

Clause 4.6 Variation Request Maximum Building Height Development Standard



313-319 Marrickville Road

Marrickville Community Hub Development

Submitted to Inner West Council
On Behalf of Mirvac Projects

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1.0 Clause 4.6 Variation Request

Overview of Justification for Clause 4.6 Variation Request

The variation to the height development standard in the LEP as proposed in the optimised DA will result in better planning, urban design and heritage outcomes for the site, the community as well as residents and users of the site, including for the following reasons:

1. **New Public Open Space** - Varying the height control allows the introduction of additional public open space in the form of a public park adjacent to the Old Nurses' Quarters in place of the previously proposed Building D. The inclusion of a new public open space is achieved by electing not to build on parts of the site where building is allowed under the planning controls. This is a site specific response.
2. **Improved Heritage Outcome** - The heritage significance of the site will be best preserved, respected and enhanced by allowing the height variation to delete building D and redistribute its floor space to buildings A1 and A2. Heritage studies confirm the optimised DA is preferred from a heritage perspective as it allows a generous visual setting around the Old Nurses Quarters and reduces the potential for visual dominance of the new buildings over the heritage buildings. The optimised DA proposal also provides clear separation between the Old Nurses Quarters and the proposed residential buildings. This is a site specific response.
3. **Better Urban Design** - The additional open space on the ground plane provided by the deletion of Building D on the site and redistribution of its floor space to buildings A1 and A2 allows greater accessibility and permeability through the site and results in a better urban design outcome for the community and residents. The additional height has been strategically located to front the busier, more urban-scaled Livingstone Road. This is a site specific response.
4. **Redistribution of permissible GFA** - The optimised DA scheme results in a better urban design outcome that is not radically different from the compliant scheme but rather it simply involves deletion of a building and redistribution of its permissible GFA to a more contextually appropriate location on the site. This is a site specific response.
5. **Total site GFA under Maximum Controls** - The deletion and redistribution of GFA results in an overall outcome whereby the total GFA for the site is below the maximum permissible (optimised DA proposes 23,350sqm of GFA, maximum allowable GFA is 23,539sqm). This is a site specific response.
6. **Minimal Overshadowing** - The increased height has been thoughtfully designed to reduce any impacts and the perception of height. There will be negligible additional impacts to overshadowing. The optimised DA provides greater amenity in terms of sunlight and air to the Children's Playground and heritage building. This is overall an improved outcome for the site and public open space. This is a site specific response.
7. **No View Loss** – There will be no view loss for adjoining residents or from adjoining public spaces.
8. **Dated Height Controls** - The height controls sought to be varied are over five years old and do not reflect the best use of the land from a heritage, urban design and community perspective. The height control is also not reflective of the current and evolving nature of the area which is likely to be accelerated by reason of the introduction of the Sydney Metro Station at Marrickville. The building height controls of 29 and 32 metres that apply to the site, are standard building heights from the Standard LEP and as such we understand were not specifically derived from detailed studies into appropriate site specific heights that the site and locality is able to support. The rigid and inflexible application of these standard height controls has the potential to prevent a far superior design outcome from being achieved.

9. **Character of Locality** - Marrickville is an area in transition; this transition has been accelerated by the Sydney Metro and the draft Sydney to Bankstown Urban Renewal Corridor Strategy. The area is moving towards a higher density character and accordingly, the controls in the 2011 LEP are not in line with the likely future character and nature of the area which is moving towards increased bulk. Sites within walking distance of the station, such as the proposed site, are likely to be upzoned in the near future.

If this clause 4.6 variation request is not upheld, the compliant scheme which reintroduces the four storey Building D will be required to be pursued by the applicant. Reintroducing Building D, while compliant with the height control, will not include the additional benefit of a public open space and a more sympathetic and appropriate heritage outcome but will result in a less desirable urban design outcome for the community, workers and the future residents when compared to the optimised DA that is currently being proposed.

The optimised DA is a clear example of a situation in which the detailed studies undertaken as part of the detailed design process for a proposal have revealed that a superior development outcome is available by allowing a minor variance from the development standard which was set prior to the benefit of those studies. This clause 4.6 variation demonstrates exceptional circumstances where flexibility in the application of a numerical development standard is justified and warranted.

Introduction

Clause 4.6 of the Marrickville LEP 2011 allows Council to grant consent for development even though the development seeks to depart from a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for the development.

Clause 4.6(3) -(5) of the Marrickville LEP provides that:

4.6 Exceptions to development standards

...

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

...

Consistency with Common Law Guidance

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
5. *Zhang and anor v Council of the City of Ryde* [2016] NSWLEC 1179.

In accordance with the above requirements, this written clause 4.6 request;

- identifies the development standard to be varied (Section 1.1);
- identifies the variation sought (Section 1.2);
- establishes and justifies that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Section 1.3);
- demonstrates that there are sufficient environmental planning grounds to justify the contravention (Section 1.4);
- demonstrates such that the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the standard and the objectives for development within the R4 and B2 zones (Section 1.5); and
- provides an assessment of the matters the Secretary is required to consider before granting concurrence (Section 1.6) namely:
 - whether the contravention of the development standard raises any matter of significance for State or regional environmental planning; and
 - the public benefit of maintaining the development standard; and
 - any other matters required to be taken into consideration by the Secretary before granting concurrence.

Accordingly, development consent can be granted to the proposal despite the proposed contravention of the development standard because pursuant to clause 4.6(4)(a), the consent authority can be satisfied that:

- this written request has reasonably addressed the matters required to be demonstrated by clause 4.6(3); and
- the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone.

1.1 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is clause 4.3 of the Marrickville LEP 2011, relating to the maximum building height.

Clause 4.3 of the LEP is reproduced below in its entirety and an extract of the Height of Buildings Map, to which that clause applies, is reproduced in **Figure 1**.

4.3 Height of buildings

(1) The objectives of this clause are as follows:

- (a) to establish the maximum height of buildings,
- (b) to ensure building height is consistent with the desired future character of an area,
- (c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

