

# **CLAUSE 4.6 REQUEST CONCEPT DEVELOPMENT APPLICATION**

**UNITING CHURCH IN  
AUSTRALIA PROPERTY TRUST  
(NSW)**

**134A-134C BURWOOD ROAD  
AND 29A-33A GEORGE STREET,  
BURWOOD**

**URBIS**

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# 1. INTRODUCTION

This Clause 4.6 Variation Request ('**the Request**') has been prepared by Urbis Pty Ltd on behalf of Uniting Church in Australia Property Trust (NSW) (**the Applicant**) and accompanies a Concept Development Application (**Concept DA**) seeking consent for a mixed-use development 134A-C Burwood Road, 29A-33A George Street, Burwood.

The Request seeks an exception from the Maximum Building Height Control prescribed for the site under clause 4.3 of Burwood Local Environmental Plan 2012 (**BLEP 2012**). The variation is request is made pursuant to clause 4.6 of BLEP 2012.

The Concept DA includes the retention of two heritage-listed buildings and concept building envelopes for three new buildings to be located to the west, south and north of the retained buildings. The proposed building envelopes for Buildings 2 and 3 are substantially less than the maximum 60 metre height standard prescribed by clause 4.3 of BLEP 2012. However, the building envelope for Building 1 exceeds the maximum height of building control and a variation is sought under clause 4.6 of BLEP 2012.

It is recognised that the proposal fully complies with the maximum building height plane (**BHP**) for all three buildings in accordance with the provisions of clause 4.3A of BLEP 2012. The proposed development also fully complies with the floor space ratio controls in accordance with clause 4.4 and clause 4.4A of BLEP 2012.

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and request for information responses dated August 2019 and March 2020.

This report includes:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** brief overview of the proposed development as outlined in further detail within the SEE and post-lodgement responses to information requested by Council and accompanying drawings.
- **Section 4:** identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 5:** identification of the statutory planning framework, including relevant planning controls and Land and Environment Court case law relevant to assessment of clause 4.6 variations.
- **Section 6:** assessment of the proposed building height variations in accordance with the clause 4.6 assessment framework and relevant case law.
- **Section 7:** summary of key findings and conclusion arising from the detailed assessment.

## 2. SITE AND LOCALITY

### 2.1. SITE DESCRIPTION

The site comprises an amalgamation of nine existing lots to provide a consolidated development site with a total area of 5,028sqm. The site benefits from two existing street frontages, including frontage of approximately 40 metres to Burwood Road to the west and approximately 40 metres to George Street. The street address and legal description is within **Table 1**. An aerial photograph is provided as **Figure 1**.

**Table 1 – Site Details**

Street Address	Legal Description
134A Burwood Road, Burwood	Lot 1 DP795259 and Lot M DP409157
134C Burwood Road, Burwood	Lot N DP409157
134B Burwood Road, Burwood	Lot A DP306236
29A-29B George Street, Burwood	Lot 10 DP669145
31A George Street, Burwood	Lot 2 DP102050
31B George Street, Burwood	Lot 1 DP102050
33 George Street, Burwood	Lot 2 DP511068
33A George Street, Burwood	Lot1 DP511068

**Figure 1 – Aerial Photograph**



Source: Nearmap / Urbis



The site accommodates existing buildings and structures as outlined below and shown within the site photographs held as **Figure 3 (Pictures 1-6)**:

- Burwood Uniting Church and ancillary church offices
- School Hall building
- At-grade car park with vehicle access from Burwood Road
- Two storey commercial building fronting Burwood Road
- Three single-storey detached dwelling houses fronting George Street

**Figure 2 – Site Photographs** (Source: Pictures 1 and 3-6 Urbis, 2018; Picture 2 Google, 2018)



**Picture 1 – Burwood Uniting Church**



**Picture 2 – Burwood Uniting Church**



**Picture 3 – At-grade car park and commercial building at 134C Burwood Road**



**Picture 4 – School Hall Building with new mixed-use developments to rear along George Street**





**Picture 5** – Dwelling houses at 29A-33A George Street and adjoining mixed-use development under construction at 29 George Street

