding, the relevant planning objectives of height is considered below on a first principles planning basis in relation to the suitability of the proposed development and its context under the LEP.

Clause 4.3 of the NSLEP 2013 identifies the following objectives in relation to height.

Table 2 Consistency with objectives (Clause 4.3)

Objective	Demonstration
Clause 4.3 of NSLEP 2013 (height)	
6. The objectives are as follows –	
<p>(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,</p>	<p>The topography of the existing site slopes moderately to the north and northwest. The overall difference in levels across the site is approximately 8.47 metres between the street frontages of Reynolds Street (RL 67.10 m) and Gerard Lane (RL 75.67 m), based the survey drawing prepared by TSS.</p>



Site Survey

The proposed development responds to the existing topography of the site with the basement parking levels located below natural ground level and the levels above generally following the natural sloping topography of the street block and subject site.

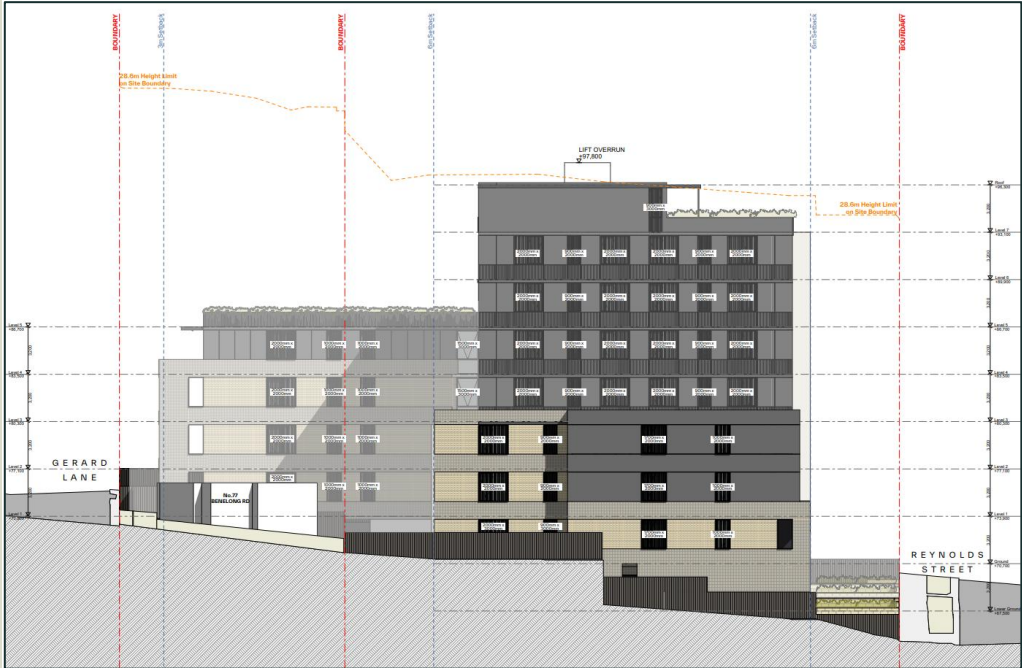
The ground plane relates well to the existing levels of Reynolds Street and has been designed to ensure a visual and physical sense of address to Reynolds Street. The entry doors, access paths and expression of the Reynolds Street façade have been carefully designed to relate to the contours of the site.

In terms of the building profile, the design comprises a distinct base composition in form and materiality that reflects adjoining two (2) to three (3) storey-built forms.

The greatest height at the southeastern portion of the site reflects the slope across the site. Overall, from the ground level to the roof level, the design of the site positively reflects and responds to the natural slope of the site. The below elevational extracts from the Architectural plans prepared by PBD illustrate how the design has responded to meet the requirements of the objective.

The 3-D modelling extract of the building form illustrates the careful design of the ground plane and upper levels to ensure that the overall design relates to the landform surrounding the site and demonstrates compliance with this objective.

Objective	Demonstration
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Elevational extracts from the Architectural plans prepared by PBD illustrating how the design responds to topography.



Elevational extracts from the Architectural plans prepared by PBD illustrating how the design responds to topography.

b) to promote the retention and, if appropriate,

The proposed development has been designed to minimise potential visual impacts and view loss impacts from the overall height and built form of the building, and this has been considered throughout the concept phases of the project and realised with the current design.

