

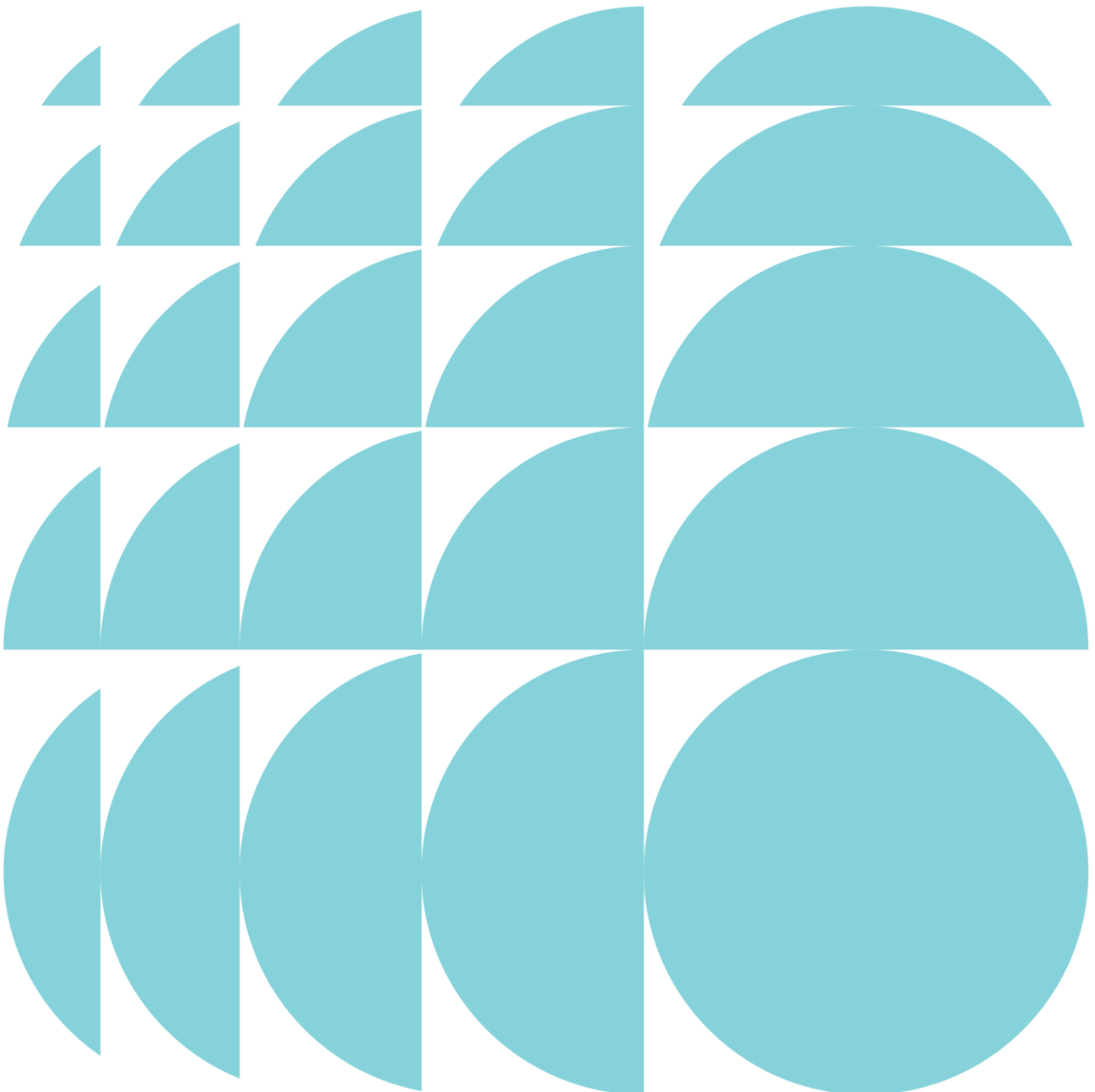
ETHOS URBAN

Clause 4.6 Variation to Height of Building Standard

182-198 Victoria Road, and 28-30 Faversham
Street, Marrickville (DA201900096)

Submitted to Inner West Council
On behalf of Toga Wicks Park Development Pty
Ltd (TOGA)

11 November 2019 | 218520



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1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of TOGA. It is submitted to Inner West Council (the Council) in support of a development application (DA) for a mixed-use residential flat building with basement level parking, ground floor retail, 272 apartments and public domain works at 182-198 Victoria Road, and 28-30 Faversham Street, Marrickville. This DA is formally known as DA201900096.