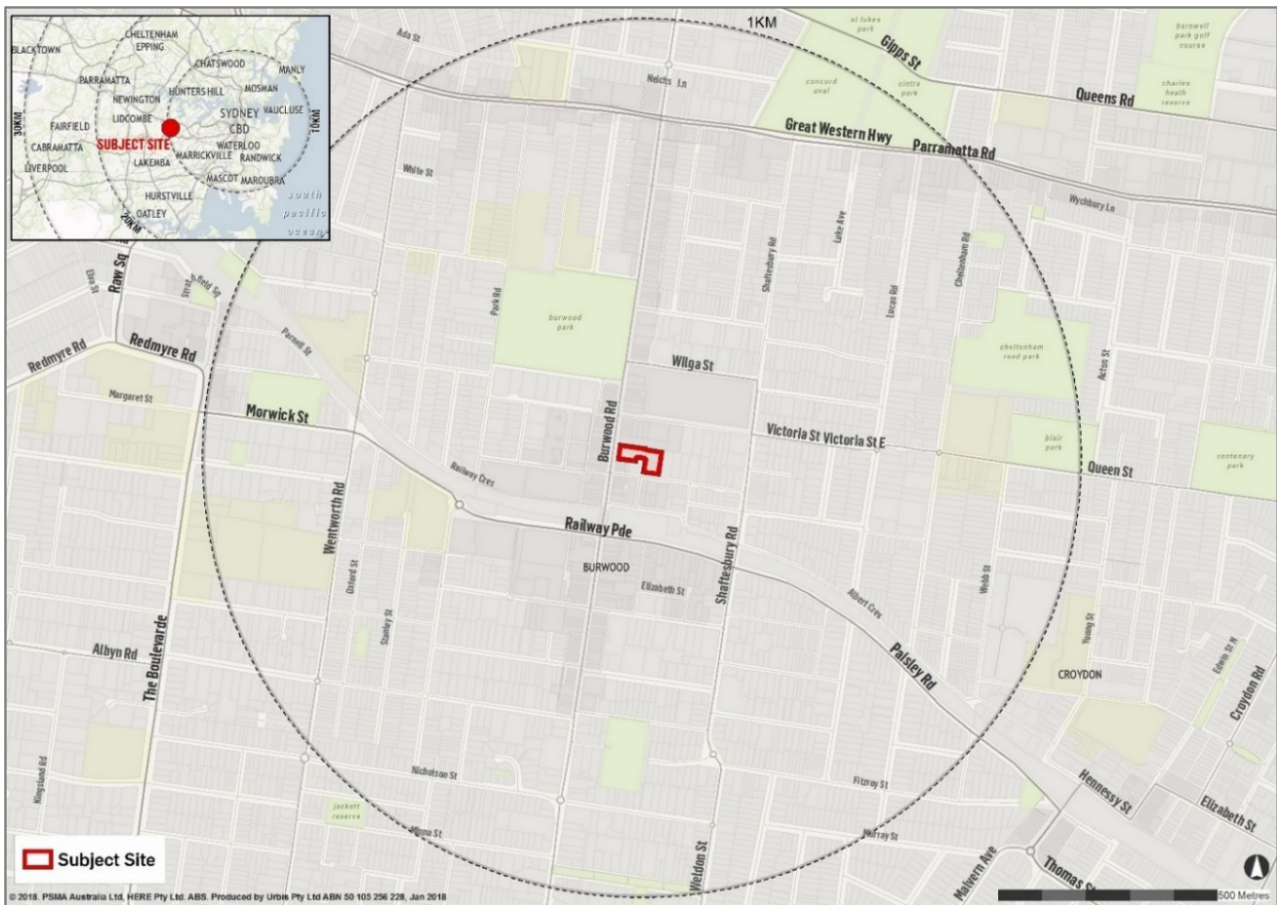


**Picture 6** – Dwelling Houses on George Street, looking north-west

## 2.2. SURROUNDING CONTEXT

Burwood is approximately nine kilometres from the Sydney central business district (CBD) and 11 kilometres from Parramatta CBD (refer to **Figure 5**). The Burwood Town Centre is undergoing a major transformation with significant redevelopment including higher-density mixed-use developments.

**Figure 3** – Surrounding Context (Source: Urbis)



The land immediately adjoining the site contains the following:

- **North:** a two-storey commercial building immediately adjoins the site to the north and currently contains a homeware store and restaurant.

- **East:** the adjoining site at 29 George Street has recently been redeveloped to facilitate a 19-storey mixed-use development, and a development proposal at 28 Victoria Street
- **South:** multiple two-storey commercial buildings are located to the south, as well as a three-storey residential flat building, with recently constructed mixed-use residential developments on Deane Street and recent Stage 1 Concept DA Approval on Burwood RSL further south.
- **West:** Burwood Road immediately fronts the western boundary of the site. A range of commercial buildings are located on the opposite side of Burwood Road.

The site is well-located close (within 800 metres) to a range of existing retail and commercial services, educational establishments, community facilities and open spaces. These include:

- **Retail and commercial:** Westfield Burwood, Burwood Plaza, B1 Square and the Burwood Road main street are all located within walking distance of the site.
- **Education:** the site benefits from close access to numerous public and private tertiary, secondary and primary level educational establishments, including:
  - TAFE NSW
  - Sydney School of English
  - Sydney School of Business and Technology
  - Burwood Girls High School
  - Burwood Public School
  - MLC School
  - Southern Cross Catholic Vocational College
  - Holy Innocents Catholic Primary School
  - Christ College
- **Community facilities:** Burwood Library and Burwood Park Community Centre
- **Open spaces:** Burwood Park and Wangal Park

Approved and proposed developments likely to influence the future built form and urban context of the locality are listed and briefly described within the following table:

**Table 2 - Approved and Proposed Developments**

Site	Description	Status
Burwood RSL site (bound by Deane Street, George Street, Shaftesbury Road and Marmaduke Street)	The site is located approximately 200m south of the subject site. The approved development has a maximum building height 94.6m, which was subject to a Clause 4.6 Request.	Approved
28 Victoria Street	This site is approximately 50 metres north-east of the subject site. A DA has been lodged for a mixed-use development with a maximum height of 100.98 metres which includes a variation of 40.98 metres.	Under assessment
42-60 Railway Parade	A Gateway Determination has been issued for a site approximately 300 metres to the south west seeking to increase the maximum building height to 136 metres and 144 metres, subject to further urban design analysis and impact assessment.	Gateway Determination issued



Site	Description	Status
29 George Street	The immediately adjoining mixed-use development to the east of the subject site comprises 19 storeys with a maximum height of 70.5 metres, which equates to a 38.3% variation.	Approved
7 Deane Street	The approved residential development has a maximum height of 70.8 metres.	Approved
9-15 Deane Street	The approved mixed-use development has a maximum height of 82.24 metres.	Approved
17 Deane Street	The approved 24 storey building has a maximum height of 104.075 RL which was subject to a Clause 4.6 Request.	Approved
121-123 Burwood Road	Council's assessment informed the Sydney Eastern City Planning Panel's approval for a 13.14% variation to the height control.	Approved

The site benefits from excellent accessibility to high-frequency public transport services. Burwood Train Station is located approximately 115 metres to the south. This station services the 'T1 North Shore, Northern and Western Line', the 'T2 Inner West and Leppington Line' and the 'Central Coast and Newcastle Line'.

The site is also located within 80 metres of dedicated bus stops to the north and south of the site that service a variety of routes and destinations, including Bondi Junction, Ryde and Sydney CBD.