Objective	Demonstration
sharing of existing views,	<p>A View Sharing Report (VSR) has been prepared addressing the four (4) step process required under Tenacity and accompanies the SEE. The VSR should be read in conjunction with this Clause 4.6 submission and is attached as Annexure 1 to this document. Selected residential affected development are considered in this submission.</p> <p>Further to this report the following assessment has been undertaken with reference to relevant Court Authorities to view sharing impact.</p> <p>The proposed increase in density and building height across the sites will result in a physical change to the outlook from several properties primarily located to the south of the site across Gerard Lane, Cremorne. In relation to proximity, the site sits to the north of the Military Road corridor which is a key ridgeline providing 360-degree district views as you go above the ground floor levels. Many of the properties that are located between this ridgeline and the subject site enjoy views at higher levels. The proposed development will primarily enjoy district views out to the northwest and northeast toward Chatswood, Northbridge, Willoughby and Seaforth. Northbridge Golf course and water glimpses of Willoughby Bay and Wreck Bay are characteristic and notable features in this view composition enjoyed by many properties. Some views toward Mosman may also be enjoyed to the east.</p> <p>Surrounding properties will enjoy many of these views, however the extent of view obtained is dependent on the heights and levels of existing development. There are several properties located in Gerard Street and Gerard Lane located directly to the south of the subject site that are occupied by three (3) to four (4) storey residential flat building that overlook the subject site and currently would benefit from the views described above from mid to upper levels.</p> <p>The assessment of view loss experienced by these residents at these upper levels is likely to be assessed as moderate to devastating, it being noted that district views and water views of Willoughby Bay would be lost. Long range views of the abovementioned view compositions relevant to more distant suburbs and ridge lines may also be interrupted from many of these properties.</p> <p>The variation itself will only obstruct sky views and will not result any material impacts beyond a complying development.</p> <p>In this regard, the use of Tenacity for assessment should be considered in the context of <i>Arnott v City of Sydney (2015) NSWLEC 1052 (Arnott)</i>.</p> <p>Arnott cites the limited utility in applying a Tenacity assessment to multiple individual units in a residential flat building. For example, where a residential flat building adjoins or over-looks a subject site, multiple residences may have access to a similar view composition and as such may be exposed to virtually the same level of view affectation. In this regard Arnott suggests that there may be limited potential to be able to more skilfully re-mass the proposed development in such a way as to significantly improve view sharing outcomes, whilst allowing for the reasonable development of the site. In other words, reducing view sharing impacts must be balanced with allowing for the reasonable development potential on the subject site.</p> <p>In <i>Goyer v Pengilly [2015] NSWLEC 54</i>, the Court considered whether view loss was given proper consideration in a Class 4 proceedings. Consideration was given to a provision of a development control plan which provided that <i>'development shall provide for the reasonable sharing of views'</i> (our emphasis in bold). The Council's</p>

Objective	Demonstration
	<p>assessment report concluded that the view impact would be ‘devastating’. Nevertheless, the Council considered that the view loss did not warrant a refusal because the proposed development was reasonable, generally compliant with the development controls and consistent with the objectives of the development control plan.</p> <p>What is relevant in this decision is that the Court did not accept the neighbour’s argument that the development control which required a ‘reasonable sharing of views’ meant that a proposed development must permit the sharing of views where those views are pre-existing and cannot remove an existing view altogether. The Court held that the word ‘reasonable’ in the control imported the potential that in some circumstances, a proposed development that wholly impedes an existing view may still be reasonable in all the circumstances.</p> <p>The Court also rejected the argument that as the view impact was ‘devastating’ the decision was manifestly unreasonable. The Court noted that whilst Council did consider that the view impact was devastating, <u>the impact on views was only one consideration when determining to grant consent.</u></p> <p>The proposed development has been predominately designed to present a built form envisaged by the state planning controls for the locality. Any loss of views to adjoining properties, particularly is considered reasonable in consideration of the substantially compliant nature of the proposal against the relevant built form controls under the Housing SEPP, particularly having regard to the underutilisation of floor space allowed and the substantial compliance with the overall height control, except for lift overrun and minor roof elements.</p> <p>In this regard, an assessment of the reasonableness of the proposal causing any impact particularly in terms of compliance with applicable planning controls and whether a different or complying design may produce a better result must be considered. It is not considered that an alternative or different proposal would produce a better result. As such, it is considered that the proposal does not result in any unacceptable view loss and is acceptable in terms of the Land and Environment Court Planning Principle established in <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140.</p>
(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,	<p>A comprehensive overshadowing analysis has been undertaken by PBD as part of the height testing and development of the final design and building form realised through the concept design stages.</p> <p>The built form and additional height above the height maximum have been designed to avoid any additional overshadowing impacts to nearby residential development and the resulting impacts do not exceed those anticipated under a compliant development scheme. The design avoids any additional overshadowing impacts to nearby and surrounding public parks or RE1 zoned lands.</p> <p>The below series of diagrams illustrates the impact of shadows to surrounding development.</p>