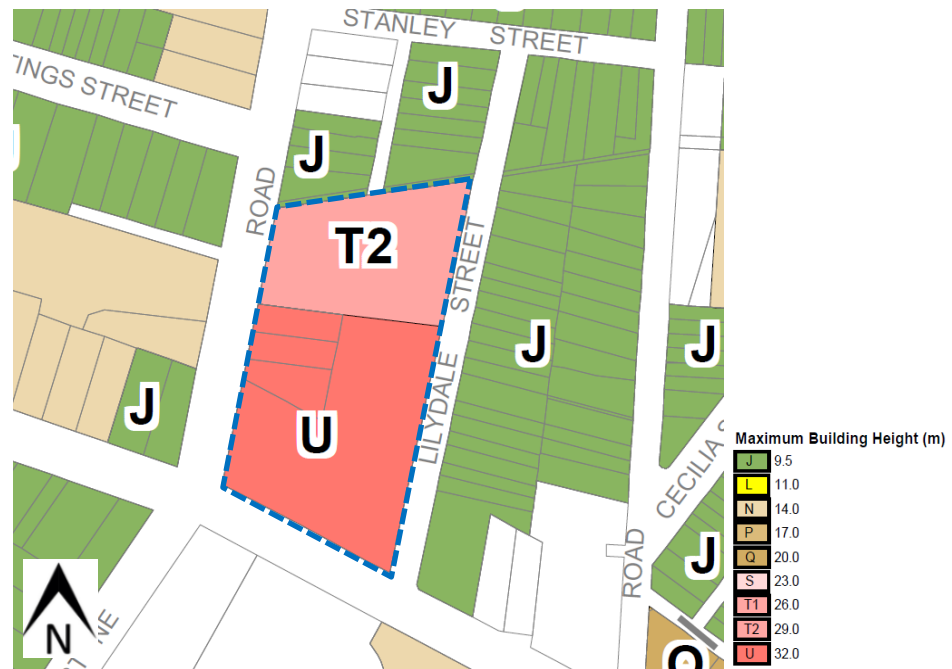


Figure 1 – Extract of Height of Buildings Map
Source: Marrickville LEP 2011

An extract of the zoning map is provided at **Figure 2**.

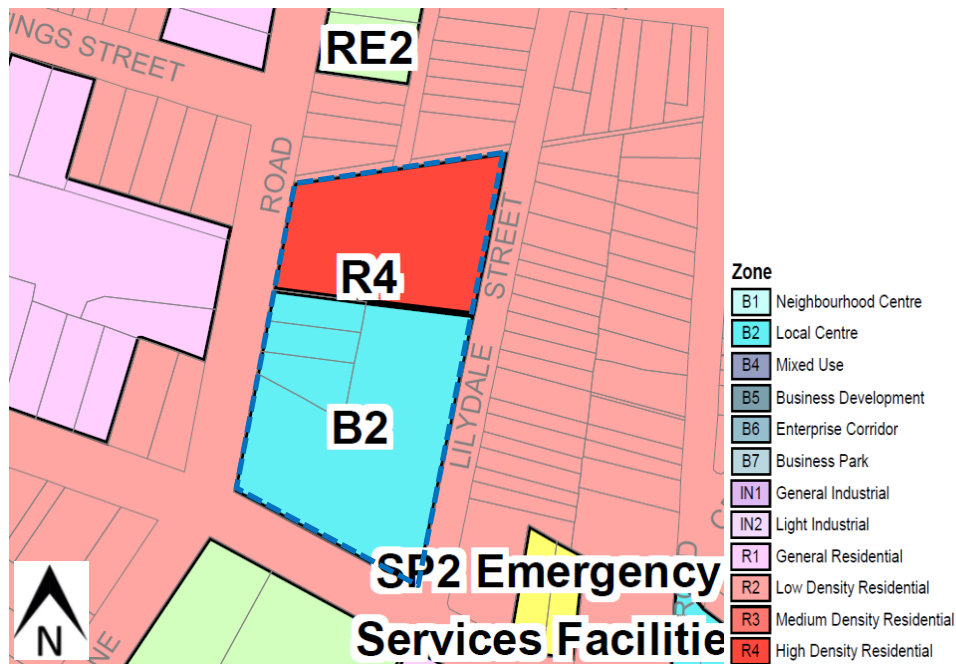


Figure 2 – Extract of Zoning Map
Source: Marrickville LEP 2011

The site is subject to two separate building height controls. A maximum building height of 29m applies to the northern proportion of the site (which is zoned R4 High Density Residential) and a maximum 32m height control applies to the remainder of the site (zoned B2 Local Centre).

1.2 Variation Sought

Sections of the proposed scheme showing the applicable 29m and 32m maximum building heights for the R4 and B2 zones are provided at **Figures 6 and 7** below. These show the extent of the proposed buildings which exceed the maximum building height for the respective land.

The original Request for Tender scheme proposed four residential buildings, including the conversion of the former heritage Old Nurses' Quarters. This scheme complied with the applicable planning controls for the site, including the maximum building height and FSR development standards of the LEP (refer to **Figure 3** for compliant scheme), and subsequently formed the basis of the Development Agreement entered into by Council and Mirvac.

Following the selection of Mirvac as the preferred developer, during further design development, it became evident that there were a number of improvements that could be made to the compliant scheme to optimise the outcome of the site for Council, the community and future residents in terms of traffic, urban design, planning, permeability and heritage conservation. Essentially the improvements include:

- providing one common driveway to service both the residential and community hub basements rather than separate site entries from Livingstone Road;
- the deletion of Building D to enhance the setting of the heritage Old Nurses' Quarters and the former Main Ward building;
- the provision of additional and better quality open space in the form of a new area of public open space in place of Building D; and
- the introduction of façade articulation and low-scale 2 storey terraces to better integrate with the adjoining neighbourhood.