### 3. PROPOSED DEVELOPMENT

The Concept DA is lodged by the Uniting Church in Australia Property Trust (NSW) and seeks approval for a mixed-use development with the following key features:

- Retention of the existing Burwood Uniting Church for its continued use as a place of public worship with conservation works to facilitate its preservation and ongoing use.
- Retention of the existing Church Hall and its adaptive re-use as a 'food and drink premises', including training and employment opportunities associated with church out-reach programmes.
- Envelopes for three new buildings to the west, south and north of the heritage listed buildings, including maximum building heights ranging from 5.33 metres (Building 3) to 91.28 metres (Building 1).
- Total floorspace of 19,833sqm gross floor area (**GFA**) comprising both existing and new buildings and accommodating a range of land use activities, including:
  - 282sqm for a place of public worship
  - 1,027 sqm for ancillary offices and meeting spaces
  - 1,037sqm centre-based child care centre floor space
  - 1,372sqm medical centre
  - 2,316sqm of commercial floor space, including retail premises and office premises
  - 12,269sqm of residential floor space, including apartments and student accommodation
- Ancillary private communal open spaces for the residential apartments (Building 1) and student accommodation (Building 2).
- Ancillary car parking and service areas located across six levels below Building 1 and providing sufficient capacity to accommodate all existing and future land use activities to be accommodated on the site.
- Vehicle access arrangements include limited access for church activities from Burwood Road and general vehicle access to the basement carpark via George Street.
- Publicly accessible open space and through-site pedestrian connection from Burwood Road to the existing through-site link adjoining 29 George Street, complemented by landscaping, bespoke furniture and outdoor dining.
- East-west through-site link from Burwood Road to north-south through-site link on 29 George Street, further strengthening the offer of existing and proposed Council-led through-site links.

The configuration and layout of the proposed development on the site is shown in previously submitted Architectural Plans dated February 2020 and the reduced sized plan extract at **Figure 4** in this report.

The maximum heights, land use activities and floorspace for each of the three buildings are outlined within the tables on the following page.

**Table 3 – Numerical Overview**

Element	Proposed Development	
Site Area	5,028sqm	
Total GFA	19,833sqm	
Total FSR	3.94:1	
Residential GFA	13,799sqm (including residential apartments and student housing)	
Residential FSR	2.76:1	
Building Setbacks (ground level)	3 metres to George Street (Building 1) 0 metres to Burwood Road (Building 2) 18 metres to Burwood Road (Building 3)	
Building Separation	6.11 metres from the Level 4 and Level 5 apartments to the northern boundary 9.1 metres from the upper level apartments to the western boundary 9.505 metres from the Level 4 terraces to the eastern boundary 9.405 metres from the upper level apartments to the southern boundary/George Street 13.53-14.1 metres from the upper level apartments to the eastern boundary	
Building Heights (maximum)	Building 1 - 91.28 metres Building 2 - 25 metres Building 3 – 5.33 metres	
Building Podium Heights	8.5 metres to Burwood Road (Building 2) 15 metres to George Street (Building 1)	
Building 1	Retail	128sqm
	Child-care centre	1,307sqm
	Medical centre	1,372sqm
	Commercial offices	1,219sqm
	Residential apartments	12,269qm
Building 2	Retail/Restaurants	605sqm
	Student Accommodation	1,530sqm
Building 3	Ancillary offices for church activities, including training rooms and gathering space (also available for use by local community groups)	1,027sqm
Church	Place of Public Worship	282sqm
School Hall	Restaurant	300sqm

Element	Proposed Development
Apartment Mix (Indicative of Envelope Capacity)	15x 1 Bedroom Apartments (12%) 94x 2 Bedroom Apartments (78%) 12x 3 Bedroom Apartments (10%)
Boarding House  (Indicative of Envelope Capacity)	Total 64



Figure 4 – Land-Use Activities (Source: TURNER, 2020)



## 4. VARIATION OF HEIGHT OF BUILDING STANDARD

This section of the report identifies the development standard proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

### 4.1. DEVELOPMENT STANDARD

This clause 4.6 request seeks to vary the maximum 60 metre height of building control prescribed within clause 4.3 of BLEP 2012 and the associated Height of Buildings Map (refer to map extract held as **Figure 1**).