Figure 3 9am, 10am, 11am (mid-winter) (Source: PBD Architects)



Figure 4 12pm, 1pm, 2pm, 3pm (mid-winter) (Source: PBD Architects)


As a result of the orientation of the site, overshadowing from the development in midwinter (21 June) will be primarily cast upon the adjoining southern property at No 53 Reynolds Street, Cremorne that comprises a two (2) to three (3) storey multi-apartment development.

The proposed development will result in overshadowing to the north facing elevations of this development between the hours 9am-12am, however after 1pm these elevations are unaffected by the proposed development.

The property located to the north at No 77 Benelong Road, Cremorne will retain adequate sunlight and remains unaffected between the morning hours of 9am – 11.30am.

It is also noted that the north facing balconies and private open space areas of the properties located on the southern side of Gerard Lane have unobstructed access to sunlight from 9.00am - 12.00am.

While the analysis identifies some additional overshadowing at midwinter, the extent of shadow is broadly consistent with that expected from a compliant built form under the LMR and IAH regimes in an evolving urban context.

Objective	Demonstration
	<p>Relevantly, the NSW Department of Planning, Housing and Infrastructure’s IAH Practice Note (December 2023, p. 12) states: "Local development standards should be applied flexibly and need to be balanced against the need to realise more affordable housing".</p> <p>It is relevant to note that the overshadowing controls for this assessment are contained in the ADG and NSDCP and have less statutory relevance in application in view of this Practice note.</p> <p>Notwithstanding, the reasonableness of the overshadowing impacts are generally consistent with a compliant built form and as the proposal delivers affordable housing apartments, the extent of overshadowing is also considered acceptable in the context of this Practice note.</p> <p>Importantly, the overshadowing impact that results from the variation is acceptable and does not result in any material or unreasonable impacts.</p>
<p>(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,</p>	<p>The site is in a R3 Medium Residential Zone, surrounded by predominantly residential development. Informed setbacks and separation will deliver viable, environmentally efficient, and functional floor plates with thoughtful entry placement and communal open space location complemented by complementary landscaping design will ensure reasonable amenity and privacy for residents of the property, existing and future surrounding residents.</p> <p>With respect to retaining reasonable privacy, the design approach is consistent with the requirements of the provisions of the Housing SEPP, the North Sydney LEP, and the Apartment Design Guide (ADG). The below series of diagrams illustrates the relevant elevations as they face adjoining residential properties. It should be noted that fixed louvre privacy screens are provided to the lower levels of the elevations, ensuring reasonable privacy is maintained for neighbouring properties and future residents.</p>  <p>Figure 5 South elevation (Source: PBD Architects)</p>