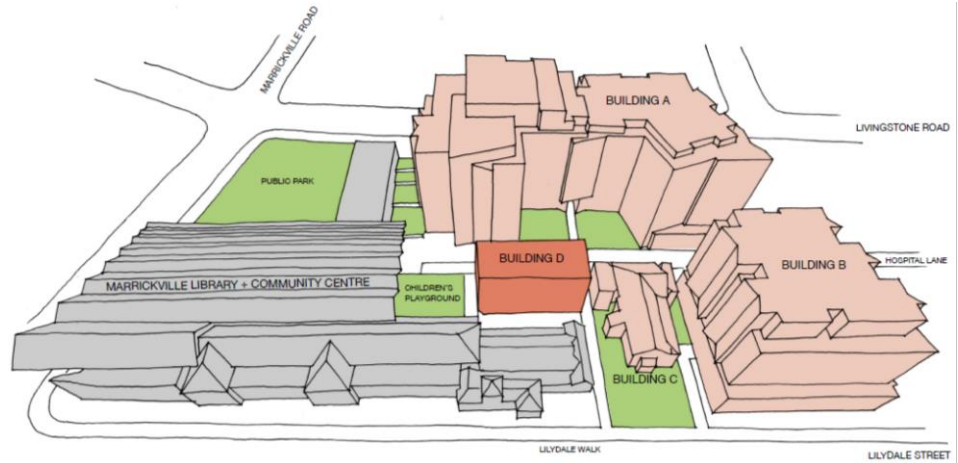


Figure 3 – Complaint Scheme
Source: Mirvac Design

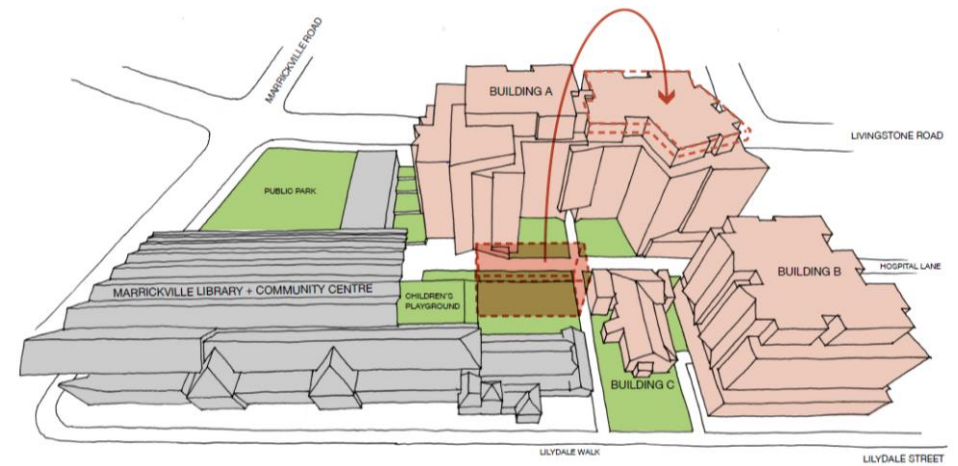


Figure 4 – Redistributed Floor Space
Source: Mirvac Design

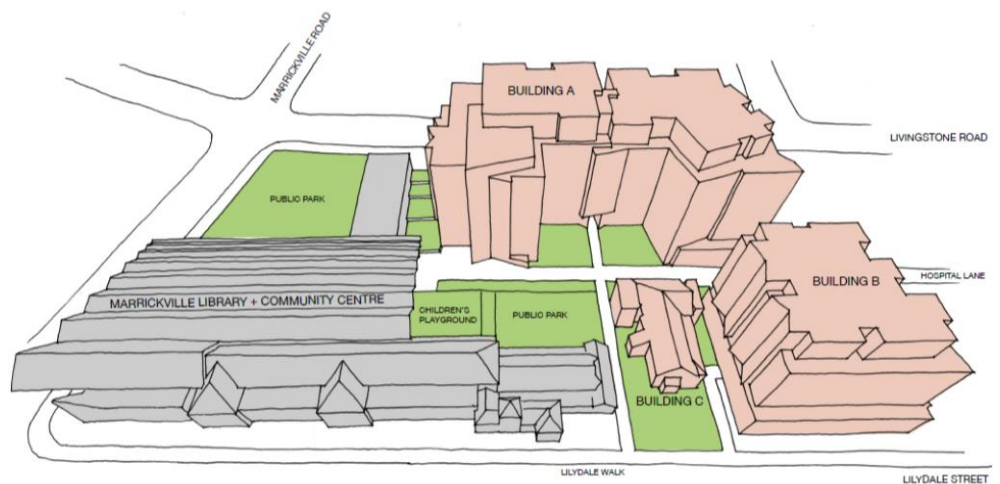


Figure 5 – Proposed Optimised Scheme
Source: Mirvac Design

In order to facilitate these outcomes, the current optimised DA scheme (**Figures 4 and 5**) transfers the floor space proposed to be provided in Building D, as an additional recessed storey, on the top of Building A1 and A2. This redistribution of floor space results in Building A1 and A2 exceeding the maximum height development standard but facilitates the above improvements by reducing the proposed number of residential buildings from four to three. The optimised DA scheme also results in a number of other planning benefits which are described in Section 1.4 below.

Figures 3 to 5 highlight the difference in massing between the compliant scheme and the proposed optimised DA scheme. It should be noted that the proposed building heights do not seek to accommodate any GFA above the total FSR permitted at the site and results in less floor space than what could be provided in a compliant scheme that included Building D. The optimised DA scheme complies with the FSR development standards of the LEP.

It has been well established by the Land and Environment Court in case law that the extent of the numerical variation does not form part of the test required to be exercised under clause 4.6. Recent decisions of the Court to approve developments subject to clause 4.6 variations reinforce this position. For example, in *Micaul Holdings P/L v Randwick City Council* the proposal sought to vary the relevant height and FSR controls to allow a 55% exceedance of height and 20% exceedance of FSR. In *Moskovich v Waverley Council* the proposal sought to vary the FSR control to allow a 65% exceedance of FSR. In each of those cases, the Court reached the required level of satisfaction pursuant to clause 4.6(4) of the relevant LEPs and approved the developments with the variations proposed.

Figure 6 below demonstrates the proposed form of Building A1 and A2 and the relationships of these proposed buildings to the maximum building height control which is shown in red and is expressed in metres. The minor exceedance of the LEP height control for building A1 relates to the lift/plant only while the exceedance proposed for building A2 is slightly greater but still considered minor in the overall scheme of the development and in light of the minor impacts of the proposed exceedance.



Figure 6 – Building A1 and A2 Maximum Height
Source: Mirvac Design

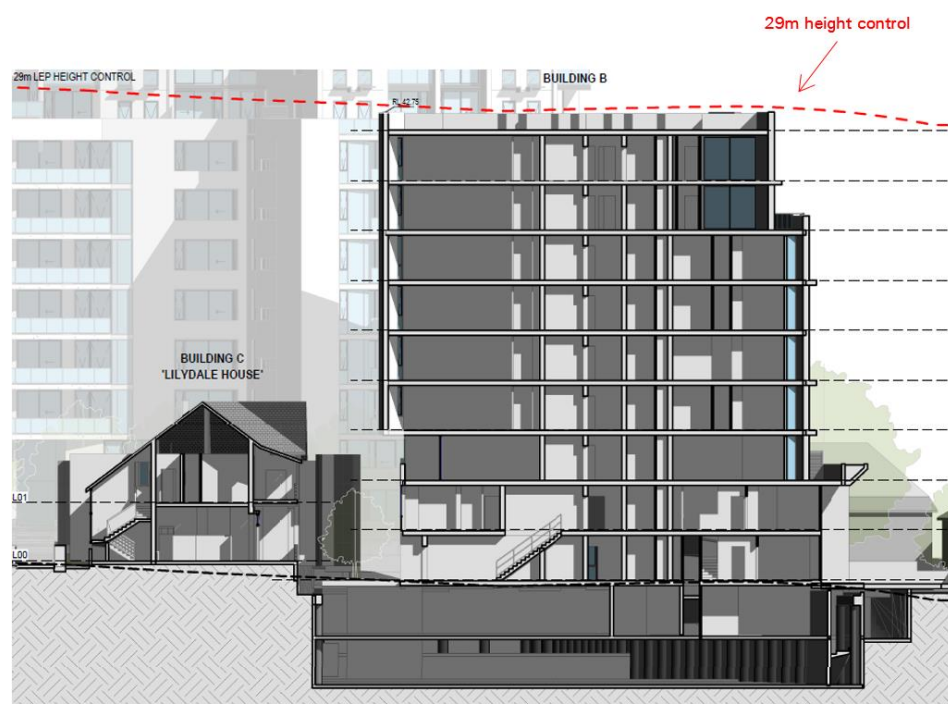


Figure 7 – Building B maximum height. The above demonstrates that proposed Building B complies with the 29 metre height control
Source: Mirvac Design

Table 1 – Summary of proposed building heights

	Marrickville LEP 2011 Maximum Height Control	Proposed Maximum Height (m)	Variation
R4 Zone			
Building A2	29m	32.8m (to top of lift core)	+3.8m
B2 Zone			
Building A1	32m	32.8m (to top of lift core)	+0.8 (the variation relates to the lift overrun and parapet only)

Table 1 above identifies the maximum building height control under the Marrickville LEP 2011 and the maximum building heights which are proposed for Buildings A2 and A1 (including lift overrun and parapet) to seek to better respond to site context and to achieve a better planning outcome which is in the public interest and delivers public benefits.