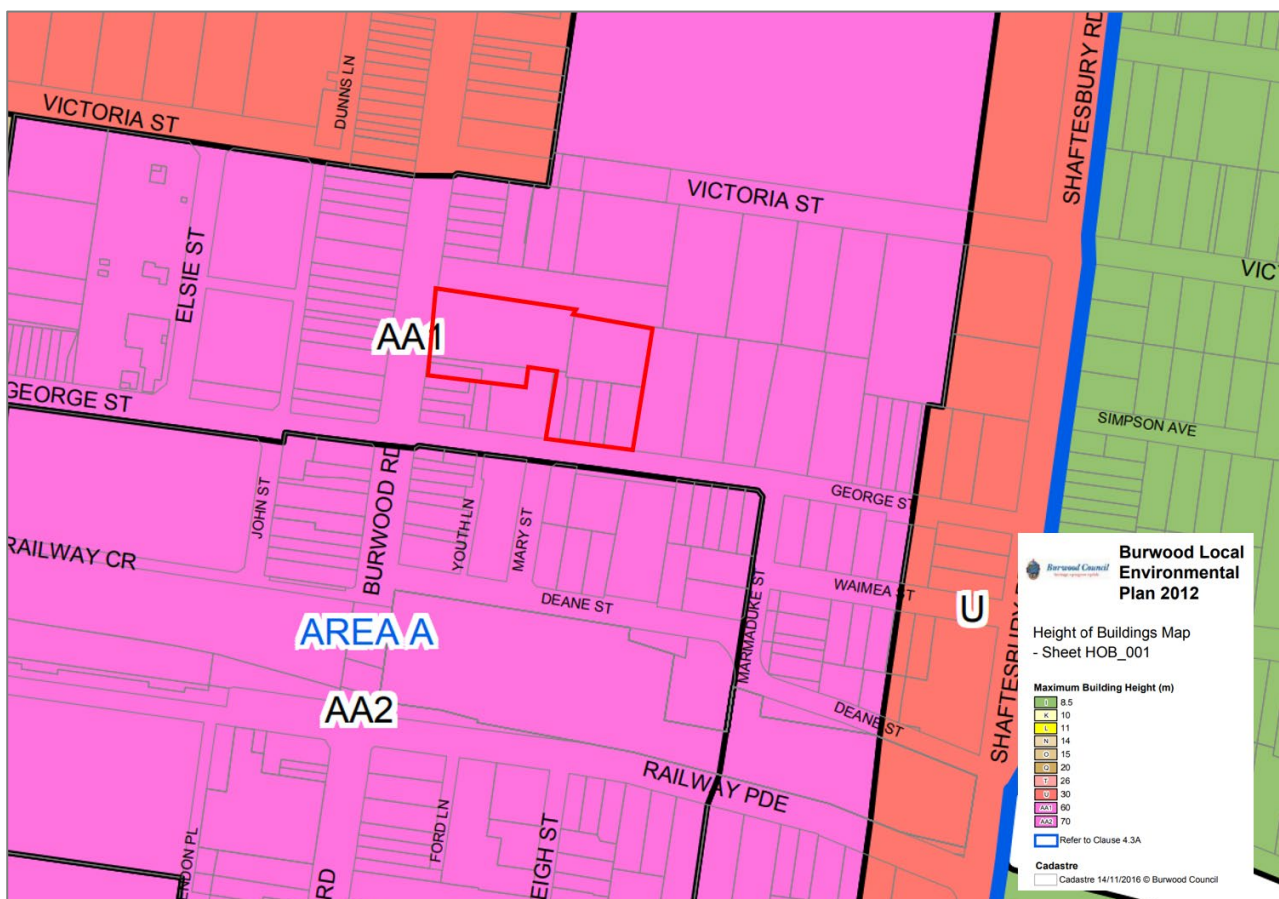
The LEP Dictionary defines building height (or 'height of building' as follows:

*building height (or height of building) means:*

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

**Figure 5** – BLEP 2012 Height of Buildings Map Extract



Clause 4.6 of BLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The clause 4.6 provisions enable development consent to be granted for a proposal that contravenes a development standard within BLEP 2012. The consent authority is required to consider a written request from the applicant that justifies the contravention of the development standard by showing:

- (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.*

The consent authority must be satisfied that the written request adequately addresses the matters required to be demonstrated by clause 4.6(3) and that 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. The concurrence of the Secretary is also required to have been obtained.

## 4.2. PROPOSED VARIATION TO CLAUSE 4.3(A) OF BLEP 2012

This clause 4.6 request seeks to vary the maximum 60 metre height of building control prescribed within clause 4.3(a) of BLEP 2012 and the associated Height of Buildings Map. The proposed maximum building height of 91.28 metres represents a proposed variation of 31.28 metres (or 52%) to the southern tower zone, and 76.08 metre maximum height to the northern tower zone, which represents a proposed variation of 16.07 metres (or 26.8%).

The design rationale for the proposed redevelopment is to deliver a high-quality mixed-use development aligned with the project vision developed by the Uniting Church in Australia Property Trust (NSW) for the Burwood-Croydon Uniting Church. This includes the delivery of new publicly accessible spaces to allow for dynamic interaction and relationships between the church and broader community. It also seeks to provide an ongoing income stream for the church to facilitate the ongoing conservation and maintenance of the heritage-listed buildings, as well as the continuation and expansion of services and programmes that meet the existing and changing needs of the local community.

One of the key spatial components of the proposed redevelopment is the retention of the existing church buildings. The siting and design of the proposed building envelopes was carefully considered, including their appearance within the Burwood Road streetscape and their compatibility with the scale and character of the heritage listed buildings, as well as the existing and approved development within the locality. The upper tower form presents a subtle definition between two zones - the 'heritage' northern zone (which forms a sympathetic backdrop to the heritage listed church and school hall) and the 'contemporary' southern zone which is slightly taller and aligns to the emerging Burwood skyline.

A new public open space and through-site pedestrian connection within the central part of the site separates the new and existing building elements. This connection also seeks to deliver improved pedestrian connectivity from Burwood Road, with activation of the ground plane by outdoor dining and bespoke furniture to be enjoyed by the local community.

The proposed envelopes for the new buildings adjoining the retained church buildings to the north and south are significantly less than the maximum 60 metre building height control that applies under clause 4.3 of BLEP 2012. Building 2 (to the south) has a maximum height of 24.53 metres which is 35.47 metres less than the maximum control. Building 3 (to the north) has a maximum height of only 5.33 metres which is 55.67 metres less than the maximum building height.

