

Clause 4.6 Variation Request

BUILDING HEIGHT

4A TERMINAL PLACE AND
GLADSTONE STREET, MERRYLANDS

SITE 2 AMENDING DA:
BUILDINGS B, C, D

14 NOVEMBER 2024

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CLAUSE 4.6 VARIATION- BUILDING HEIGHT

This Cl.4.6 supports an **amending DA** to make alterations and additions to an approved mixed use development at 4A Terminal Place and Gladstone Street, Merrylands. The original approved DA is DA2022/0776 and was approved on 13 June 2024 by the Sydney Central City Planning Panel.

This Development Application seeks to:

Amend the approved DA (as amended) by making alterations and additions to facilitate the delivery of a minimum of 15% affordable housing for a period of 15 years, with the building height and FSR using the bonus provisions under State Environmental Planning Policy (Housing) 2021, with an associated increase in units by 146. The proposal seeks to deliver three levels of basement parking, updated dwelling mix, provide 73 affordable housing units in Block C, 8 affordable housing units in Level 3 of Block D, with all units in Block B (174 units) delivered as build to sell and 194 units in Block D provided as Build to Rent housing.

The total yield over the site is 449 units.

BUILDING HEIGHT & THE DEPARTURE

This Clause 4.6 Variation Request relates to the height of buildings principal development standard. It is noted that the base standard is prescribed under Clause 4.3 (2) of Cumberland LEP 2021. That Clause stipulates a maximum building height of 39m and 54m prescribed for the portion of the site on which the development is proposed as illustrated on the map extract below.



Section 16(3) of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP 2021) applies to the proposed development, which contains a 15% affordable housing component. As a result, the maximum building height development standard is 130% of the 39m and 54m prescribed in Cumberland LEP 2021, or 50.7m and 70.2m being authorised under Section 16(3).

The architectural plans that accompany this Clause 4.6 departure illustrate that the proposal seeks a maximum building height:

- **Building C:** 55.71m, which exceeds the 50.7m development standard under Section 16(3) by 5.01m or 9.88%.
- **Building D:** 55.92m, which exceeds the 50.7m development standard under Section 16(3) by 5.22m or 10.29%.
- **Building B:** 74.76m, which exceeds the 70.2m development standard under Section 16(3) by 4.56m or 6.4%.

The table below summarises the variation sought.

	Height Limit	Variation	Proposed Height	Includes
Building C	50.7 m (+30%) for Infill affordable housing under	9.88% (5.01m)	55.71m	<ul style="list-style-type: none"> – services zone – lift over-run – fire stair component – a small part of the façade that is designed to screen the upper communal area
Building D	50.7 m (+30%) for Infill affordable housing under	10.29% (5.22m)	55.92m	<ul style="list-style-type: none"> – lift over-run – fire stair component – part of the façade screening element to the southern portion of the building – communal open space screening
Building B	70.2m (+30%) for Infill affordable housing under	6.4% (4.56m)	74.76m	<ul style="list-style-type: none"> – lift overrun – the screening element of rooftop

Following the application of the 30% bonus under the Housing SEPP 2021 the height exceedance is limited to the roof structure and the lift overrun only. The habitable areas of the building remain below the height limit.

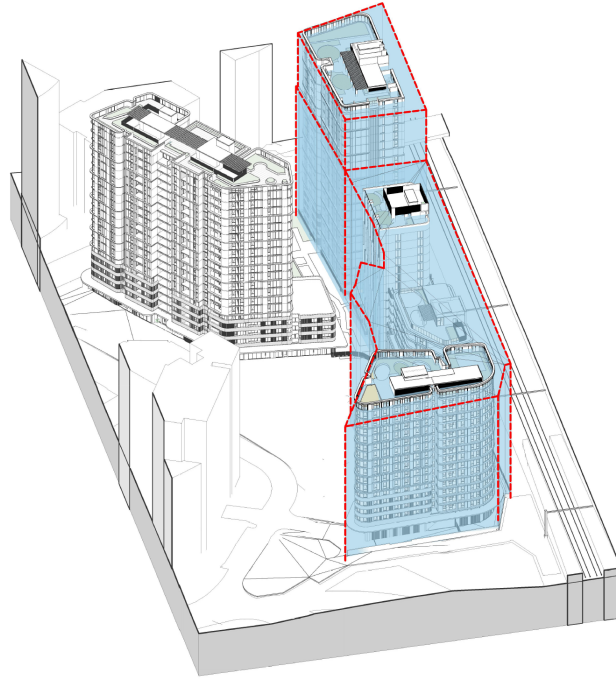
The exceedance is due to the function of a number of elements including:

- The lift over-run exceedance which arises from the need to provide lift access to all levels of the building and these are necessary for accessibility and to meet BCA standards.
- The need to provide a building that complies with fire safety requirements, in terms of evacuation by fire stairs
- The inclusion of building services on the rooftop, with screening provided to provide an attractive setting and skyline
- For safety reasons around the rooftop communal open space areas.

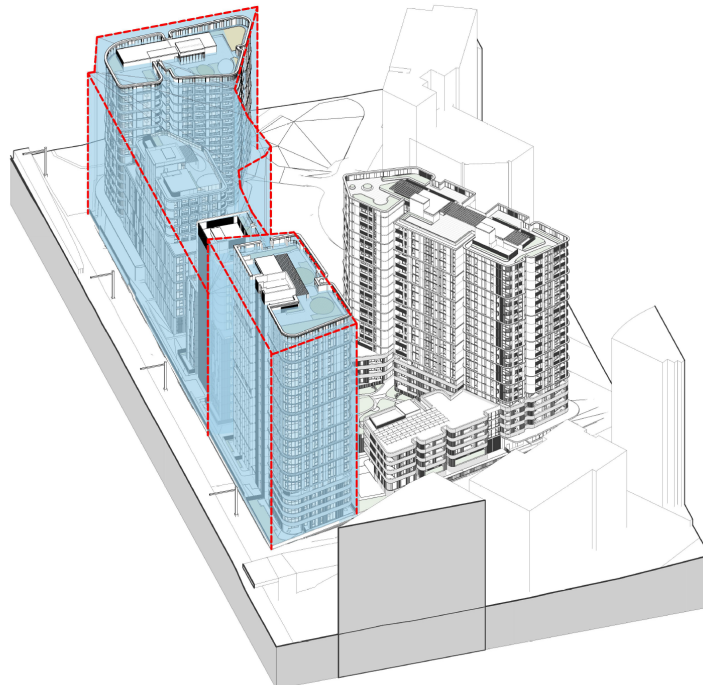
The elements over the height limit are not noticeable from the public domain, with the highest point centrally located.

For these reasons, and the additional reasoning set out below, the height departure reflects a specific design response for the site. It is noted that the proposal meets all other relevant key planning controls. Hence the height breach is not a means of attempting to achieve greater density on the site but to provide a suitable balance between urban design outcomes, building height and necessary building elements.

A 3D extract of the extent of departure are provided below that demonstrates the extent of breach and shows the minor nature of that departure.