Clause 4.6 of the *Marrickville Local Environmental Plan 2011* (Marrickville LEP) enables Inner West Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the development standard for height of building under clause 4.3 of the Marrickville LEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban. The building height standard for which this Clause 4.6 Statement applies is the 23m height limit along the site, Victoria Road frontage.

Following the exhibition process of DA201900098, a number of amendments have been made to the proposed development to reflect the feedback provided from Council and the Architectural Excellence Panel AEP. Notably, this feedback has required the need for a vegetated screening structure to respond to the following comment provided by the AEP:

“18. Condenser units located on the terracing roofs will generally be visible from floors above, (eg. Level 6 roof), and these should be visually concealed, especially those at lower levels, which are increasingly overlooked.”
(AEP Report, dated 13 August 2019)

In responding to the above comment, the scheme design now includes a vegetated screening structure on the Level 6 rooftop to ensure the effective screening and concealment of the condenser units. This amendment has inadvertently resulted in a minor exceedance of the maximum building height of 23 metres specified under Marrickville LEP. This screening structure exceeds the maximum building height by **750mm - 850mm**, representing a variation of **3.2% - 3.6%**. Accordingly, due to this now minor non-compliance with the LEP height of building standard, a clause 4.6 variation request has been prepared to support the DA.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify the contravening development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

In accordance with the above requirements, this written clause 4.6 request identifies the variations sought to the maximum building heights across the site and establishes that compliance with the development standard is unreasonable and unnecessary in the circumstances. It also demonstrates that there are sufficient environmental planning grounds to justify the contravention for each building and provides an assessment of the matters the Secretary is required to consider before granting concurrence.

2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the Marrickville LEP. Clause 4.3 provides that the maximum building heights for the site as shown on the building height map are 23m and RL49, nominated for different areas on site.

It should be noted that the original development scheme sought under DA201900096 was fully compliant with the height of building standards. A revised scheme has been submitted to Council which results in a minor breach to the height of building standard due to the applicants need to respond to the AEP recommendations. Refer to separate supporting documentation for further detail of the changes to the proposed building for the site, as a result of AEP recommendations.

Clause 4.3 of the LEP is reproduced below in its entirety and an extract of the relevant Height of Buildings Map, to which that clause applies, is reproduced in **Figure 1**. The site is subject to differing maximum heights. A height of RL 49.00 applies to the majority of the site and to the primary Wicks Park frontage and a 23m height limit applies to the built form fronting Victoria Road.

Maximum heights of between 20m and RL 50.00 surround the site.

Clause 4.3 Height of Building

(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](#).