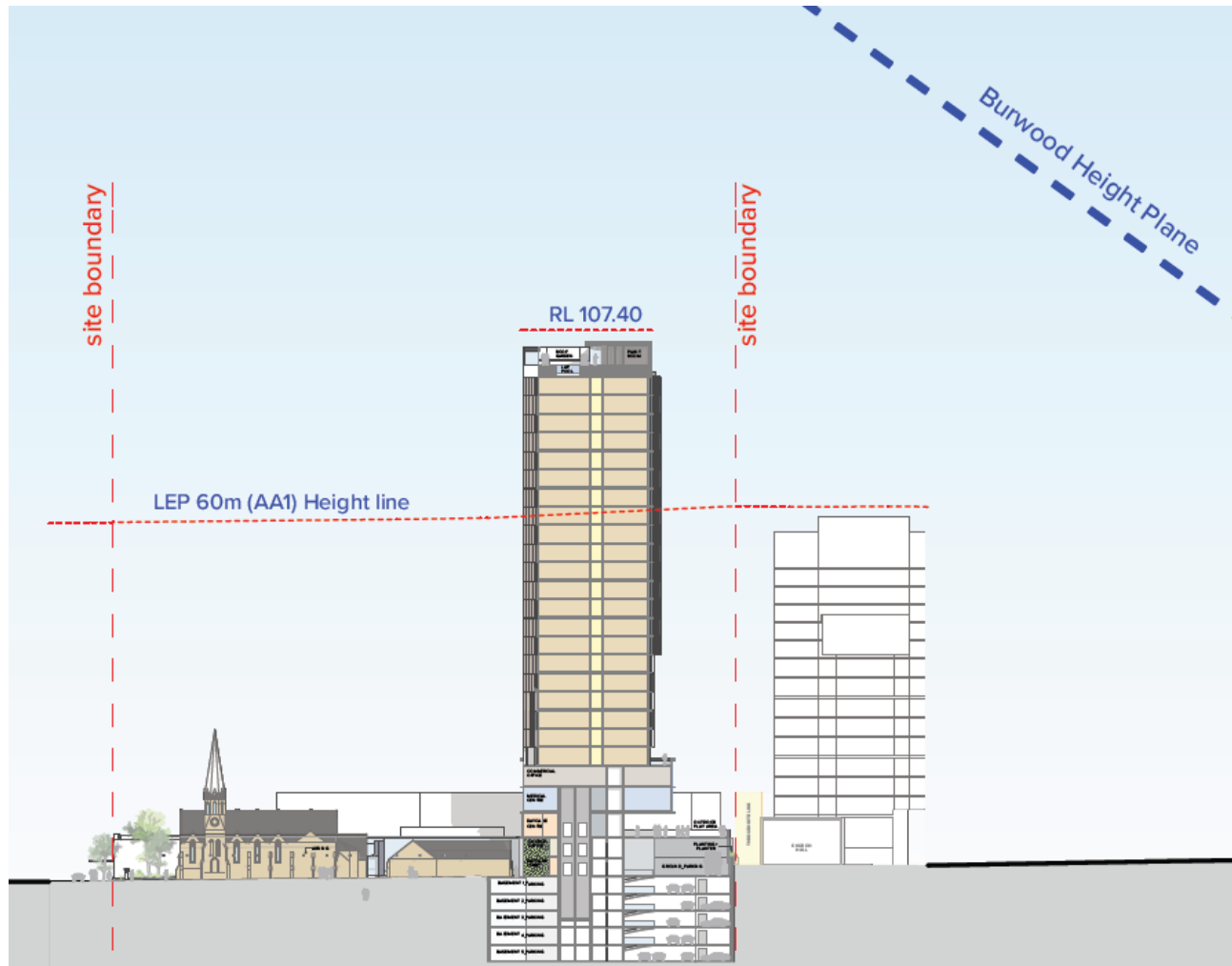
The proposed envelope for Building 1 (to the east) has a maximum overall building height of 91.28 metres which exceeds the maximum height of building control by a maximum of 31.28 metres (or 52%). However, the tower mass to the 'heritage' northern zone was reduced to respond to the heritage items, resulting in a lesser building height of 76.08 metres which exceeds the maximum building height by 16.07 metres (or 26.8%). The proposed additional height is sought to allow the potential floorspace to be achieved in accordance with the local planning controls, while respecting the heritage significance of the church and delivery of the public domain improvements on the ground level. The siting and design of the proposed building has been carefully considered to avoid any unacceptable visual or heritage impacts, as well as providing for a high amenity outcome both the site and the surrounding properties.

The proposed building (and height variation) is located within the eastern part of the site, to the rear of the existing church buildings and within an emerging cluster of high-density mixed-use developments. **Table 2** in **Section 2.2** of this report outlines the recent and proposed developments which will influence the future skyline. The recently approved buildings heights generally range between 70 metres and 100 metres above

existing ground level, which is consistent with the proposed maximum building height for the subject site. Analysis of the existing, approved and proposed developments demonstrates Building 1 will be compatible and consistent with the evolving built form character within the Burwood CBD.

The proposed variation to the height of building control in clause 4.3 and compliance with the Building Height Plane control in clause 4.3A is shown in the reduced-sized plan extract at **Figure 6** on the following page. The plan extract provided at **Figure 7** was prepared by GMU as part of Council's independent design assessment to benchmark the proposed building height against the existing and approved buildings within the immediate locality. It demonstrates the compatibility and consistency of the proposed development with the emerging built form within the Burwood CBD.