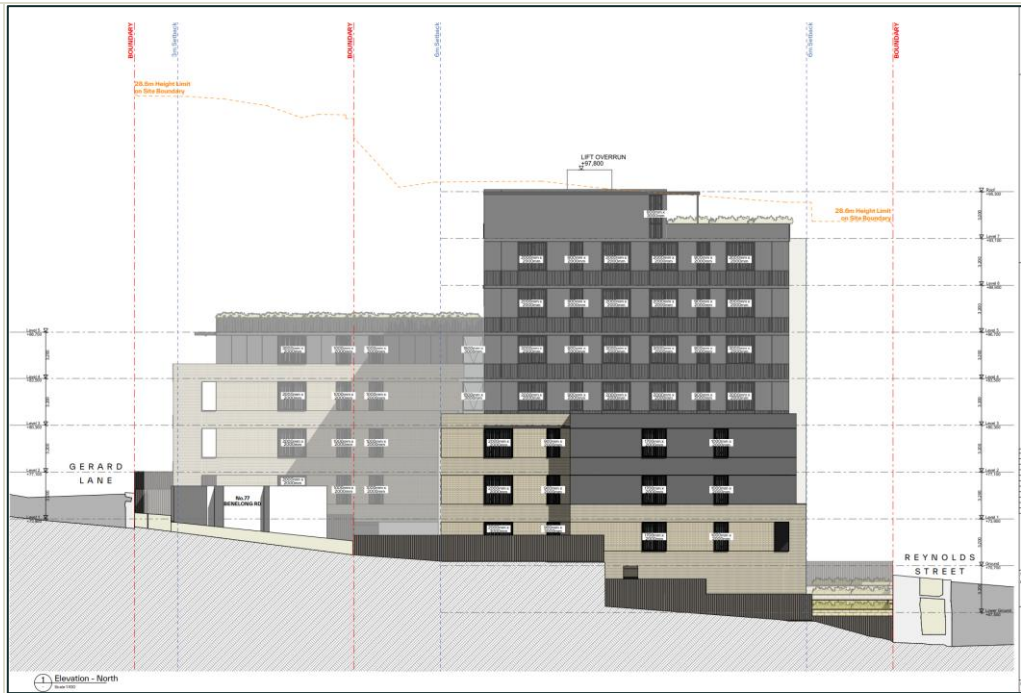
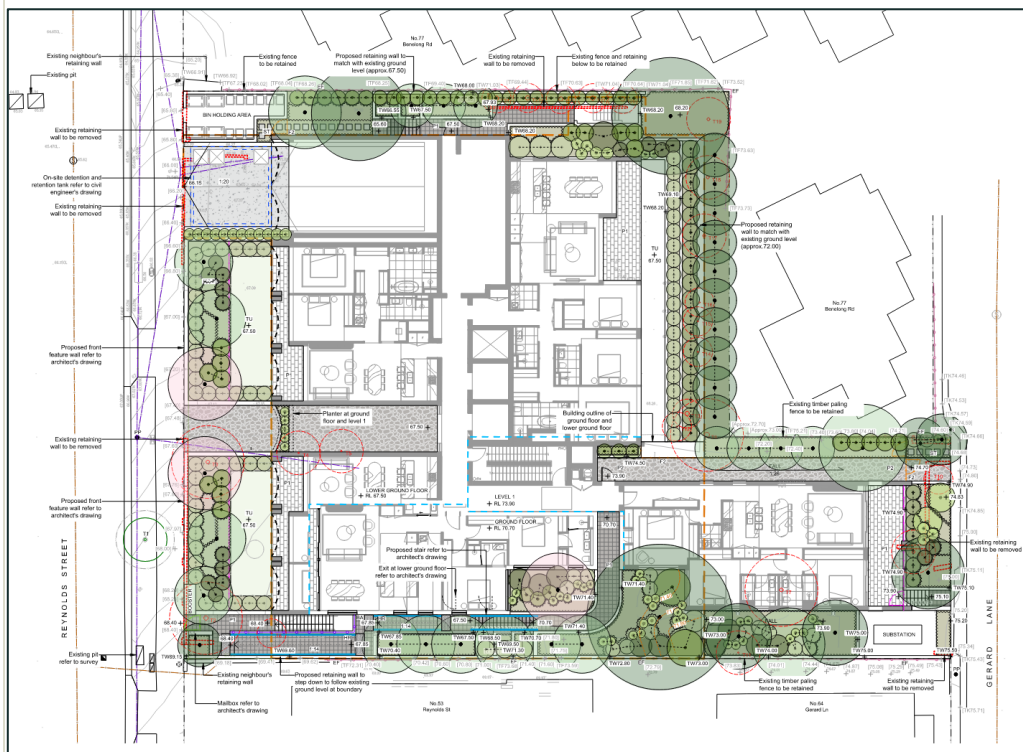


Figure 6 North elevation (Source: PBD Architects)

A complementary landscaping scheme also assists in providing a landscaped setback area that will ensure reasonable outlook from adjoining properties and mitigate unobstructed viewing from and between adjoining properties at lower levels. The landscaping varies in height from ground covers to larger screening and canopy tree between 4-6m in height. The below landscape plan illustrates the proposed planting that will provide a setting to proposed development and will ensure an effective screening to adjoining development.