1.3 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ of the Land and Environment Court identified five ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

The five ways outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Way**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

This clause 4.6 variation request establishes that compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of the proposed development and accordingly justifies the variation to the height control pursuant to the First Way outlined in *Wehbe*.

In the recent judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (*our emphasis*) the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

Sections 1.3.1 to 1.3.3 address the matters in clause 4.6(3)(a), in particular how the objectives of the maximum height development standard are achieved notwithstanding the non-compliance with the numerical control.

1.3.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way)

The objectives of the building height development standard (under clause 4.3 of the LEP 2011) are:

- (a) *to establish the maximum height of buildings,*
- (b) *to ensure building height is consistent with the desired future character of an area,*
- (c) *to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The proposed optimised DA scheme satisfies the objectives of the height of buildings development standard, notwithstanding the non-compliance with the height control, as set out below.

Objective (a) – to establish the maximum height of buildings

The building height controls which apply to the site (29 and 32 metres) are the standard building heights contained within the Standard LEP. The height controls for the site were not derived from detailed studies to assess appropriate heights for the site and locality and therefore are not site specific controls.

The development when assessed in its entirety is generally consistent with the maximum building height. Given the opportunities described above, the variation to the height control will not result in any adverse precedents or the abandonment of the maximum building height development standard.

In overall terms the part of Building A1 for which the height standard of 32m applies, is largely compliant with that control, with the exception of the roof parapet and plant located toward the northern end of the building which exceed the 32m height control. The southern part of the building, which forms the interface with the Community Hub and the new public open space, is fully compliant with the development standard.

The parts of Building A1 and Building A2 that are subject to the 29m height standard, each exceed the height limit by a maximum of one storey or 3.8m to the top of the lift overrun. To provide a better urban outcome for the site, the optimised DA scheme offers a centrally located publicly accessible open space made possible by the deletion of Building D which results in the following benefits for the site:

- greater permeability for the site;
- greater amenity in terms of light and air to the Children's Playground and heritage 'lease area' building which is to be dedicated to Council;
- greater amenity to the residents and community by opening up the ground plane by providing less built form at ground level;
- assists to more sympathetically respond to and address the heritage fabric of the two storey Old Nurses' Quarters; and
- creation of a new publicly accessible open space (The Common) which benefits the entire site and wider community.

A description of improvements that can be delivered by the optimised DA scheme is provided at Section 1.4.

Objective (b) – to ensure building height is consistent with the desired future character of an area

The Marrickville DCP was adopted in 2011. Since that time, Marrickville has evolved significantly and is now undergoing a transition towards a higher density urban environment. Although the desired future character anticipated for the site in the Marrickville DCP is still relevant in the assessment of the development application, the effluxion of time, the changing nature of development and density and the planned delivery of infrastructure in Marrickville are significant influences on the future character of the area.

The Marrickville Town Centre is undergoing a transition to a higher density built form and character. This transition is supported by the conversion of the Bankstown rail line to the planned Sydney Metro. The enhanced public transport network will provide a catalyst for new growth and development along the metro line in increased densities than that currently contemplated in the LEP, as set out in the draft Sydenham to Bankstown urban renewal corridor strategy. The Marrickville Town Centre is expected to accommodate new medium to high density residential accommodation within walking distance to the station on sites such as the subject site. It is also intended to provide improved open spaces and a high quality public domain that preserves the character of existing local heritage. The Greater Sydney Commission has committed to releasing the draft Sydney Central District Plan for consultation by the end of 2016 and it is expected that this plan will reflect increased building densities in the vicinity of planned Metro stations, including Marrickville, in accordance with the additional capacity supported by the planned Sydney Metro.

The desired future character of the area is detailed within Part 9 of the Marrickville DCP 2011 and provides:

To renew the former Marrickville Hospital site to accommodate a range of civic and commercial land uses and a public square that fronts Marrickville Road and Livingstone Road, with mixed use and residential uses to the north that transition to the adjoining lower density residential areas.

The proposed development seeks to redevelop the site in accordance with this vision and the site specific masterplan included in the DCP 2011. The masterplan envisages a scale of development consistent with the proposal and the relatively minor variation to the height limit will not result in a departure from this vision. The site will still be redeveloped for a range of civic and commercial land uses, and the public square will still achieve the required amount of solar access throughout the day under the optimised DA scheme, as demonstrated in **Table 3** and discussed in relation to 'Objective C' below.

The transition from the proposal to the adjoining lower density residential uses will also be maintained as the proposed upper levels of Buildings A1, A2 and B are appropriately set back. This setback enables the buildings to step down to the surrounding lower density areas. As demonstrated in **Table 2** below, the proposed reallocation of floor area in removing the Building D envelope, will improve the transition between the higher density and lower density buildings and will reduce the perceived bulk and scale of the proposal when viewed from the public domain.

Table 2 – Photomontages comparing proposal to height compliant scheme

Height Compliant Scheme	Optimised DA Proposal
	
Hospital Lane Looking North	
Height Compliant Scheme	Optimised DA Proposal
	
Hospital Lane Looking South	

The proposed height of the optimised DA scheme has resulted from further assessment of the heritage opportunities and constraints when compared with the compliant scheme. The retention of the heritage buildings limits the available area of the site that may be developed for building mass. As such, the optimised DA scheme seeks to include additional massing to the top of Building A1 and A2 to provide more open space around the heritage buildings. The further heritage assessment indicates that the heritage significance will be greater preserved and addressed through the deletion of Building D and redistribution of floor area as proposed on Buildings A1 and A2. A further Heritage Statement prepared by GBA (**Appendix A**) provides specific commentary on the compliant and optimised schemes and concludes that the optimised scheme provides a number of substantial heritage benefits, including:

- an improved setting for the retained hospital buildings;
- potential for visual dominance is reduced;
- clearer separation between the old and new components of the site; and

- provision of views to the retained hospital buildings from within the site.

The deletion of Building D facilitates a number of significant public benefits as outlined above. Buildings A1 and A2 are best placed to accommodate the building mass as it fronts Livingstone Road which is the busier of the two street frontages. Livingstone Road includes commercial/community uses and currently includes the dominant nurses' home/pathology building. This is in contrast to Building B fronting Lilydale Street which is a lower density, residential road consisting primarily of detached dwellings.

Further, in the optimised DA scheme the building massing, particularly at Lilydale Street, is further stepped and articulated to better relate to the adjacent neighbourhood context. At the base of the buildings, the façade has been further articulated to create a two storey terraces to complement the neighbouring dwellings. This articulation provides a human scale that relates to the scale and detail of the surrounding dwellings and the retained heritage buildings within the development.

The additional massing on top of Building A2 adopts the setback of 2m established between levels 9 and 10 to create a recessive appearance. The proposed massing does not cause any significant adverse impact on the way the buildings relate to the broader area. In fact, the relationship of the built form will be improved by reducing the building mass at ground level and freeing up more of the site for additional communal open space.