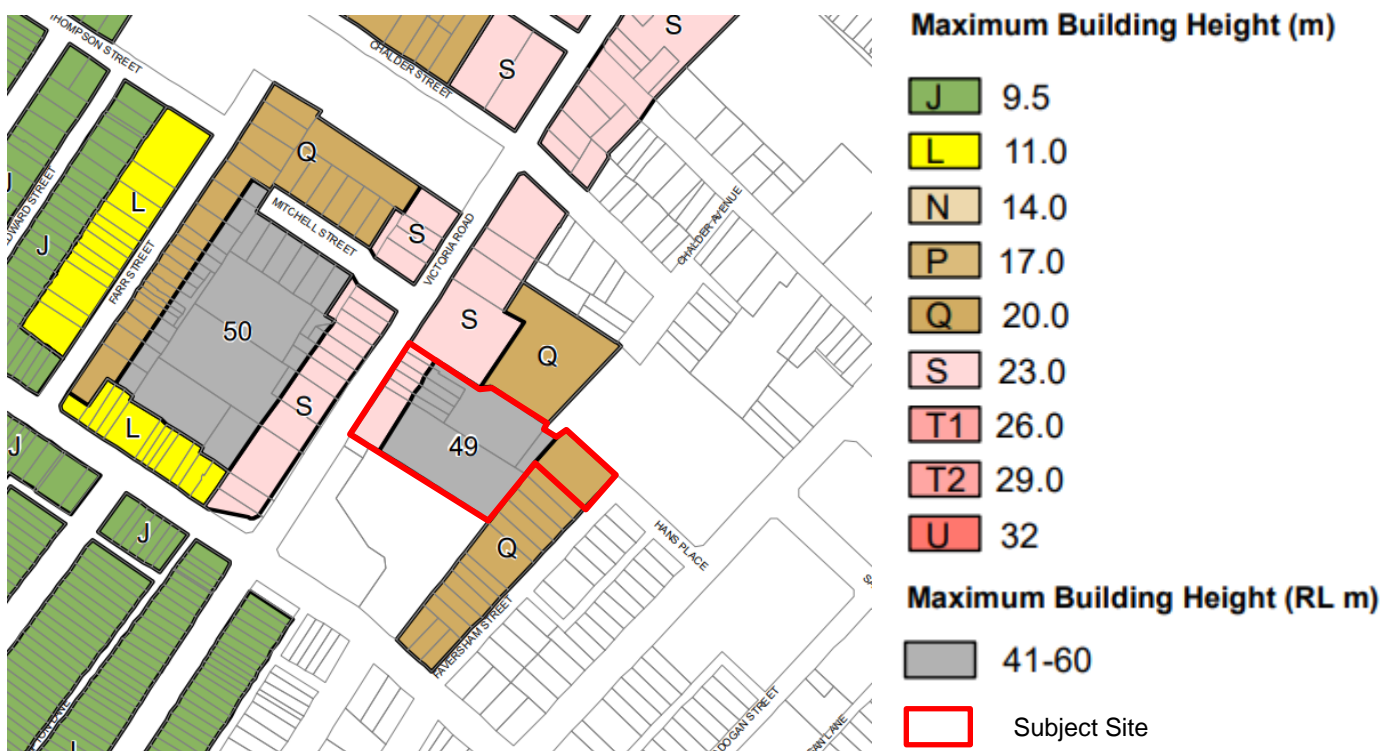


Figure 1 Extract of the LEP maximum building height (site indicated in red)

Source: MLEP 2011

2.1 Variation sought

The revised DA scheme responds to recommendations raised by the AEP and now includes two vegetated screening structures on the Level 6 rooftop plant area fronting Victoria Road. The vegetated screening structures are located centrally atop the proposed plant structures with the sole purpose of screening them from residential outlooks when viewed from above. Incorporation of the screening devices will provide a better planning outcome by visually concealing building services in an area that is inaccessible to residents.

These vegetated screening structures have a maximum height of 23.85m, which is approximately 0.85m above the maximum height limit of 23m presented at **Section 2.0**. The exceedance proposed represents an approximate 3.6% variation. The vegetated screening structures are set back a minimum of 6m from the front alignment of the proposed building along Victoria Road.

Extracts of the architectural plans showing the location and extent of the proposed height variation sought are provided at **Figures 2, 3 and 4**, with the breach highlighted in yellow and the LEP height limit line shown in red.



Figure 2 Extracts of the western elevation showing the location of screening structures

Source: Turner Architects



Figure 3 Extract of the northern elevation showing the location of screening structures

Source: Turner Architects



Figure 4 Extract of the southern elevation showing the location of screening structures

Source: Turner Architects

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the MLEP 2011 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.*

Further, clause 4.6(4)(a) of the MLEP 2011 provides that:

- (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.*

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] NSW LEC 827;*
2. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009; and*
3. *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*

The relevant matters contained in clause 4.6 of the MLEP 2011, with respect to the height of building development standard, are each addressed below, including with regard to these decisions.

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

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

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]).

As the language used in subclause 4.6(3)(a) of the MLEP 2011 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 Method**).
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 Method**).

The 'First Method' is of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary. The following section addresses 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.

3.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.3 of the MLEP 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.*

3.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

Objective (a): *to establish the maximum height of buildings*

Objective (a) is not relevant given that the building height standard is established by clause 4.3(2).

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

The desired future character of the area is established by:

- The zoning of the site and the objectives of the zone under the Marrickville LEP (Amendment No. 14) gazetted during December 2017 which encompasses the provisions of the Victoria Road Planning Proposal; and
- The desired future character which is set out under Part 9.47 of the *Marrickville Development Control Plan 2011 (Marrickville DCP)*.