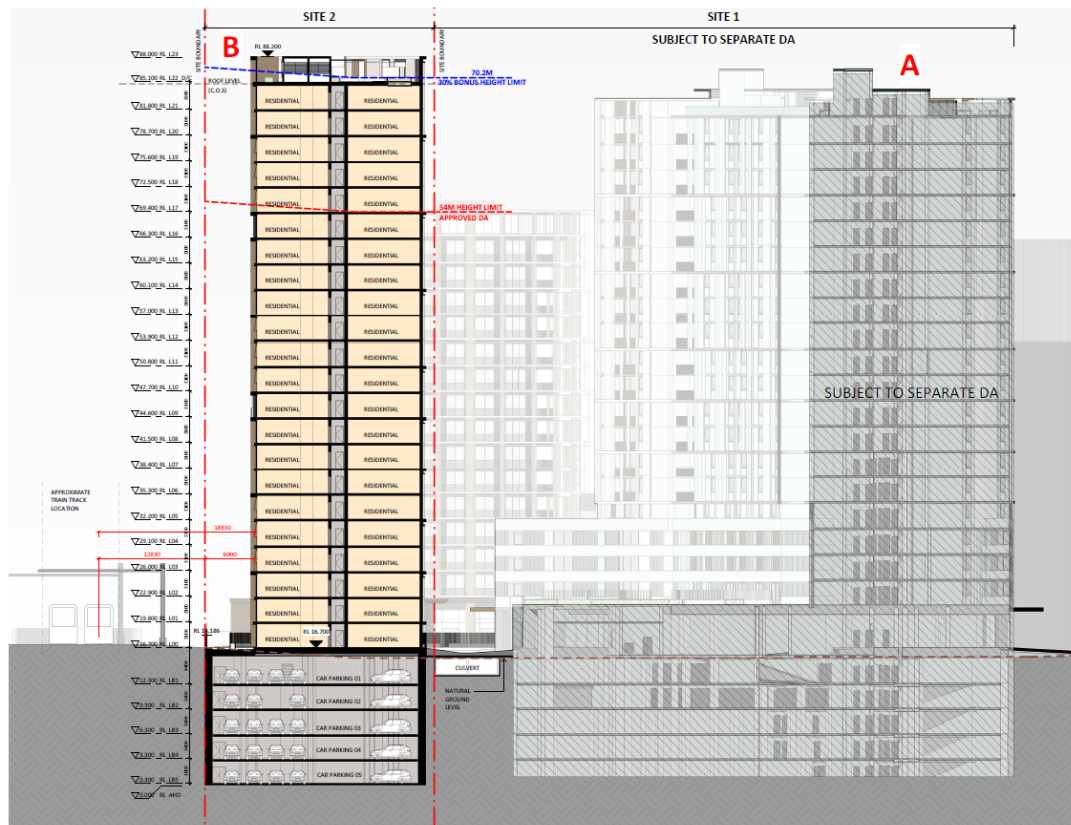
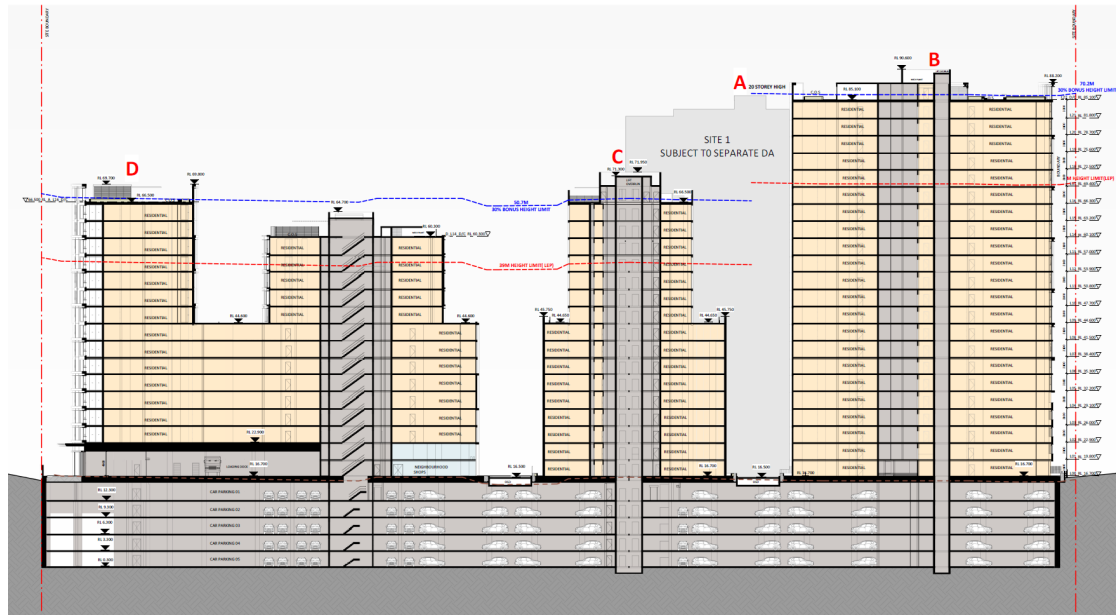