It is considered that the optimised DA scheme presents a form and scale of development that is consistent with this future character of the area and therefore meets Objective (b) notwithstanding the non-compliance with the height control.

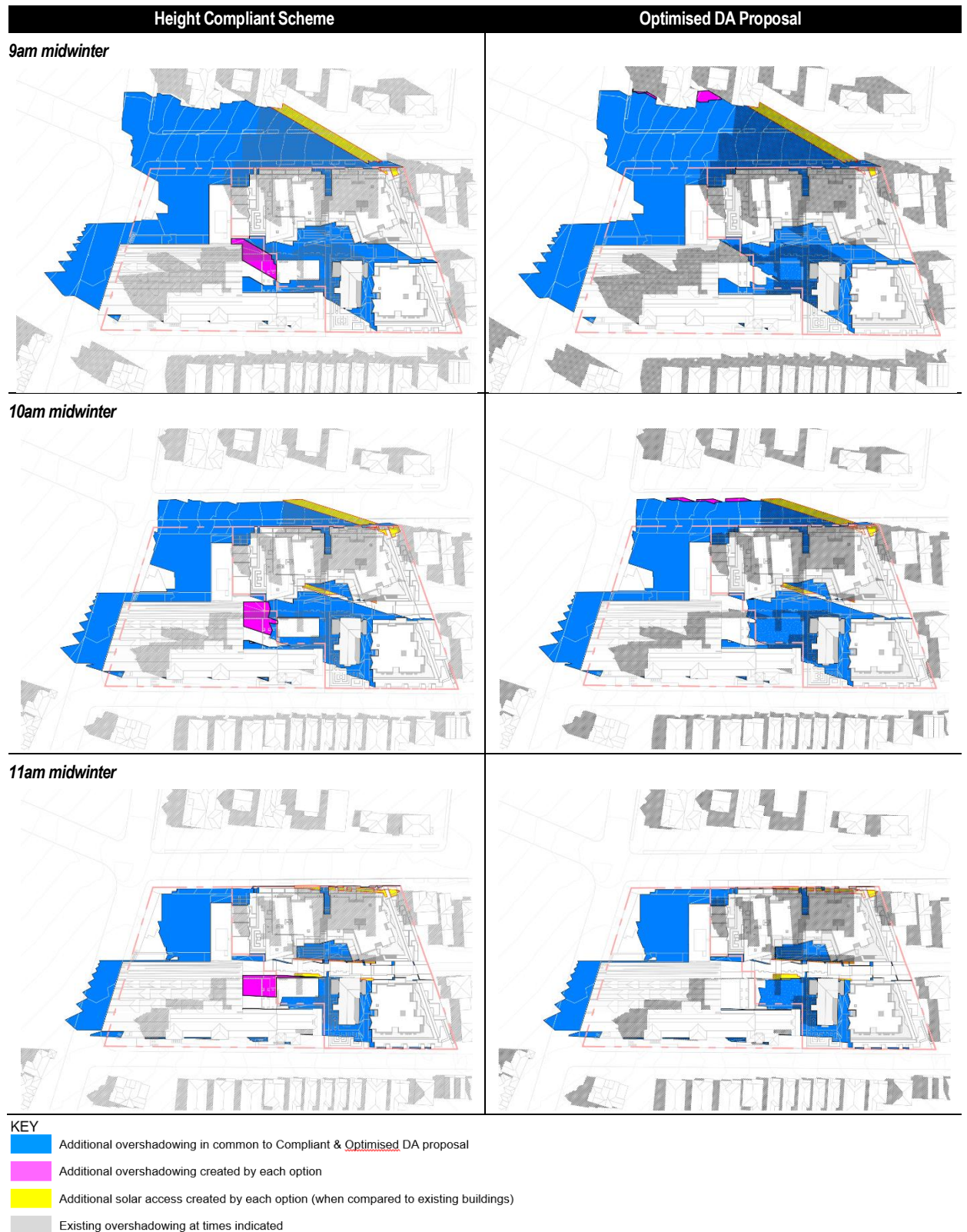
Objective (c) – to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,

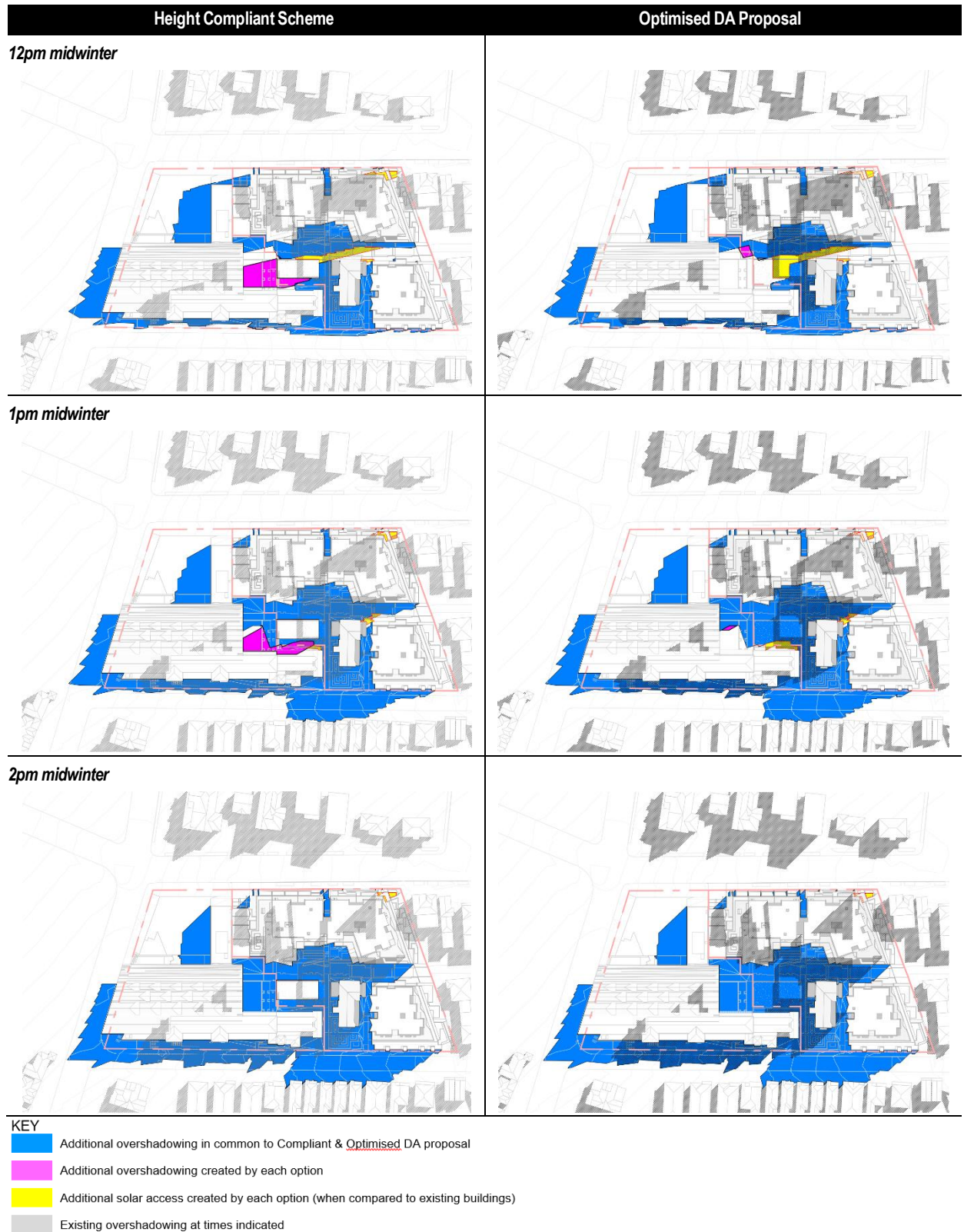
Where the development exceeds the maximum height standard it has no additional impact on the solar access to the new public park proposed to be created on the corner of Livingstone and Marrickville Roads. The proposed development is appropriately set back from its boundaries and adjoining development to ensure satisfactory levels of solar access will be maintained.