The zoning of the site is B4 Mixed Use. The consistency of the proposed development with the objectives of the zone is considered in section 3.3.2 below.

The site is located in the Victoria Road Precinct (Precinct 47) under the Marrickville DCP. The desired future character of that precinct is set out in section 9.47.3 of the Marrickville DCP and is included in **Table 1** below.

Table 1 Desired Future Character Victoria Road Precinct

Character Statement No.	Comment
1. To create an active commercial corridor of high-quality urban design along Victoria Road by encouraging active ground floor commercial uses such as cafes, small retail opportunities; boutique retail showrooms; and professional business spaces which are accessible to all persons.	It is considered that the minor variation to height will not compromise the developments ability to deliver ground floor active uses along Victoria Road.
2. To integrate urban and architectural design excellence and sustainability in the precinct to provide an	The built form of the proposed development continues to promote design excellence and has been designed to

Character Statement No.	Comment
environment that encourages sustainable living for all residents.	maximise amenity within the site without having an adverse impact on surrounding sites. The proposed development has been designed to provide all dwellings with a high quality of internal amenity and outlook in which the proposed vegetated screening structures contributes to.
3. To enhance existing streets and incorporate new shared zones to encourage pedestrian activity.	The minor variation to height at Level 6 does not hinder the sites ability to deliver the through-site link from Victoria Road.
4. To support the creation of new roads: shared zones: and vehicular accessways to enhance permeability; to increase the connectivity between each sub-precinct, and to provide opportunities for vehicular access to development sites, other than via direct access to Victoria and Sydenham Roads within the precinct.	Similarly to the above comment, the development will continue to provide the creation of a new road. The minor height variation will not impact the new through-site link.
5. To enhance the streetscape by incorporating sustainable design such as green streets and pathways throughout the precinct that form part of a wider green network connecting local activities, parks, public spaces and schools and which provide opportunities for incidental, casual social interaction amongst employee, residents and visitors.	The proposed vegetated screening structures at the Level 6 rooftop aims to incorporate additional provisions for greenery within the precinct.
6. To enable a broader mix of businesses that meets the requirements of the local employment profile and changing demographics of the Inner West Local Government Area.	The minor variation to height will not hinder the sites ability to provide a mix-used development that can enable a broader mix of businesses within the precinct.
7. To foster the transition of industrial uses to cleaner and modern, light and creative industries to improve the amenity of the precinct, while retaining employment opportunities.	The minor variation of height relates to the proposed vegetated screening structures which aims to improve the internal residential amenity of the precinct and contributes to an environmentally cleaner urban built form outcome than that of the existing industrial character.
8. To create a vibrant hub for Marrickville's creative industries (including live music venues) that complements the existing arts and cultural premises in the Chapel Street Sub-precinct and other parts of the precinct, as well as the proposed Sydenham Station Creative Hub in the adjacent precinct.	The minor variation to height does not diminish the developments ability to contribute to creating a vibrant hub for Marrickville's creative industries.
9. To create a liveable residential environment within the Victoria Road Precinct with inclusive access for all residents to the new Victoria Road Commercial Corridor, transport, and existing and new amenity areas.	The proposed vegetated screening structures will contribute to the residential amenity of the precinct in creating a liveable environment with greener outlooks in a higher density setting.
10. To ensure that higher density developments, within the precinct, demonstrate good urban design and environmental sustainability for occupants of those developments.	The minor variation to height allows the development to deliver on appropriate infrastructure that screens hard plant equipment area and deliver good urban design outcomes that also contributes to environmental sustainability by keeping the level 6 rooftop plant area cool via additional landscaped provisions.
11. To encourage the conversion of existing warehouses and other industrial buildings, where appropriate, and to support the creation of a hub within the Chapel Street	The vegetated screening structures does not impact the creation of a hub within the Chapel Street sub-precinct for home renovation and food production businesses.