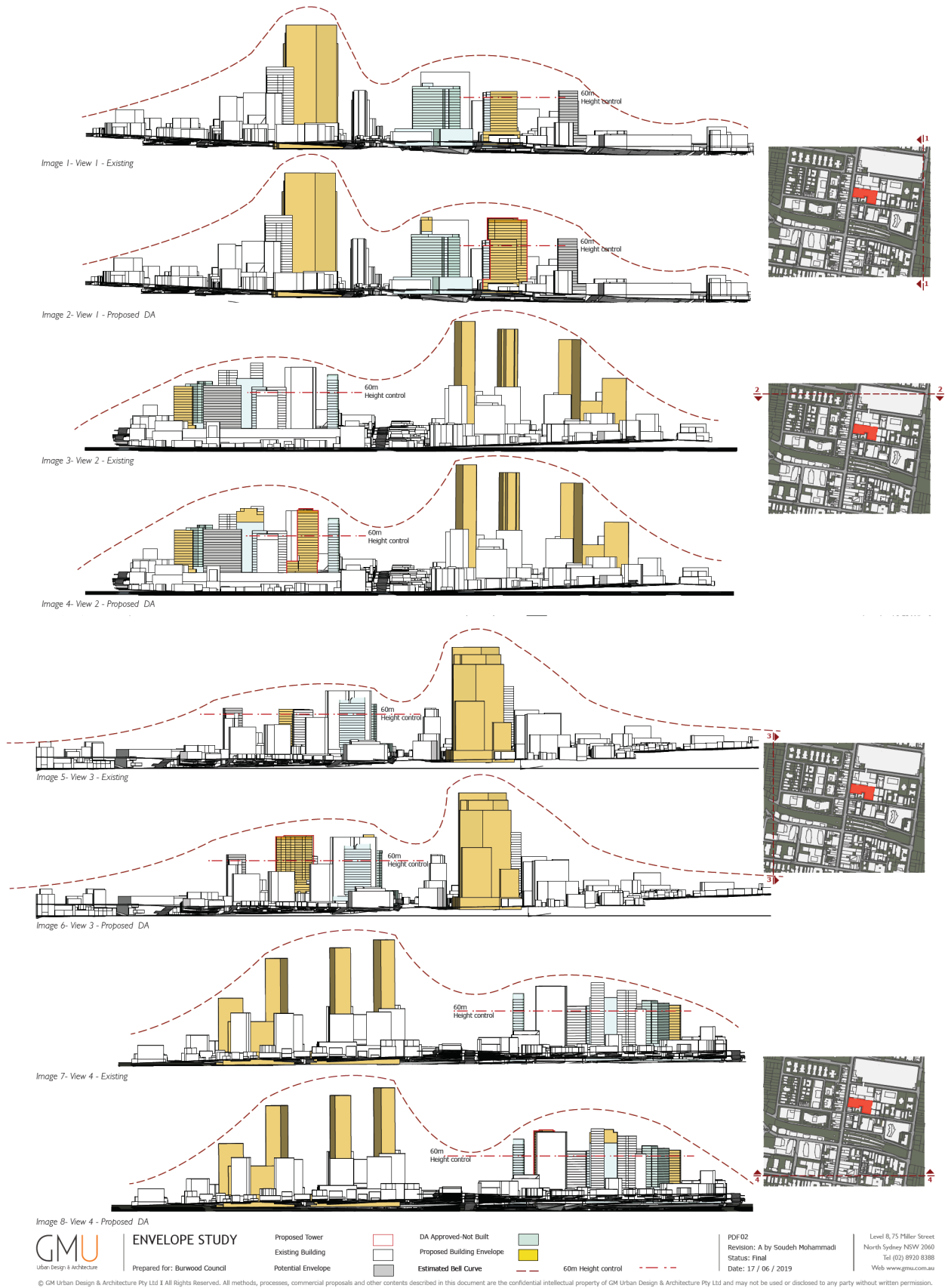
**Figure 6** – Elevation of Height Variation



Source: Turner



**Figure 7 – Benchmarking of Height with Surrounding Developments**



Source: GMU – Note: Prior to reduction to northern zone of tower massing

## 5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of BLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of BLEP 2012 are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that 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 in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the maximum building height prescribed for the site in clause 4.3 of BLEP 2012 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the maximum building height development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

## 6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the maximum building height in accordance with clause 4.3 of BLEP 2012.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

### 6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The maximum building height control prescribed under clause 4.3 is a development standard capable of being varied under clause 4.6 of BLEP 2012.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of BLEP 2012.

### 6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The objectives of clause 4.3 are listed within the LEP as follows:

- (a) *to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,*
- (b) *to control the potentially adverse impacts of building height on adjoining areas.*

The specific objectives of the building height standard as specified in clause 4.3 of BLEP 2012 are detailed in **Table 3** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

**Table 3** - Assessment of consistency with clause 4.3 objectives

Objectives	Assessment
<i>to establish the maximum height of buildings to encourage medium density development in specified areas and maintain Burwood's low density character in other areas,</i>	<p>The proposed mixed-use development is compatible and consistent with the vision for the Burwood Town Centre to accommodate employment growth and additional housing within accessible locations, while protecting the scale and character of the surrounding lower density areas.</p> <p>The proposed mixed-use development has been designed to be compatible with the evolving and desired scale and character of the existing and likely future development within the Burwood Town Centre (as referenced in Section 2.2 and 4.2). It includes a mixture of land use activities appropriate for its location within close walking distance of employment, existing services and high-frequency public transport.</p> <p>The proposed variation to Building 1 enables the permitted floor space to be achieved, realising the potential opportunities for growth to be accommodated across the development site in a manner which protects the heritage significance of the existing buildings and achieves a satisfactory streetscape along Burwood Road.</p> <p>The underlying object or purpose of the development standard is to provide a built form that is compatible with the scale and character of surrounding development and avoids detrimental impacts on the amenity of the locality.</p>
<i>to control the potentially adverse impacts of building height on adjoining areas.</i>	<p>The proposed has been comprehensively assessed regarding its potential environmental impacts on the amenity of the adjoining areas. The slender tower design for Building 1 and the reduced heights for Buildings 2 and 3 will reduce the potential overshadowing impacts associated with a complying scheme. The commitment to design excellence and the future architectural design treatment will provide for an attractive built form that makes a positive contribution to the city skyline.</p> <p>Further, the proposed height and design of the envelope for Building 1 enables the permitted floorspace to be better allocated across the site and protect more sensitive parts of the site. This includes maintaining the existing sightlines to the heritage listed buildings and a consistent streetscape along Burwood Road and the Burwood Town</p>



Objectives	Assessment
	Centre.