Objective	Demonstration
	<p>Figure 7 Landscaping plan (Source: IZ Architects)</p>
<p>(e) to ensure compatibility between development, particularly at zone boundaries,</p>	<p>The subject site is bounded to the north by Reynolds Street and to the south by Gerard Lane. The sites eastern and western boundaries adjoin land that is zoned R3- Medium Density.</p> <p>Notwithstanding, the adjoining zone to the south (across Gerard Lane) is zoned R4 – High Density Residential. The zoning of the land to the north (across Reynolds Street) is R2- Low Density residential. Reynolds Street is estimated to have a width of approximately 13m and Gerard Lane is estimated to have a width of approximately 6m.</p> <p>The design of the proposed development has considered the carriageway distances combined with the requirements and objectives set under Chapter 4 (Design of Residential Apartment Development) and the NSW Apartment Design Guidelines relating to streetscape, landscaping and setbacks and ensures compatibility between development at the zone boundaries. The privacy, building separation and amenity requirements also address compatibility to R3 zoned adjoining land. The proposed development has also considered the design principles in Schedule 9 of the Housing SEPP that requires a design to respond appropriately in terms of adjoining building context and ensuring the environmental and physical amenity and privacy requirements are satisfactorily addressed.</p> <p>The minor variation resulting from the lift over run will not adversely affect the attainment of this objective.</p>
<p>(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area,</p>	<p>The local statutory planning controls are important initial reference points in this consideration and can offer guidance in relation to expected scale and density controls and the type of development that is in accordance with and promotes the character of an area. The NSLEP 2013 do not regulate the floor area permitted in the R3 or R4 zones in relation to a residential flat building development. Under the R3- Medium Density controls, it is noted that multi-dwelling housing is permitted with consent and the NSLEP 2013 prescribes a maximum height of 8.5metres.</p> <p>The adjoining site/s to the south of Gerard Lane are zoned R4- High Density Residential and permit multi-dwelling housing, residential flat buildings and shop top housing and the height permitted is set at 12metres. Further to the south (across Parraween Street) the land is zoned MU1- mixed use and allows residential flat buildings and shop top housing heights ranging from 16-20metres.</p> <p>The positive attributes of the character of an area with reference to ensuring appropriate scale and density is also informed by the desirable elements identified by the character statement outlined for the Waters Neighbourhood local area which are:</p> <ul style="list-style-type: none"> • Wide tree lined streets with grass verges and concrete paths. • Predominantly medium to high density residential accommodation, generally comprising attached dwellings, multi-dwelling housing and residential flat buildings, according to zone.

Objective	Demonstration
	<ul style="list-style-type: none"> <li data-bbox="395 300 1406 398">• Future development of high-density housing must have a sympathetic relationship to other surrounding development in terms of height, bulk and scale, privacy and access to views. <p data-bbox="395 412 1426 689">Councils DCP also contains a suite of built form controls that apply to residential flat building development, however in the circumstances the ADG generally prevails in terms of hierarchy. Notwithstanding, the principal requirements and objectives relating to streetscape, setbacks and landscaping have been considered in the design process. These built form controls along with the existing character and desired character are observable within a 300m radius of the site. The below photographic templates recognise the existing and approved development that forms the built context of a site and character of the locality.</p> <div data-bbox="384 701 1430 1702"> </div>

