



## ANNEXURE 1: BUILDING HEIGHT DISCUSSION

The parent allotment was prior to the amendment to the LEP and was subject to different HOB standards.

Presently the proposal is subject to a 42m-54m height limit that is breached by the proposed increase in the floor to floor heights- noting that there is no change to the height in storeys of the development and the proposal simply seeks to amend the scheme to align with the provisions of the ADG in terms of floor to ceiling heights and ensuring the lift heights and the like are clearly consistent with the relevant lift specifications. It is noted that the prior MOD did not show the required lift over-run and fire stairs to the Block B- despite them being required. Hence the apparent increase to Building B is appearing to be larger than it really is- because the required lift-overflow and fire stairs are now provided which further breach the height.

### The Departures

A building height comparison sheet is provided and confirms the height increases to be as follows. note that the figures for the height in meters & percentages provided in the table above do not match the approved plans:

#### **Block A** (maximum LEP height - 54m)

- - Most recent approval – 63.22m (variation 9.22m – 17.1%)
- - Proposal – 70.37m (variation 16.37m – 30.31%)
- - Variation between approved & proposed – 7.15m (11.3%)

The variation in height to Block A is attributed to various design aspects to ensure compliance is achieved.

The make-up of the height variation relates to:

- Lifting the GF level to comply with the **design flood level** for the site (+0.45m)
- Increasing the retail GF and commercial L1 floor to floor levels to make allowances for **structural transfer slabs** and service zones to promote flexibility of use as per **ADG 4C ceiling heights** (+1.8m)
- Ensuring all residential floor to floor heights comply with the **3.1m floor to floor** as per **ADG 4C ceiling heights** (+1.9m across the tower)
- Correctly indicate the **lift overrun**

**Block B** (maximum LEP height - 42m)

- Most recent approval – 43.40m (variation 1.4m – 3.33%)
- Proposal – 48.75m (variation 6.75m – 16.07%)
- Variation – 5.35m / 12.3%

The variation in height to Block B is attributed to various design aspects to ensure compliance is achieved.

The make-up of the height variation relates to;

- Lifting the GF level to comply with the **design flood level** for the site (+0.25m)
- Increasing the retail GF floor to floor levels to make allowances for **structural transfer slabs** and service zones to promote flexibility of use as per ADG 4C ceiling heights (+0.8m)
- Ensuring all residential floor to floor heights comply with the **3.1m floor to floor** as per ADG 4C ceiling heights (+1.5m across the tower)
- Correctly indicate the **lift overrun**

This is most clearly reflected on the Elevation and Section Drawings D2.06-D2.53 which shows the extent of change to the heights. The breaches to the height standard facilitate improved amenity for the residential floors by achieving the required 3.1m floor to floor heights, and ensuring adequate protection from flooding, as well as required slab thicknesses. Therefore grounds exist for the departure.

As is clearly observed from the table above the extent of change is minor and reflects buildability elements associated with the scheme. What is also critical in relation to the height departure is the fact that Building C and D are some 23.4m-35.4m below the maximum height.

This was approved to ensure a suitable urban design outcome on the site and adequate solar access to the building- effectively “decanting” the building volume onto Building A which was approved above the height limit as being a better urban design outcome.

As set out in the original Statement of Reasons by the Sydney West JRPP on the original DA the height variation was support on urban design grounds- with an extract provided over the page:

Determination and Statement of Reasons	
<b>2015SYW143 – Cumberland – DA2015/220 [224-240 Pitt Street Merrylands]</b> as described in Schedule 1.	
<b>Date of determination:</b> 25 May 2016	
<b>Decision:</b> The panel determined to unanimously approve the development application as described in Schedule 1 pursuant to section 80 of the <i>Environmental Planning and Assessment Act 1979</i> .	
<b>Panel consideration:</b> The panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and the matters observed at site inspections listed at item 8 in Schedule 1.	
<b>Reasons for the panel decision:</b>  <ol style="list-style-type: none"> <li>1. The proposal will add to the future supply and choice of housing within the Central Western Metropolitan Subregion and Cumberland local government area in a location with ready access to metropolitan transport services available from Merrylands Railway Station and the amenities and services available within Merrylands Town Centre. The proposed development will also contribute further commercial capacity and social vitality to Merrylands Town Centre.</li> <li>2. The panel has considered the Applicant's request to vary the development standards contained in Clause 4.3 (Height of Buildings) and Clause 4.4(2b) (Floor Space Ratio) of Holroyd LEP 2013 and considers that compliance with these standards unreasonable and unnecessary in the circumstances of this case as the variations while redistributing the prescribed height and FSR controls over the total site subject of the application do not increase the total Gross Floor Area otherwise achievable on this site and results in a preferred urban design solution which is consistent with and well integrated with the scale of buildings existing within and planned for this locality. It is considered the development remains consistent with the objectives of the standards and the applicable B4 Mixed Use and R4 High Density Residential zoning of the subject site.</li> <li>3. The proposed development adequately satisfies the relevant State Environmental Planning Policies including SEPP65 – Design Quality of Residential Development and its associated Residential Flat Design Code, SEPP 55 Remediation of Land, SEPP (Infrastructure) 2007.</li> </ol>	

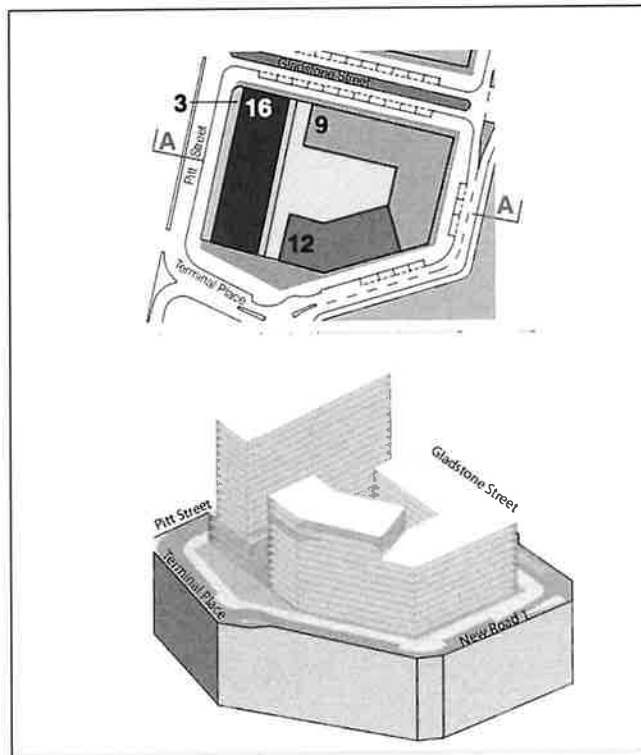
The proposal maintains this approach and the minor increase in height to Building A and a portion of Building B is to provide suitable lift and fire stair over-runs plus achieve a 3.1m floor to floor height to align with the ADG and best practice.

As set out in the original Clause 4.6 variation request the design rationale for the manipulation of the heights was as follows:

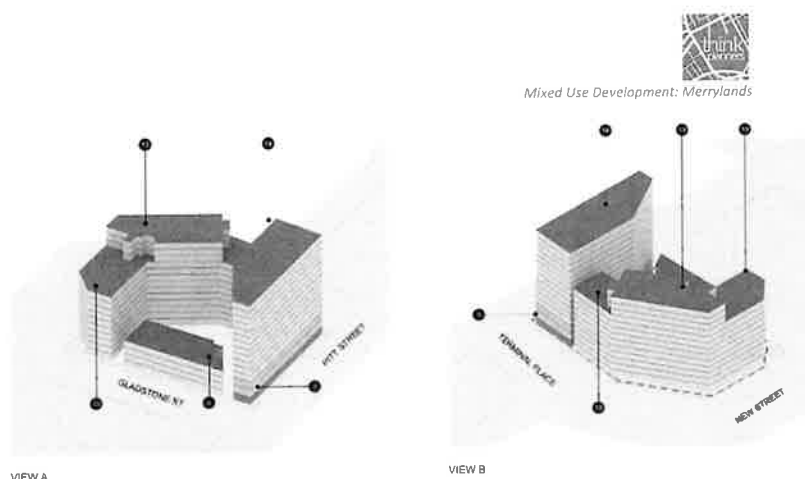
### Design Rationale

The redevelopment of the broader precinct has been subject to several months of investigations exploring development options in the context of the planning controls and site specific DCP. This has revealed the significant impact of flooding on building locations that has served to stall planning and design elsewhere in the Precinct. Therefore the intention has been to proceed with the detailed planning for 'Site C' that equates to Block 3 in the Town Centre DCP. Detailed design and analysis of the DCP envelopes has been undertaken and in essence the design development has identified the 9/12/16 storey approach on the site is not practical once taking into account matters such as required levels of solar access, natural ventilation, building separation and the like. Therefore a revised 4/10/14/19 storey approach has been taken to enable compliance with SEPP 65 matters.

The DCP mass modelling is shown below:



The current proposals indicative mass modelling is shown below, noting that this has been further refined on the submitted DA drawings.



It is important to note that the amendments continue to comply with the LEP FSR control however it does result in breaches of the height limits to Buildings A and B with the building on the Gladstone Street frontage being 22m below the maximum permitted building height along the northern perimeter of the building.

Therefore the departure has merit and this is addressed further below.

#### ***Clause 4.6 Does not Apply***


It is noted that there is actually no requirement for a Clause 4.6 variation as this proposal is a S4.55.

The consideration of development standards pursuant to Section 96 amendments has been an ongoing issue dealt with in the Land and Environment Court. It is important to note that the Court has consistently described the section 96 modification provision of the Act as "beneficial and facilitative" (as is Section 4.55).

It is designed to assist the modification process rather than to act as an impediment to it; 'It is to be construed and applied in a way that is favorable to those who seek to benefit from the provision' (see *North Sydney Council v Michael Standley & Associates Pty Limited* 1998).

Consistent with this philosophy it is noted that a Council can approve a section 96 modification application even where it would contravene a development standard. In such cases, neither a SEPP1 nor Clause 4.6 variation is required.

In *North Sydney Council v Michael Standley & Associates Pty Ltd* the judgement identified that section 96 is a "free-standing provision". This means that a section 96 "modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application."



It is clear that Section 96/4.55 authorizes the development to be approved irrespective of any breach of development standards. The tests for a section 4.55 are different to that of a development application, as it includes that of "substantially the same". Accordingly, a determination pursuant to Section 4.55 does not require a SEPP1 or Clause 4.6 variation to give Council power to approve.

Sutherland Shire Council argued in *Gann v Sutherland Shire Council* that it is illogical for a developer to have the opportunity to gain consent for a compliant development by virtue of a Development Application and then be granted opportunity to ignore development standards via the former section 96 modification processes.

The Court noted:

*"This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s 79C, which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s 76A(1) does not apply."*

Having regard to the above discussion, we note that section 96/4.55 authorizes the approval of modifications to be given by the consent authority where there is a breach of a development standard.

**Neither Clause 4.6 nor SEPP1 are applicable to a Section 96/4.55 modification, as these are only relevant during the development application and assessment stage. However a consent authority is still to have regard to the control and the merit, or otherwise, of supporting a variation to a control.**

As set out above a detailed Clause 4.6 variation is not legally required for the modification application.

However the following reasons indicate that the departure to the height control is acceptable for the revised development and the discussion below follows the general provisions of Clause 4.6 to provide a merit assessment- noting that no Clause 4.6 variation is actually required- only consideration of the merit of the height breach.

#### **Consideration of Clause 4.6**

Clause 4.6 of the Cumberland LEP 2021 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:


- (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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Each of these provisions is addressed individually below.

#### **Clause 4.6(3) & Underlying Objectives of the Standard**

##### **Compliance unreasonable or unnecessary**

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.