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

The underlying objectives of the building height control have been achieved as outlined above. The proposed building envelopes are considered appropriate for the Burwood Town Centre and will protect the scale and character of the surrounding low-density residential areas. A comprehensive assessment of the potential environmental impacts has concluded the proposal will provide a satisfactory level of amenity for the surrounding properties within the town centre as outlined above. The proposal achieves the objectives of the development standard as outlined below:

- The proposed mixed-use development is compatible with the scale and character of existing and likely future development within the Burwood Town Centre Middle Ring. The height of Buildings 2 and 3 are compatible with the height of existing buildings along Burwood Road, including the BCUC building which is to be retained. Building 1 is to be located at the rear of the site and is generally consistent with similar mixed-use development proposals within the immediate locality that have been approved by Council and the Sydney Planning Panel.
- The proposed development is consistent with the built form outcomes expressed within the Burwood Development Control Plan (DCP) including:  
*‘to develop human-scale street environments and to facilitate higher density development while maintaining the existing character of street development fronting Burwood Road’*
- The reduced heights for Building 2 and 3 will create an active and human-scale development along the Burwood Road frontage. The increased building height for Building 1 will facilitate the allowable floorspace to be delivered on the less sensitive part of the site towards the east and away from the Burwood Road frontage.
- The proposed variation to the maximum height for Building 1 facilitates a taller, slender tower element which minimises the potential visual impacts by reducing the overall mass and building bulk. It also enables solar compliance to be achieved for existing and likely future developments in accordance with the Apartment Design Guide (ADG). Additionally, the tower provides two subtly defined zones that enable a transition between the emerging contemporary Burwood skyline (south) and heritage listed items located on site.

The proposed development fully complies with the BHP control for all three building envelopes in accordance with clause 4.3A of BLEP 2012. It also fully complies with the maximum floorspace that can be achieved in accordance with clause 4.4A of BLEP 2012. The proposal seeks only to redistribute the permitted floorspace to the eastern part of site, allowing for retention of the existing church buildings and delivery of publicly accessible open space and through-site pedestrian connection from Burwood Road.

The proposal will deliver a superior planning outcome compared to a complying scheme. The reduced height (and floorspace) of the proposed building envelopes along Burwood Road will deliver an improved streetscape. The proposed slender tower design for Building 1 and the reduced heights of Buildings 2 and 3 will reduce the potential overshadowing impacts on adjoining properties.

The proposed development includes the delivery of a significant new public space, with an activated ground plane and improved pedestrian links that benefit from natural surveillance. The concept landscape design is inclusive and welcoming, including bespoke furniture that encourages its use by the local community. The allocation of the potential floorspace towards the rear of the site enables the delivery of this public space, while optimising the site opportunities and social benefits arising from the proposed mixed-use development.

- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences**

**attributable to the proposed non-compliant development** (cf Botany Bay City Council v Saab Corp [2011] NSWCA 308 at [15]).

Strict compliance with the building height development standard could defeat or thwart the achievement of underlying objectives of the control, consequentially creating an adversely disproportionate impact to the community. The proposed variation will enable the redevelopment to:

- Provide a built form that is compatible with the scale and character of surrounding development,
- Protect the existing scale and character of the low density residential areas; and
- Avoid detrimental impacts on the amenity of the adjoining properties within the town centre.

Each of the proposed buildings has been sensitively located and designed to respect the heritage significance of the Church and Hall buildings which are to be retained and provide for appropriate connections between existing and future buildings.

For example, Building 3 is proposed to be located close to the existing church building with direct access from the Burwood Road frontage to provide satisfactory access for older and differently abled persons and facilitate greater engagement with the community, especially those of varying vulnerabilities. This design response includes a significant reduction in the maximum permitted height of this building to allow for an appropriate built form outcome which respects the existing church building, including its ongoing and growing purposes and its heritage significance, as well as the Burwood Road streetscape.

Building 2 has also been carefully located and designed to achieve a range of objectives. The proposed building envelope is aligned to the front boundary to provide for an active streetscape along Burwood Road, while also maintaining sightlines to the existing church building. The maximum permitted building height has been significantly reduced to respect the setting and sightlines to the heritage-listed church building, including its steeple. A large area of public open space is centrally located within the site, providing for separation between the existing and new buildings, as well as potential public benefits including passive recreation, community interaction and improved pedestrian connectivity.

The unutilised floorspace capacity on the western part of the site has been reallocated to the eastern part which is less sensitive regarding potential heritage and visual impacts. This has resulted in the height of Building 1 varying from the maximum control prescribed under BLEP 2012. The potential environmental outcomes arising from the proposed variation have been assessed in detail and are considered entirely acceptable considering their potential impacts on the site and the amenity of the surrounding properties. The proposed variation will result in a positive outcome as the potential impacts upon the more sensitive parts of the site have been avoided.

An alternative development proposal that complied with the maximum height of building control would likely result in Buildings 2 and 3 being increased in height to enable the permitted floorspace to be achieved. This would result in a development that is contrary to the objectives of the building height control and an inferior outcome regarding the heritage significance of the retained buildings. It would also result in greater amenity impacts, including increased overshadowing of adjoining properties and an increased mass and scale with a more significant visual impact.

Overall, it is considered that strict compliance with the development standards is unreasonable as an alternate scheme which complied with the height standards would result in an inferior outcome for the site and/or result in the significant loss of accommodation for seniors within the locality.