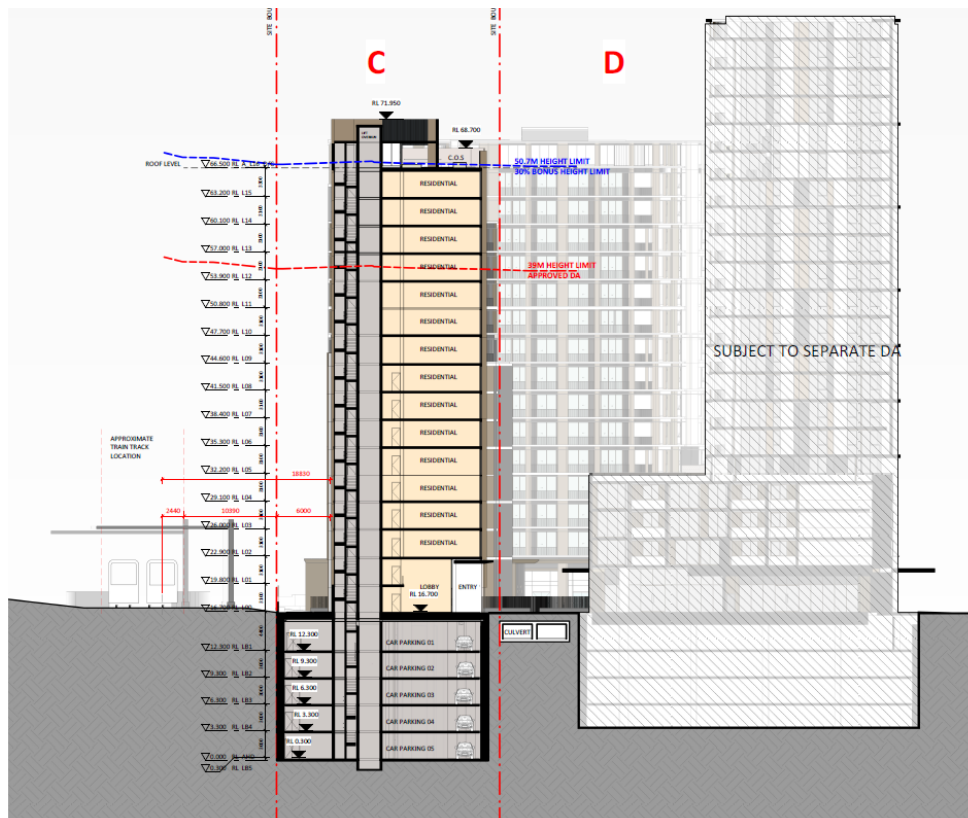
1 LEP HEIGHT BLANKET SITE 2- SOUTH-WEST
HEIGHT BLANKET INCLUDES AN ADDITIONAL 30% HEIGHT
ALLOWANCE FROM AFFORDABLE HOUSING - SEPP 2021