Objective	Demonstration
	<div data-bbox="392 297 1441 640" data-label="Image"> </div> <p data-bbox="392 689 1326 757">There is a broad array of higher density development observable in the locality consistent with the proposed development.</p> <p data-bbox="392 770 1410 976">The new Infill Affordable Housing incentive provisions & Low to Mid Rise housing reforms and bonus (GFA & height allowances) adopted in the Housing SEPP must be factored into any consideration of what constitutes the “character” or ‘desired future character’ of an area in terms of scale and density or appropriateness of built form. [see <i>Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115 p63 & Big Property Pty Ltd v Randwick City Council (2021)</i>].</p> <p data-bbox="392 1032 1430 1167">These provisions enable up to a 30% increase in available height and floor space and will enable permissible development equivalent to 28.6m in height or approximately 8-9 storeys in scale within the R3 – Medium Density Residential Zone. The surrounding residential zones could also conceivably realise 22m in height or greater.</p> <p data-bbox="392 1223 1414 1429">It is very clear that the character of the area in which the site is located will be undergoing a significant transition in terms of residential developments of greater density and dwelling yield. The proposal will promote the character of the local area in that the LMR and IAH regimes that envisage a change in character and this is indicative of the evolving character of the area comprising greater intensity of development.</p> <p data-bbox="392 1485 1398 1691">The proposed development seeks to rely on new Infill Affordable Housing incentive provisions & Low to Mid Rise housing reforms and bonus (GFA & height allowances) adopted in the Housing SEPP and despite the variation proposed, will provide an appropriate response in relation to its scale and density and one that promotes the existing character of the area consistent with the future character envisaged under these planning reforms for this locality.</p> <p data-bbox="392 1747 1390 1917">This objective will also be ensured by the development’s consideration of the design principles in Schedule 9 of the Housing SEPP that requires a design to respond appropriately in terms of scale and density specifically having regard to the local context and adherence with the requirements of the NSW Apartment Design Guidelines.</p> <p data-bbox="392 1973 1418 2036">Despite the variation proposed it is considered that the overall scale and density of the proposed development fall well within the type of increased densities that could</p>

Objective	Demonstration
	foreseeably be conceived and could occur in proximity and in adjoining residential zones under these planning reforms for this locality and as such, will promote the character as expected under the state and local controls.
(g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living.	<p>The provisions of the Housing SEPP prevail over an equivalent standard set out in a local environmental plan (LEP) or development control plan (DCP) that is more onerous.</p> <p>The proposed development seeks to also utilise Clause 180 in Chapter 6 of the Housing SEPP that establishes a maximum building height of 22 metres and a FSR of 2.2:1 for sites located within the <i>low and mid rise housing inner area</i> in conjunction with the in-fill affordable housing provisions in Chapter 2, Part 2, Division 1 of the Housing SEPP which provide opportunity for up to 30% additional building height and FSR for developments that incorporate at least 10% affordable housing.</p> <p>The proposed height and associated built form and minimal height variation will promote the supply of additional housing in the locality inclusive of affordable housing units and will provide a positive response to the current housing crisis with no unacceptable, additional, adverse environmental impacts.</p> <p>The proposed variation from a built form of mainly 1 or 2 storeys does not prejudice the achievement of the desired future character, and in fact it enhances it by providing greater flexibility in the arrangement of building massing to optimise the spatial qualities of the development.</p>

4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.

As noted above, there is no objective of the development standard in clause 16 of the Housing SEPP. This clause 4.6 request has therefore been prepared with consideration of the underlying objectives of a particular standard on a first principles planning basis. It has also considered the aims and principles of the relevant sections of the planning policy that provides guidance in relation to the intent of the development standard and can be adopted as fundamental tenets used to support the attainment of the standard. This submission offers material justification to allow a variation of the requirements pursuant to clause 16 and if compliance was required, a significant redesign would be necessary resulting in poorer amenity for the residents through the loss of access to the proposed communal open space and that's would subsequently also result in the loss of floor space available to the affordable housing provision.

4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.

Given the recent commencement of Chapters 2 and 6 of the Housing SEPP we would not say that the development standard has been virtually abandoned or destroyed. We do note, however, the maximum building height development standard provided under the NSLEP has been applied flexibly on many occasions in circumstances similar to this application; namely as a response to topography and or to accommodate lift overruns as follows.

We also note that the flexible application of the height of building development standard provided by section 16(3) of the Housing SEPP is an incentive-based control that enables the supply of additional housing in the locality inclusive of affordable housing units and will provide a positive response to the current housing crisis.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land (via Chapter 6 of the Housing SEPP) is appropriate given its proximity to existing transport infrastructure and demographic circumstances. We do not strictly rely on this reason.

We note that Chapter 6 of the Housing SEPP enables developments of greater densities in relation to height and floor space ratio in R3 Medium Density Residential zoned land in certain circumstances. Despite the increased density allowed the proposal development is consistent with the objectives of the zone.