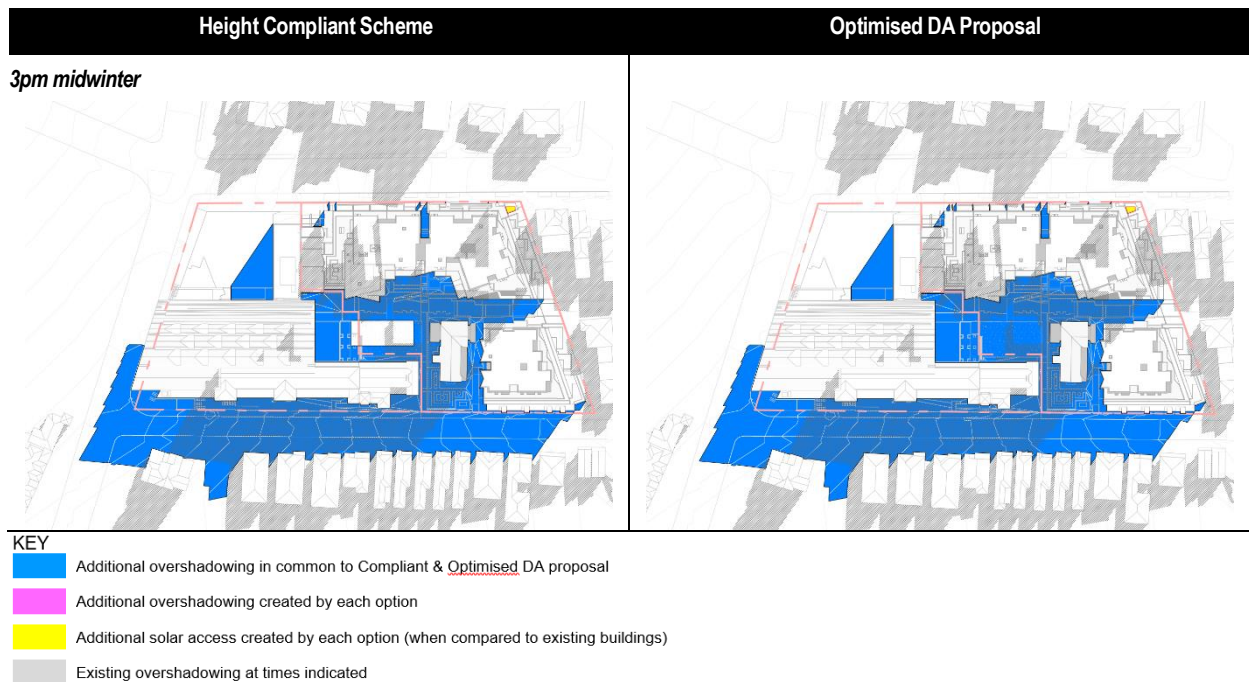
The shadow plans included within the Architectural documentation and appended to the Statement of Environmental Effects (**Appendix A**) demonstrate that the new public park area at the corner of Livingstone and Marrickville Roads will benefit from good amenity irrespective of the variation relating to the building height control whereby the solar compliance exceeds the DCP control of 30%. The proposed residential development also receives 70% solar access to living areas and balconies in accordance with the ADG.

The additional height (over and above 29m) will still allow solar access well above the minimum standards to be achieved for the residential properties and community uses to the west pursuant to Section 2.7.3 of the Marrickville DCP - Solar access for surrounding buildings. As shown in **Table 3**, the additional shadow caused by the parts of the buildings that depart from the height control is inconsequential and does not affect the private open space of surrounding dwellings between the hours of 9am and 3pm. Hourly shadow diagrams are shown below.

Table 3 – Shadow diagrams comparing proposal to height compliant scheme







The overshadowing studies clearly demonstrate that the optimised DA scheme offers a far superior outcome from an overshadowing perspective when compared to the compliant scheme.

The optimised DA scheme creates minimal additional overshadowing to the front yard of the Marrickville Health Centre at 9am only. Additional marginal overshadowing occurs at 12 – 1pm on the edge of Hospital Lane. The compliant scheme has significant overshadowing impacts between the hours of 9am – 1pm to the Children's playground, the heritage buildings and Hospital Lane. It can therefore be concluded the optimised DA provides greater amenity in terms of light and air to the Children's playground and the heritage building. This is an overall improved outcome for the site.

The proposed height is supported as:

- the proposed height has no additional impact on overshadowing or views enjoyed by neighbouring properties or within the vicinity. If this clause 4.6 variation request is not upheld and the applicant's will be required to pursue the compliant scheme with the reinstatement of Building D, this will result in additional overshadowing of the "leased area" and the Children's Playground;
- building separation distances generally comply with the recommended distances identified within the ADG, allowing for satisfactory exposure to the sky and sunlight;
- substantial light and air amenity setback is provided to the Councils Children's playground and 'leased area' heritage building, creating a greater sense of openness;
- it allows for the creation of a new amenity for the entire site in the form of a public open space and greater enhancement of permeability through the site;
- complies with the maximum allowable GFA for the site;
- it has resulted from a site specific design circumstance to achieve an optimal outcome for the site; and
- it is supportable in light of legal precedence.

Overall, the optimised DA scheme meets Objective (C), despite the non-compliance with the height control the proposal ensures that buildings and public areas receive

satisfactory exposure to the sky and sunlight and that neighbouring residences receive adequate solar amenity.

Objective (d) – to nominate heights that will provide an appropriate transition in built form and land use intensity.

The proposed increase to height will continue to provide a development that is consistent with the scale of the original compliant scheme.

The proposed height variation will allow for a reduction in the number of buildings on site from four to three by transferring the mass of Building D as an additional story to Building A2, which fronts the busier, more urban-scaled Livingstone Road.

The buildings have been articulated to give human scale on the ground and first floor and have been setback on the upper levels to provide additional articulation in order to transition more sympathetically to the surrounding two storey streetscape. The revised building massing of the optimised DA scheme better relates to the adjacent neighbourhood context, as described in Objective (b) above.