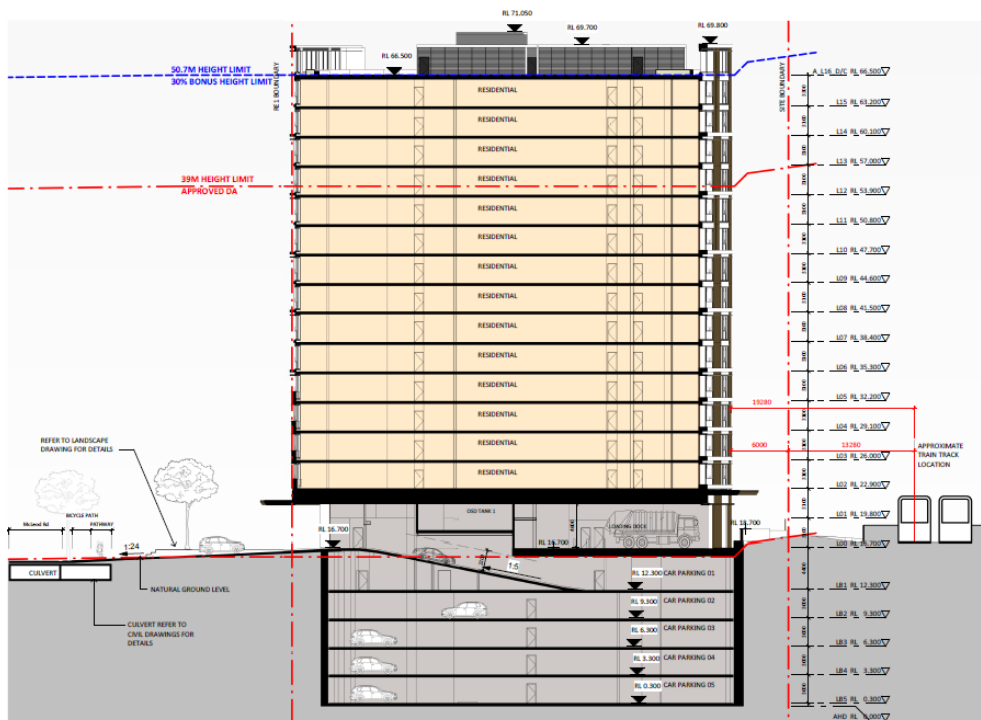
2 LEP HEIGHT BLANKET SITE 2- NORTH-EAST
HEIGHT BLANKET INCLUDES AN ADDITIONAL 30% HEIGHT
ALLOWANCE FROM AFFORDABLE HOUSING - SEPP 2021

The extent of breach is shown on the section extracts below.





SECTION E-W2
1:250



CLAUSE 4.6 OF THE LEP

Section 4.15(3) of the Environmental Planning and Assessment Act 1979 gives power to utilise Clause 4.6 of the Cumberland LEP 2021 to vary a provision of SEPP Housing 2021 noting it sets out:

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards—

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note.

The application of non-discretionary development standards to complying development is dealt with in section 4.28(3) and (4).

This is the case with this proposal and Clause 4.6 can be utilised.

Clause 4.6 of Cumberland LEP 2021 provides that development consent may be granted for development even though the development would contravene a development standard. The objectives of clause 4.6 are:

1) The objectives of this clause are as follows—

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 operative provisions of the clause are as follows:

3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

This document has been prepared in accordance with section 35B of the *Environmental Planning and Assessment Regulation 2021* to address the above requirements.

The key tests or requirements arising under clause 4.6 are as follows:

- That ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.

An earlier version of clause 4.6, prior to its amendment on 1 November 2023, contained an additional requirement that the development be “in the public interest”, including 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”.

This requirement is no longer expressly relevant to clause 4.6 variation requests.

RELEVANT CASE LAW

Clause 4.6(3)(a) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances. The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6. Further, in *Initial Action* the Court confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure. The five common methods for demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are:

- 1) Demonstrating that the objectives of the development standard is achieved, despite the noncompliance [42]
- 2) Establishing that the underlying objective or purpose is not relevant and compliance is therefore unnecessary [45]

- 3) Showing that the underlying objective or purpose would be defeated or thwarted if compliance required, confirming that compliance is unreasonable [46]
- 4) Establishing that the standard has been virtually abandoned or destroyed through council's own actions. Therefore given council's granting of consents that depart from the standard, compliance is unnecessary and unreasonable [47]
- 5) Demonstrating that the zoning of the land is unreasonable or inappropriate, meaning that compliance with the development standard is also unreasonable or unnecessary [48]

Of the five common methods above, this Cl.4.6 applies Method 1 of Wehbe.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the building height departure.