Character Statement No.	Comment
Sub-precinct for home renovation and food production businesses that promotes active or display ground floor uses such as ancillary showrooms and cafes.	
12. To develop architectural design excellence for new buildings within the precinct which adopt design cues, where appropriate, from existing industrial buildings that are likely to be retained and re-used.	The vegetated screening structures are minor in size yet are considered to contribute to the developments opportunity to provide an outcome that exemplifies architectural design excellence as it responds to the recommendations made by the AEP.
13. To provide significant housing and employment spaces for Sydney, within the precinct while balancing the impacts on surrounding lower density residential properties.	The minor variation to height does not hinder the developments ability to provide significant housing and employment spaces on site.
14. To ensure the provision of a high level of residential amenity for development within the precinct and to mitigate any impacts on the residential amenity of adjoining and surrounding properties.	The vegetated screening structures aim to fulfil this statement in that it serves a sole purpose to screen the Level 6 plant equipment area and provide better residential amenity to improve the outlook from above eastern elevation units.
15. To ensure the interface between potential conflicting land uses are managed appropriately through design and siting measures.	The vegetated screening structures are not considered to be at the interface of conflicting land uses. The development has undergone an extensive design and assessment process and is considered to achieve the best use and design on site, whilst also responding to recommendations made by the AEP.
16. To support the upgrade of existing parks and the provision of new publicly accessible open spaces, located on private land. to provide useful open space and landscaped areas.	The proposed vegetated screening structures will not hinder the ability to provide park upgrades to Wicks Park. Furthermore it does not hinder the useful open space in Wicks Park.
17. To ensure development within the precinct is compatible with the operations of Sydney Airport.	The vegetated screening structures are not proposed in a location that breaches OLS measures.

The Victoria Road Precinct is divided into a number of sub-precincts, including Wicks Park sub-precinct. The Wicks Park Future Character Statement is provided in **Table 2**.

Wicks Park sub-precinct future character statement	Comment
<p>The Wicks Park Sub-precinct will comprise of a mixed-use area that will be characterised by non-residential ground floors with residential above, whilst a business development zone will encourage new enterprises and creative uses along Faversham Street.</p> <p>The sub-precinct will also support the function of the commercial corridor along Victoria Road while maximising amenity opportunities from Wicks Park Streetscape and street network improvements will directly link to Victoria Road, enhancing the permeability of the sub-precinct, and supporting the ongoing function of the Victoria Road Commercial Corridor. The extension of Hans Place to Victoria Road will be a shared zone that will provide a key pedestrian link from the Creative Hub Precinct to the Victoria Road Commercial Corridor, with the opportunity for active uses such as cafes, studios: boutique showrooms: and smaller retail opportunities.</p>	<p>The development responds to the Wicks Park sub-precinct attributes by developing a site with a direct interface to Wicks Park and aims to engage the development to address the park specifically, improving residential amenity outcomes and contributing to the activation of Wicks Park.</p> <p>Despite the minor variation to height limit, the site will continue to achieve a development outcome that provides a function that contributes to supporting an activated commercial corridor along Victoria Road. The development will achieve a high quality mixed-use precinct that prioritises pedestrians, sustainable transport and supports the existing network of creative industries by providing residential opportunities and employment space for cafes, studios and smaller retail areas.</p>

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

The proposed height exceedance is situated adjacent to the western boundary of the site, towards the Victoria Road frontage (see **Figure 3**). Because of the location and minor extent of the non-compliance, the additional height is unlikely to have any impact on sky and sunlight exposure from buildings and public areas to the rear at Wicks Park. That is because any additional overshadowing created by this additional height would be of a minor nature as the vegetated screen structure is open, allowing light to permeate through the structure.

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

The proposed development, inclusive of the screening structure, will continue to support an appropriate transition in built form intensity across the site through a stepped building form. The western building frontage is 6 storeys in height, dictated by the 23m Marrickville LEP height limit, with upper levels 6 to 11 setback further as it complies with its own decentralised height control over the site (see **Figure 1**).

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard**3.2.1 Ground 1: No additional environmental impacts arising from the non-compliance**

The additional height does not have any impact on exposure to the sky and sunlight from the public domain or surrounding sites. It's important to note that the site contains various LEP height limits being RL 49.00 for the majority of the site, with a 23m height control limited to the western elevation of the site in which the proposed screening structure omits.

The proposed screening structures result in a minor height variation of 0.85m above the existing height provision and are located in a setback position on the Level 6 rooftop, recessed behind the parapet and existing built form structure above, and therefore do not generate any adverse additional overshadowing impacts on surrounding areas.