Providing the new central public open space allows greater separation and light between the heritage buildings and provides a sympathetic backdrop. In addition, the new public open space allows for greater site permeability also assisting with the reduction in the built form intensity.

In accordance with the above, the proposed development will continue to provide an appropriate transition in built form and the increase in height will not increase the proposed intensity of the land use despite the non-compliance with the LEP height control.

1.3.2 Other reasons why compliance is unreasonable or unnecessary

Compliance with the maximum building height standard is also unnecessary in these circumstances because a better planning outcome for the site as a whole and the community generally can be achieved as a result of the non-compliance. This is outlined in Section 1.4 below. The development is an integrated proposal that will deliver residential accommodation with high amenity and significant investment in community infrastructure that will benefit the residents of Marrickville. It is appropriate that these benefits be maximised within the environmental opportunities and constraints of the site.

1.4 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the building height control as it applies to the site. The non-compliance with the building height control results from the opportunity to create additional public open space and better integrating with its neighbouring surrounds, whilst recognising the sites contextual relationship and future desired character.

The inclusion of new public open space in the optimised DA scheme is achieved by electing not to build on parts of the site where building is allowed under the planning controls, and redistributing this building mass to the top of Building A1 and A2. By doing so, the development as a whole will benefit as it:

- provides an approximately 400m² of additional public open space that benefits the entire site and broader community;
- substantially increases permeability through the development including hospital lane and a softening of the landscaping;

- provides substantial light and air to the Council's Children's Playground and the heritage 'leased area' building;
- introduces a setback to Building B along Lilydale Street and the stepping of this building which better integrates with the low density scale of the adjoining properties;
- provides a better ESD outcome by the removal of what would be an inefficient building, with the GFA being relocated to Building A1 and A2 which will have a high efficiency; and
- allows the heritage fabric and built form of the Old Nurses' Quarters to be more visible from the public domain and a general improvement to the heritage setting of this building and the former Main Ward building.

1.4.1 Conclusion on clause 4.6(3)(b)

In light of the above it is considered that there are no environmental planning grounds that warrant maintaining and/or enforcing the numerical building height standard in this instance. Rather, there are clear and justifiable environmental planning merits which justify the flexible application of the height control allowed by clause 4.6.

1.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

1.5.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in Section 1.3 of this report.

1.5.2 Consistency with objectives of the zone

The proposed development exceeds the maximum height standard on land in both the R4 High Density Residential and B2 Local Centre zones. As such, the objectives of both zones are required to be considered in determining whether the variation to exceed the applicable height standards is supportable.

R4 High Density Residential

The objectives of the R4 High Density Residential Zone are as follows:

- (a) *To provide for the housing needs of the community within a high density residential environment.*
- (b) *To provide a variety of housing types within a high density residential environment.*
- (c) *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- (d) *To provide for office premises but only as part of the conversion of existing industrial and warehouse buildings or in existing buildings designed and constructed for commercial purposes.*
- (e) *To provide for retail premises in existing buildings designed and constructed for commercial purposes.*
- (f) *To provide for well-connected neighbourhoods that support the use of public transport, walking and cycling.*

The proposal in its entirety satisfies the R4 zone objectives as it:

- provides a 4% mix of affordable housing in 1, 2 and 3 bedroom apartments;

- creates a green buffer along the northern boundary with low density residential neighbours;
- removes the northern driveway to minimise potential conflict with low density residential neighbours;
- proposes a mix of dwelling typologies consisting of 1, 2 and 3 bedroom apartments and 3 bedroom 2 storey terraces within a high density residential environment to provide for the housing needs of the community;
- contributes to housing diversity and will increase the housing choice within the LGA by providing additional housing in an established urban area with good access to a commercial centre, employment lands and public transport;
- provides a residential development that is compatible with and benefits from the services that will be provided as part of the Community Hub facilities, including library, children's playground, lease area and open space; and
- in addition the proposed development includes significant open space on site, and an enhanced through-site link which will substantially improve pedestrian and cyclist permeability through the development. In this way, the optimised DA better achieves the objectives of the R4 zone than the compliant scheme.

B2 Local Centre

The objectives of the B2 Local Centre zone are as follows:

- (a) To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- (b) To encourage employment opportunities in accessible locations.*
- (c) To maximise public transport patronage and encourage walking and cycling.*
- (d) To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.*
- (e) To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.*
- (f) To constrain parking and reduce car use.*

The proposal in its entirety satisfies the B2 zone objectives as it:

- will provide substantial community uses in the form of a new public library, Community Hub and open space to serve the needs of the local population;
- provides employment opportunities through the community uses and incorporates a 'leased area' building that may be leased through Council for commercial purposes;
- is located in a highly accessible location with good access to public transport;
- includes end of trip facilities and through-site links in close proximity to the existing centre thereby encouraging walking and cycling through the local precinct;
- includes publicly accessible car share facilities;
- contributes to housing diversity and will increase the housing choice within the LGA by providing additional housing in an established urban area with good access to the business centre;
- provides active uses at street level including a library, café and high quality landscaped spaces; and
- By removing bulk from the ground plane, the optimised DA better achieves the B2 zone objectives than a compliant scheme.

1.5.3 Conclusion on clause 4.6(4)(a)(ii) and overall in relation to clause 4.6(4)

Despite the proposed variation to the numerical maximum building height control, it is considered and has been demonstrated that the proposed building height is consistent with the objectives of the R4 High Density Residential and B2 Local Centre zones of the Marrickville LEP 2011.

Accordingly, the consent authority can reasonably be satisfied that this written request has adequately addressed the matters in clause 4.6(3) and that the proposed development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

1.6 Secretary Concurrence

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

1.6.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the maximum building height development standard does not raise any matter of significance for State or regional planning. We do note however, that the proposal is consistent with the most recent metropolitan plan for Sydney, *A Plan for Growing Sydney* in that it:

- provides accommodation and services to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- allows for the use of the site to continue to provide local employment opportunities;
- is well located for public transport connections;
- protects the local heritage of the area;
- includes the redevelopment of a substantial urban renewal site in proximity to public transport and a commercial centre;
- contributes substantial social infrastructure to the locality through the inclusion of a public library, Community Hub and open space; and
- provides affordable housing in proximity to public transport and a local centre.

Further, the additional height proposed does not result in any adverse impact on the surrounding area, and enables a more appropriate distribution of building mass across the site to free up the ground level for additional communal open space.

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

There is no public benefit in maintaining the numerical building height development standard in this instance. In fact strictly adhering to the maximum height development standard would result in a worse public outcome for the site. Maintaining and enforcing

the development standard in this case would unreasonably prevent the orderly and economic development of this underutilised and dilapidated site, and would unnecessarily encumber the various community benefits this development brings, including:

- revitalisation of an underutilised and derelict site and the adaptive reuse of important heritage buildings;
- a new development that is compatible with the desired future character of the locality and which recognises that Marrickville is an area undergoing significant and dynamic transformation;
- a new development offering high quality design and improvements to the streetscape;
- a new development including a 1,250m² public park with significant areas of deep soil in addition to landscaped through-site pedestrian linkages and a 400m² public open communal open space;
- electing not to build on parts of the site where building is allowed under the planning controls to provide a public open space;
- the provision of construction jobs and ongoing employment opportunities;
- the capacity to achieve a better outcome by limiting development in more sensitive locations on the site;
- the provision of significant community infrastructure for the benefit of the broader area, including a new library, Community Hub, public parks and Children's playground; and
- activity on a long held vacant dilapidated site.