THE VARIATION & DESIGN RESPONSE

The proposal seeks to vary Section 16(3) of the Housing SEPP, being the building height standard, and is limited to the screening elements, lift overruns and servicing elements of the Buildings B, C and D. The architectural plans that accompany this Clause 4.6 departure illustrate that the proposal seeks a maximum building height of:

- **Building C:** 55.71m, which exceeds the 50.7m development standard by 5.01m or 9.88%.
- **Building D:** 55.92m, which exceeds the 50.7m development standard by 5.22m or 10.29%.
- **Building B:** 74.76m, which exceeds the 70.2m development standard by 4.56m or 6.4%.

CLAUSE 4.6(3) - COMPLIANCE UNREASONABLE AND UNNECESSARY

In accordance with the provisions of Cl.4.6(3)(a) 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.**

At the proposed heights of 55.71m 55.92m and 74.76m, the proposal is consistent with the character of a 15-21 storey apartment building with lift overrun, similar to others nearby within the town centre.

The proposal will be in keeping with the character of new apartments delivered in the area that apply the infill affordable housing height provisions of the Housing SEPP 2021. It is notable that the provision of additional rental housing supply and affordable housing supply is a critical need within the community, with this proposal providing substantial public benefit.

Further, the proposal has been designed so that no habitable floor area exceeds the height standard, with the variation being limited to lift overrun, screening elements and fire stairs.

In Wehbe it was set out that compliance can be considered unreasonable or unnecessary where:

(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard

It is considered that this approach can be followed in this instance. The objectives of the Height development standard, drawn from the LEP given the lack of specific objectives under the Housing SEPP, are stated as:

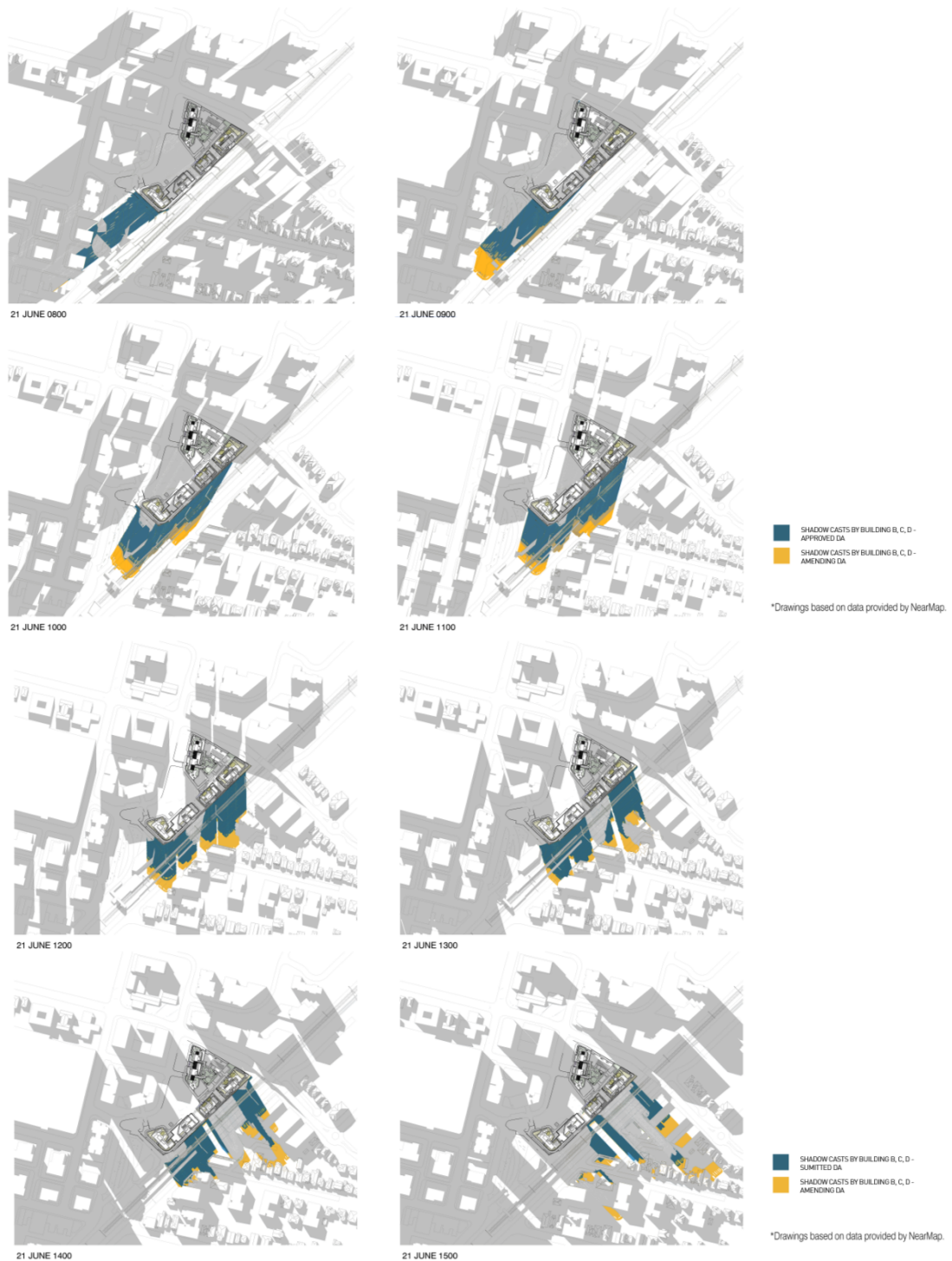
- a) *to establish a maximum height of buildings to enable appropriate development density,*
- b) *to ensure that the height of buildings is compatible with the character of the locality,*
- c) *to minimise the visual impact of development,*
- d) *to ensure sufficient solar access and privacy for neighbouring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