The zone objectives for the land are extracted below and a planning comment for each justifying and demonstrating that the intensity of development is also compatible with the zone objectives for the land:

Zone R3 Medium Density Residential

1 Objectives of zone

- *To provide for the housing needs of the community within a medium density residential environment.*

Comment: *All LGAs across NSW are facing a housing stock crisis and the development provides vital housing and affordable housing in an area that is recognised for its proximity to a wide range of frequently needed goods and services, frequent public transport, and infrastructure.*

- *To provide a variety of housing types within a medium density residential environment.*

Comment: *The Housing SEPP permits the type of development proposed within the R3 Medium Density zone. The proposal provides a variety of private sale and affordable housing apartment types in keeping with the residential environment.*

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment: *This objective is not relevant to the proposed development.*

- *To encourage the development of sites for medium density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.*

Comment: *The development facilitates a high quality environmentally, socially, and economically sustainable development by providing vital, well-designed contemporary apartments in accordance with the NSW Apartment Design Guidelines in an appropriate and highly accessible location. The design responds to the local context and the design principles in Schedule 9 of the Housing SEPP (as set out in the Design Report) and will not unreasonably compromise the amenity of the surrounding area. The site has no recorded natural or cultural heritage considerations of significance.*

- *To provide for a suitable visual transition between high density residential areas and lower density residential areas.*

Comment: The proposed development is considered to be compatible with the desired character of the area as stated above and as such is considered to provide a suitably visual transition between surrounding zones.

- *To ensure that a high level of residential amenity is achieved and maintained.*

Comment: As stated above the proposed development has been designed to address the requirements of the ADG and will provide high levels of residential amenity for the residents of the apartments.

There will be no unreasonable adverse impacts on the residential amenity of neighbouring properties because of the minor height non-compliance. As stated above, the proposed development will not give rise to additional adverse impacts on neighbouring development above what could be anticipated for a compliant development under the provisions of the Housing SEPP. The height variation does not result in any additional adverse visual or acoustic privacy impacts on neighbouring properties given their central location to the building and the building as a whole has been carefully designed to relate and respond to adjoining development.

5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning ground to justify the departure of the Height of buildings development standard are as follows:

- The height exceedances occur at the lift overruns and leading roof edges, largely due to the site's topography, and inclusion of roof top communal open space. These minor variations are located centrally and are typical on sloping sites and have negligible visual impact.
- The height variation is confined to components of the development that primarily include the lift overrun providing equitable access to the roof top community and private open space levels. These elements will maximise amenity for users of the building due to their high-quality design and substantial on-structure planting. The lift overrun and height breach could be eliminated but it would result in a poorer quality development and likely loss of a storey with significantly less affordable housing, with poorer amenity for future residents whilst the exceedances cause no detrimental impact.
- Despite the numerical non-compliance with the height development standard, the development provides a scale and form of development that is compatible with surrounding developments and one that responds to the NSW Governments strategic and statutory planning initiatives to encourage private developers to boost diversity of housing choice and deliver more market housing in well located areas close to public transport.

Namely, the variation reflects the objectives and development standards provided in the Housing SEPP for infill affordable housing and low- and mid-rise housing (LMR). The overall development is a product of these legislative reforms which will also see a higher-density character emerging within the areas of Neutral Bay and the wider area that fall with the identified LMR land.

- The proposed additional height allowed under the SEPP Housing bonus legislation and the minor exceedance from this maximum is a factor in determining what is considered the desired future character of the area. In *“Big property”*, Commissioner O’Neill found that the exceedance of height/FSR standards due to the provision of affordable housing units was an “environmental planning ground” and thus the clause 4.6 request was a well-founded request.

Commissioner O’Neill also expressly referenced the fact that some State Environmental Planning Instruments, such as that for affordable housing, “incentivise the provision by the private sector of infill affordable housing by providing additional GFA above the otherwise applicable development standards that determine the building envelope for a particular site”. This too must be factored into any consideration of what constitutes the “desired future character of the area”. Despite the variation proposed it is considered that the proposed development is consistent with the desired future character envisaged for this locality under these controls.