In some circumstances, it may be in the public benefit for development controls to be strictly applied, for example if an undesirable precedent is likely to be set if a development standard is varied. This site is unique and unlikely to create an undesirable precedent in that:

- it is large and offers the opportunity for a cluster of buildings to be developed as well as community and public space to be created if the height variation sought is upheld; and
- the heritage buildings and superior heritage outcome in the optimised development application scheme justify an alternative outcome that is more desirable.

This site and the optimised development application represent exceptional circumstances that warrant the variation of the height control to allow a better outcome to be delivered. It is therefore considered to be in the public interest for the variation to the development standard be supported in this case.

1.6.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence.

In addition to the matters already mentioned, it is worth noting that the proposed variation to the maximum height development standard will not set an undesirable precedent in the area and the maximum height controls are specific only to this site. The height variation sought applies only to some parts of selected buildings in locations that have no detrimental impact on the amenity of surrounding properties or future users of the site. Further, the circumstances of the development are unique to the proposal and will allow for increased permeability, improved heritage setting, better integration with the site surrounds, and additional green communal open space to be provided on the site. The variation sought is a direct result of the unique heritage context of the site and the opportunity presented by the optimised DA scheme.

1.7 Summary

Compliance with the maximum building height development standard contained in clause 4.3 of the Marrickville LEP is unreasonable and unnecessary in the circumstances of the case, and the justification is well founded. It is considered that the variation allows for a better planning outcome for the site by freeing up additional ground plane area for a high quality public open space.

This clause 4.6 variation request demonstrates, notwithstanding the proposed variation to the maximum building height development standard, that:

- the objectives of the maximum height development standard are achieved notwithstanding the variation to the numerical control;
- the proposed flexible application of controls achieves better planning outcomes than would be achievable by strict adherence to the controls across the development site;
- it is in the public interest as the proposal remains consistent with the applicable land use zones and development standards;
- the proposal is compatible with the scale and character of the area and will not have adverse amenity impacts on surrounding land;
- the non-compliance with the development standard does not raise any matters of State and regional planning significance;
- there is no public benefit in maintaining the building height development standard adopted by the environmental planning instrument for this site; and
- legal precedent has been taken into account and addressed as part of this clause 4.6 variation request.

This clause 4.6 request demonstrates that the proposed development will deliver a holistically better outcome for Council, the community and future residents of the development. Overall, the proposal results in the opportunity to establish a high quality development that positively contributes to the precinct and provides significant public benefits. For the reasons set out in this written request the development should be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Marrickville LEP.

If this clause 4.6 variation request is not upheld, realistically the applicant can pursue a compliant development application to reintroduce the four storey Building D in a space that would otherwise be public. The alternate proposal with the reintroduction of Building D will not include the additional benefits of providing a public open space, or providing a more sympathetic and appropriate heritage outcome. The alternative proposal will also result in a less desirable urban design outcome for the community, workers and the future residents.

2.0 Conclusion

This development application seeks consent for the redevelopment of the old Marrickville Hospital site for a new Community Hub, public open space and residential flat buildings.

This report provides an assessment and justification for the development, consistent with the relevant local environmental plans and policies. The environmental assessment provided in Section 1.0 demonstrates that the matters for which approval is sought will have no adverse environmental impacts. The proposed development is also generally consistent with the objectives of the relevant statutory planning instruments and guidelines with the exception of a proposed height variation to facilitate the optimised development scheme.

This SEE demonstrates that the proposed development will not give rise to any significant adverse environmental effects which cannot be managed or mitigated. The proposed development is of a high quality in terms of architectural and landscape design and will make a positive contribution to the locality. The proposal is sympathetic to the site's heritage context and will allow the retained heritage buildings to continue to be enjoyed by the broader community into the future.

The Community Hub will provide a range of much needed community facilities and public spaces to the Marrickville Centre and the residential component will deliver a number of affordable dwellings along with a mix of new housing stock. The development as proposed will realise Council's longstanding vision to redevelop the site for benefit of the Marrickville community.

Upholding this clause 4.6 variation request and approving the optimised DA will result in a better planning, urban design and heritage outcomes for the following reasons:

1. **New Public Open Space** - additional public open space will be introduced in the form of a public park adjacent to and south of the Old Nurses' Quarters in place of the previously proposed Building D.
2. **Improved Heritage Outcome** - the heritage significance of the site will be best preserved and respected by allowing the height variation to redistribute building mass from the ground plane to building A1 and A2. Heritage studies confirm the optimised DA is preferred from a heritage perspective.
3. **Better Urban Design** - the additional open space proposed on the ground plane will allow greater accessibility and permeability through the site and results in a better urban design outcome. The optimised DA provides greater amenity in terms of light and air to the Children's Playground and heritage building. This is overall an improved outcome for the site and public open space.
4. **Re-distribution of Permissible GFA** - the proposal results in a better planning outcome that is not radically different from the original scheme that was envisaged, rather it involves a slight reduction and redistribution of permissible GFA.
5. **Total GFA under Permissible Controls** – the deletion and redistribution of GFA results in the total proposed GFA is below the maximum permissible controls.
6. **Minimal Overshadowing**- there will be negligible additional impacts to overshadowing. In fact, the optimised DA provides a greater amenity in terms of sunlight and air to the Children's playground and heritage building. This is an overall improved outcome for the site and public open space.
7. **No View Loss**- The increased height has been thoughtfully designed to reduce any impacts and the perception of height. There will be no view loss for adjoining residents or from adjoining public spaces.

8. **Dated Height Controls** - the proposal in the optimised development application better reflects the transitioning character of the Marrickville locality to a more dense urban environment. The height controls are standard controls (from the Standard LEP) and a rigid and inflexible application of the controls would only serve to frustrate the delivery of a superior design outcome.
9. **Character of Locality** - Marrickville is an area in transition; this transition has been accelerated by the Sydney Metro and the draft Sydney to Bankstown Urban Renewal Corridor Strategy. The area is moving towards a higher density character and accordingly, the controls in the 2011 LEP are not in line with the likely future character and nature of the area which is moving towards increased bulk. Sites within walking distance of the station, such as the proposed site, are likely to be upzoned in the near future.

The optimised DA is a clear example of a situation in which the detailed studies undertaken as part of the design process for a proposal have revealed that a superior development outcome is available by allowing a minor variance from the development standard which was set prior to the benefit of those studies. This clause 4.6 variation demonstrates exceptional circumstances where flexibility in the application of a numerical development standard is warranted.

In light of the above and the detailed assessment of the proposal, we have no hesitation in recommending this DA be approved.