Despite the height breach, the proposal remaining consistent with the objectives of the clause because:

- The height approach:
 - a. Retains the height profile established in the approved DA and intent of the height controls, by adding +30% in accordance with the infill housing provisions of the Housing SEPP 2021
 - b. Retains an appropriate density for the area, noting that the Council has a planning proposal over the site that would deliver a 68 m tall building in one location (minimum 43 dwellings), verse this proposal that delivers +95 apartments across the whole site in a manner more consistent with the planned urban outcome – despite being taller.
 - c. Delivers 70 infill affordable housing units, providing significant public benefit for the community, with all habitable floor space within the height limit.
 - d. The proposal does not impact on any views, being lower than other development within the Merrylands Town Centre, along with its location adjacent to the rail line.
 - e. The proposal achieves compliance with solar access and privacy standards.

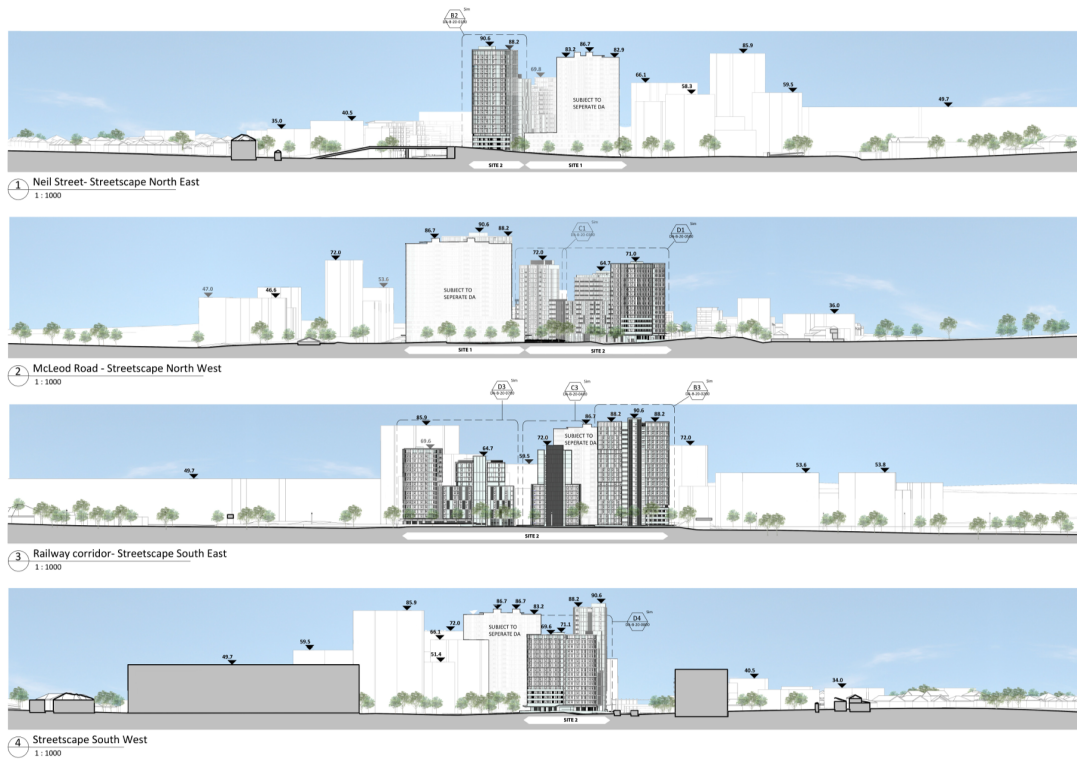
The proposal also continues the additional break between Building C and B that is not required by the DCP- but provides a better design response. It is noted that the FSR of the site is 6.5:1 under the Housing SEPP 2012, with the proposal complying, and therefore satisfying objective (a).

- The visual impact of the non-compliance is limited noting the departure is primarily to the centrally located plant, stair, and lift core areas and communal open space screening which are not easily ‘read’ in terms of the character of the locality and satisfies objective (b).
- The shadow diagrams show the adjoining properties received adequate solar access, and the breach of the height to the buildings is centrally located with no meaningful additional shadow impacts- which aligns with part of objective (c).



- The additional height has no bearing on the privacy of neighbouring properties which aligns with part of objective (c);
- The development is designed to follow the landform, whilst acknowledging the impact of overland flow/flooding and a suitable design response noting that the ground floor is marginally raised to deal with flooding;

- The development provides an appropriate scale and intensity, noting consistency with the intent of the Neil Street DCP height massing and noting the FSR, across the entirety of the site is compliant.