- The proposed height variation is directly linked to maximising the number of residential dwellings possible in response to the current housing crisis with no unacceptable, additional, adverse environmental impacts. In this regard, the height variation is directly consistent with the objectives of the development standards provided within the Housing SEPP and the objectives of the zone. Clearly, there is an inherent public benefit in providing affordable housing on the site, particularly given the proximity of the site. This public benefit is a direct result of the height non-compliance.
- There will be no adverse impacts on the residential amenity of neighbouring properties because of the height non-compliance. As stated above, the proposed development will not give rise to additional adverse impacts on solar access to neighbouring development above what could be anticipated for a compliant development under the provisions of the NSLEP 2013. The height variation does not result in any additional adverse visual or acoustic privacy impacts on neighbouring properties given that the lift structure is located away from the street and laneway frontages.
- The proposal promotes the orderly and economic use and development of land through the redevelopment of underutilised sites for an appropriate residential development.
- The proposed development promotes the construction of a building which exhibits good design and amenity of the built environment. PBD Architects have designed the building with consideration of the context and have incorporated various architectural elements to create a high-quality design outcome.
- The site is located within a locality that benefits from well-connected transport links, shopping precincts and good outdoor recreational open space and on that basis is likely to undergo gradual transformation to higher density living as a result of the Chapter 2 (Infill Affordable Housing) and Chapter 6 (Low and Medium Rise Housing) planning controls which seek to increase the supply of market and affordable housing in well located areas. The desired future character is informed by these planning controls and the desirable elements of the character of the Waters Neighbourhood local area which are:
 - Wide tree lined streets with grass verges and concrete paths.
 - Predominantly medium to high density residential accommodation, generally comprising attached dwellings, multi-dwelling housing and residential flat buildings, according to zone.
 - Future development of high-density housing must have a sympathetic relationship to other surrounding development in terms of height, bulk and scale, privacy and access to views.

The proposal is compatible with its local area in that the LMR and IAH regimes envisages a change in character, and this is indicative of the future character of the area comprising greater intensity of development. The proposed variations to the building height control do not prejudice the achievement of the desired future character, and in fact enhance it by providing greater flexibility in the arrangement of building massing to optimise the spatial qualities of the development.

The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:

- The development facilitates a high quality environmentally, socially, and economically sustainable development by providing vital, well-designed housing (including affordable housing) in an appropriate

and highly accessible location. This will positively encourage sustainable modes of transport and increase employment opportunities locally.

- The proposal promotes the orderly and economic use and development of land through the redevelopment of underutilised sites for an appropriate medium density residential development. There will be substantial uplift in both housing and employment generation on the site, which aligns with the desired future character of the Cremorne locality. Accordingly, the proposal achieves the objective in section 1.3(c) of the Environmental Planning and Assessment Act 1979 (EP&A Act), “to promote the orderly and economic use and development of the land”.
- The development will deliver affordable housing which will provide housing for the wider North Sydney community. The development is well placed to maximise the benefits of this type of housing, being near the bus stops, and train stations providing access to the wider Sydney region.
- The development has been designed to be compatible with the surrounding built form and despite the height non-compliance, will not adversely impact neighbouring amenity. The upper storeys of the building are carefully massed, to break up the buildings bulk and scale. Importantly, the variation to the height of building development standard does not result in any unreasonable impacts to residential amenity, solar access, views, or privacy.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances. Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187%.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75% (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42% (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council [2019] NSWLEC 1555* the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27% (1.27:1 compared to the permitted 1.0:1).
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1369* the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49% (14.16m compared to the permitted 9.5m).

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

6. Conclusion

This Clause 4.6 variation request demonstrates that:

- compliance with the prescribed control would be unreasonable and unnecessary in the circumstances of this development as on a first principles planning basis the underlying objectives are met. Further, this written submission demonstrates that the relevant aims and principles of the Housing SEPP that provides guidance in relation to the intent of the development standard have been satisfactorily met, despite the minor noncompliance.
- there are sufficient environmental planning grounds to justify the contravention and specifically in that the proposal does not result in any unacceptable or unreasonable impacts to highly scenic views and to the privacy and amenity of adjoining residential development when compared to a fully compliant building envelope.
- the proposed development is generally consistent with the objectives of the R3 Medium Density Residential zone. Specifically, the proposed development conforms to and reflects natural landforms, maintains solar access to existing dwellings, public reserves and streets, maintains privacy for residents of existing dwellings and encourages an appropriate scale and density of development that is in accordance with the character of an area.
- the proposed development responds to the NSW Governments strategic and statutory planning initiatives to encourage private developers to boost diversity of housing choice and deliver more market housing.
- the proposal promotes the objectives of the in-fill affordable housing provisions through providing vital affordable housing in the area, whilst expanding on the need for greater diversity in housing typologies in North Sydney LGA more broadly.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.