In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved. The objectives of the building height development standard are stated as:

The objectives of the building height development standard are stated as:

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

- (a) to establish a maximum height of buildings to enable appropriate development density,*
- (b) to ensure that the height of buildings is compatible with the character of the locality,*
- (c) to minimise the visual impact of development,*
- (d) to ensure sufficient solar access and privacy for neighbouring properties.*

The proposal remains consistent with the objectives based on the following:

- In relation to objective (a) the height of the development enables an appropriate development density- noting despite the minor increase in height there is actually a decrease in FSR for the total development- hence the maximum building height as proposed enables a suitable development density that is marginally less than the original approval.
- The development proposal is consistent with the intent of the maximum height control and will provide an attractive series of buildings that address the site's frontages and the height in storeys aligns with the DCP provisions and the height of the building is compatible with the character of the locality, and this satisfies objective (b). This is particularly the case given the varied building heights on the site that were specifically formulated to provide the most suitable Urban Design response on the site.
- The non-compliance is minor in nature with the majority of the building being compliant with the building height control and the extent of breach not changing the height in storeys at all as the changes relate to floor to floor heights and lift over-runs. The structure associated with the rooftop communal open space and service overruns are recessed there its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level as compared to the prior scheme and therefore satisfies objective (c) despite the departure to the height control. This is particularly the case because the height in storeys does not change from that originally approved.



- The departure will not unreasonably impact on the solar access of adjoining properties or the public areas in the vicinity of the site, nor does it impact on privacy, which satisfies objective (d). The comparison solar access drawings show a minor increase in shadows mainly to the bus interchange and rail station in the afternoon period and a slight increase in the shadow to the properties to the immediate south. The extent of shadow increase is minor and will not impact on the ability for adjoining properties to redevelop noting the planning controls contemplate significant redevelopment of those sites.
- Due to the minor nature of the variation it will not have any adverse amenity impacts. In this regard it is noted:
  - The variation will be visually unnoticeable and will have no adverse impact on the physical bulk, height or scale of the development.
  - The proposed variation will not lead to view loss or interrupt views to and from the site.
  - The proposed variation will not lead to a reduction in privacy afforded to existing residents or future residents of the proposal.

### ***Sufficient Environmental Planning Grounds & Design Response***

The below points demonstrate suitable environmental planning grounds exist to justify contravening the height development standard and further demonstrates that the height departure does not give rise to any unacceptable environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- The design rationale has been driven through ~~analysis~~ analysis of solar access to the site and the reduced height to the northern perimeter is offset by the increased height along Pitt Street and part of the new road at the south-east corner which is the driver of the height variation;
- The proposal adopts an FSR that is reduced relative to the prior approval- which demonstrates that the height variation is not a means of capturing additional yield- but a site specific design response to acknowledge the sites opportunities and constraints;
- The development site is constrained by flooding which has necessitated an increase to the natural ground level to provide an adequate freeboard that effectively increases the height of the building to ensure that flood waters cannot enter the building;

- The increased height is proposed to ensure compliance with ADG 3.1m floor to floor heights to improve amenity for the residential units and also to provide the necessary slab thicknesses to accommodate the building size and configuration. Finally showing the relevant lift over-runs facilitates access to all residential floors via the lift.

All of these elements that contribute to the minor breach enable a better design outcome for the development, and in fact enable the development to meet necessary standards, and this is consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

*(g) to promote good design and amenity of the built environment,*

*(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

Therefore, the current proposal demonstrates suitable environmental planning grounds and demonstrates that there is merit in varying the height control to achieve a better design response on the site which demonstrates sufficient environmental planning grounds to support the departure.

#### Clause 4.6(4)- Public Interest and Objectives of the Zone

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest, as it remains consistent with the objectives of the height control. In addition the proposal is consistent with the objectives of the B4 and B6 zone.

The proposal provides for the housing needs of the community and contributes to a variety of housing forms within a high-density urban centre context.

The development site is in close proximity to public transport and existing facilities. The design concept recognizes the key site attributes and provides for an attractive built form that relates to the existing and future site context.

#### Clause 4.6(5)

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of 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. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.



The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

### **Conclusion**

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.