As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS & DESIGN RESPONSE

In Initial Action, Preston CJ observed that in order for there to be “sufficient” environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

The following points demonstrate that sufficiently environmental planning grounds exist to justify contravening the height development standard and further demonstrates that the height departure does not give rise to any environmental impacts. Council can be satisfied that the proposal is an appropriate design response for the subject site for the following reasons:

- The design and provision of the rooftop communal rooftop terrace that necessitates balustrading, lift cores and fire stairs which protrudes beyond the permitted height plane. The proposal as designed seeks to maximise amenity for future occupants via the provision of this communal rooftop open space area. Proposed rooftop structures i.e. lift overrun, lobby, seating, bbq facilities are directly correlated to the design, function and intended use of the rooftop communal open space area which forms an integral part of the proposed development. The structures service the rooftop communal open space area which has been provided to benefit the future occupants of the site. The non-compliance relates to features of the property which will significantly improve the amenity of the occupants.
- The services zones identified are centrally located and not visually dominant but are a necessary component of a building of this size and scale.
- The additional height proposed does not result in detrimental environmental planning outcomes, as it does not give rise to adverse solar access, view loss or visual or acoustic privacy impacts on site, or to neighbouring properties.
- The flood affectation that necessitates a suitable freeboard level to be achieved.

Overall, the minor departure enables a better design outcome, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

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

Therefore, the current proposal is a preferred outcome from an environmental planning perspective 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.

CONCLUSION

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 objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.