### **6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)**

The Land & Environment Court judgment in Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

*“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in*

*the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and*

*...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”*

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- The proposed redevelopment will provide for a range of public benefits, including
  - Providing a significant proportion of proposed dwellings as affordable rental housing, with support services including mentoring and community engagement
  - Providing a range of community spaces, child-care facility and medical centre in a highly accessible location near Burwood railway station
  - Providing a range of shop and restaurant spaces to increase retail competition and consumer choice
  - Retaining the existing Burwood Uniting Church and Church Hall buildings to ensure their local heritage significance continues to be preserved into the future
  - Providing space for the relocation of the Regional Headquarters of the Uniting Church in Australia to Burwood and the continuation and expansion of existing services and programmes for the local community
  - Providing new through site links to increase pedestrian permeability and access between Burwood Road and George Street
  - Providing a central plaza space which incorporates a range of Crime Prevention Through Environmental Design (CPTED) principles that can be accessed and utilised by the public
- The proposed variation to the height of the Building 1 envelope will provide for the protection of the heritage significance of the church building and delivery of an attractive and active streetscape to Burwood Road. It will facilitate the delivery of a development that meets the objectives of the height and floorspace controls by enabling a lower built form to be delivered close to the heritage listed buildings and as a sympathetic backdrop, while realising the desired growth of employment and housing within the Burwood Town Centre.
- It has been demonstrated that there will be no unacceptable environmental impacts arising from the proposed height variations. The shadow diagrams demonstrate that solar access compliance will be maintained for the adjoining and surrounding buildings in accordance with the ADG. The 3D modelling provided by TURNER has shown that the proposed height variations have been sensitively located to avoid visual amenity impacts on the streetscape or neighbouring properties.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed clause 4.3 building height non-compliance in this instance.

## **6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)**

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

## 6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in Table 4 above. The proposal is also consistent with the land use objectives that apply to the site under BLEP 2012. The site is located within the B4 Mixed Use zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 4** below.

**Table 4** – Assessment of Consistency with B4 Mixed Use Zone Development Standard Objectives

Objective	Comment
<i>To provide a mixture of compatible land uses.</i>	<p>The proposed development will offer a mixture of compatible land uses.</p> <p>The development will retain the existing church as a place of public worship. The existing church hall will be adaptively re-used as a restaurant known as the Café Ministry, creating a gathering place for local residents, workers and visitors. The café will be closely operated with the BCUC to equip locals with healthy, sustainable cooking skills, develop support networks and employment opportunities and skill development.</p> <p>The existing child care services will be relocated from the existing church hall to Level 1 of the new Building 1. The proposal will significantly increase the capacity of the existing not-for-profit facility from 40 children per day to 120 children per day, responding to the growing demand and changing needs of the local community.</p> <p>The three new buildings will accommodate additional land use activities including retail, restaurants, commercial offices, community facilities, medical centre, student (affordable) housing and residential accommodation, improving the current mixture of uses and enhancing the activity and vitality of the existing site.</p> <p>This includes the delivery of new community-based meeting facilities within Building 3 to continue to encourage and support the wide diversity of growing support services offered by Burwood Uniting Church. These meeting spaces will also be available to support other community services, including not for profit community organisations.</p> <p>The introduction of affordable housing within the development site will help support the needs of the tertiary student community that has been built upon over years of active engagement with the BCUC. This includes a model of accommodation that places students within an intentional network of support that is currently being replicated in other parts of the Sydney metropolitan area,</p>

Objective	Comment
	including Leichhardt and Maroubra.
<i>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.</i>	<p>The proposed mixed-use development includes a broad mix of land use activities, including a place of public worship, retail, restaurant, child care, medical centre, commercial office and residential accommodation (including student housing) within a highly accessible location. The site is well-located within the Burwood Town Centre, close to Burwood railway station.</p> <p>The integrated mix of uses will maximise public transport patronage and encourage walking and cycling. The proposal includes a new through-site link from Burwood Road to a through-site linked adjoining the recent development of 29 George Street. This will increase the pedestrian permeability of the site and providing increased connections with other planned pedestrian links. Bicycle parking will be provided within the public domain and a secure location at grade within the development.</p> <p>A central plaza space is also proposed between Building 2 and the existing church building. The proposed design incorporates Crime Prevention Through Environmental Design (CPTED) principles including passive surveillance and territoriality. The adjoining outdoor dining area and landscape concept have been specifically designed to facilitate and encourage use of the space by the public.</p> <p>The proposal is a high quality urban design outcome and aligns with the strategic importance of the Burwood Town Centre as a Strategic Centre in accordance with the Eastern City District Plan.</p>

The above table demonstrates the proposed development will be in the public interest notwithstanding the proposed variation to the maximum building height standard as 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.

## 6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**



The proposed non-compliance with the maximum building height will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

▪ **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the maximum building height and the land use zone objectives despite the technical non-compliance.

It has been demonstrated the proposed variation is appropriate based on the specific circumstances of the case, including:

- Protecting the heritage significance of the existing Church and Church Hall buildings through the careful siting and design of Buildings 2 and 3, including significant reduced building heights;
- Delivery of a central plaza and through-site link to enhance the pedestrian permeability of the site and its appearance within the Burwood Road streetscape;
- Reallocating the potential floorspace to the less sensitive part of the site to the east, while maintaining overall compliance with the floor space ratio control; and
- Achieving a high quality built form that avoids unacceptable environmental impacts on the surrounding properties, including ongoing compliance with the solar access controls in the ADG.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

▪ **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

## 7. SUMMARY AND CONCLUSION

For the reasons set out in this written request, strict compliance with the maximum building height contained within clause 4.3 of BLEP 2012 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the maximum building height to the extent proposed for the reasons detailed within this submission and as summarised below:

- The proposal achieves the objectives of the development standard as provided in clause 4.3 of BLEP and is consistent with the objectives of development within the B4 Mixed Use Zone.
- The proposal is compatible with the existing site context and is consistent with the desired future character of the site and locality.
- The proposal provides an appropriate transition in building scale consistent with the approved height of immediately adjacent development and the evolving skyline approved and proposed for the Burwood CBD and the desired outcomes for the Burwood Road streetscape.
- An alternate scheme which complied with the maximum building height standard would result in adverse environmental impacts, including reduced residential amenity for the site and surrounding developments.
- The proposal will result in significant social and economic benefits, including the revitalisation of a significant landholding within the Burwood Town Centre and additional employment opportunities.
- The proposal will deliver significant public benefits, including public open space, improved pedestrian connections and a range of community facilities.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the maximum building height should be applied.

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