3.2.2 Ground 2: Contributes to an improved residential amenity outcome for the overall site

The additional height is minor and responds to recommendations made by the AEP on 13 March 2019, with specific relation to item no. 18 being:

18. Condenser units located on the terracing roofs will generally be visible from floors above, (eg. Level 6 roof), and these should be visually concealed, especially those at lower levels, which are increasingly overlooked.
(AEP Report, dated 13 March 2019)

The screening of the plant area will provide a better planning outcome for the residential amenity and outlook of apartments on the eastern elevation of the upper building between Levels 6 to 11. The vegetated screening structure also will help mitigate the potential acoustic impacts associated with the condenser units as well as surrounding noise emitters associated with the transport corridor along Victoria Road.

3.2.3 Ground 3: No impacts to bulk and scale of the proposed development

The additional height is minor as it seeks a variation of up to 750mm - 850mm above the 23m height control, which is only a 3.2 - 3.6% variation. The extent of the variation is limited to the screening structures that are setback by 6m from the Victoria Road frontage parapet. The structures are located centrally within the Level 6 rooftop area in a recessed location from the building parapet and as a result will not be seen from the ground plane. Therefore, the extent of the height variation from the proposed screening structures are not considered to contribute to the bulk and scale of the built form at the Victoria Road frontage.

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

3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the height development standard, for the reasons discussed in **Section 3.1.2** of this report.

3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use Zone, as demonstrated below.

To provide a mixture of compatible land uses

The proposed development meets the objectives of the B4 Mixed Use zone as it seeks to develop the site for a mixture of retail/ residential uses.

To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

The proposed development will maximise public transport patronage as it provides additional retail and residential floor space within only 650m walking distance of Sydenham Train Station. The site will also provide retail opportunities for local shops and services which will encourage walking within the development and reduces the need for residents to use their car. The development also encourages cycling through the provision of bicycle parking spaces and end of trip facilities. There will also be a through-site link, providing easy access outcomes where it previously did not exist. Further commentary is discussed in great detail in the Statement of Environmental Effects.

To support the renewal of specific areas by providing for a broad range of services and employment uses in development which display good design

The development will facilitate urban renewal within an identified precinct and provide new high quality retail and housing in a growing area within close proximity to bus services on an established road network as well as existing rail infrastructure.

To promote commercial uses by limiting housing

The development provides dedicated ground floor retail / commercial spaces.

To enable a purpose built dwelling house to be used in certain circumstances as a dwelling house

This objective of the B4 Mixed Use zone does not apply to the proposal.

To constrain parking and restrict car use

The proposal achieves this aim by providing car share spaces to reduce private car use and enable a mixed-use precinct that is capable of supporting the everyday needs of residents and encouraging sustainable transport use.

3.4 Secretary Concurrence

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

(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.*

These matters are addressed in detail below.

3.4.1 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 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 to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- is well located for public transport connections, open space and services;
- is designed to a high standard and offers a unique architectural appearance and design in efforts to screen unsightliness within the Victoria Road Precinct, being a key urban renewal precinct in the inner Sydney area; and
- achieves well designed residential units that meet the design objectives and design criteria under Part 3 and Part 4 of the Apartment Design Guide.

Further, the additional height proposed does not result in any adverse impact on the surrounding area and enables a more appropriate design in response to recommendations presented by the AEP in improving the residential amenity and outlook of apartments contained on the eastern elevation of Levels 6 to 11 of the site.

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

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height is minor, it does not result in additional adverse amenity impacts to neighbouring dwellings, and the proposal is consistent with the desired future character of the Victoria Road Precinct.

3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

None.

4.0 Conclusion

The assessment above demonstrates that compliance with the height development standard contained in clause 4.3. of the Marrickville LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that:

- The extent of non-compliance is minor in terms of additional height as well as the horizontal extent of the non-compliance and is limited to a vegetated screening structure to conceal the Level 6 rooftop plant areas;
- The variation results from specific compliance to recommendations made by the AEP in relation to screening the plant services area at the rooftop location of Level 6, as it aims to protect the residential amenity of above apartments;
- The proposed development remains consistent with the desired future character of the Victoria Road precinct in terms of height, bulk and scale identified in Marrickville DCP Part 9.47; and
- Because of the location and minor extent of the non-compliance, the variation will not result in any additional environmental impacts in terms of overshadowing, privacy, bulk and scale, or exposure to the sky and sunlight from surrounding land and the public domain.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Marrickville LEP.