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AMENDED CLAUSE 4.6 VARIATION REQUEST

Ashfield LEP 2013

2-6 Cavill Avenue, Ashfield

Prepared for

SHAYHER ALLIANCE PTY LTD

14 May 2021

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1. INTRODUCTION

1.1. OVERVIEW

This amended clause 4.6 variation request (**variation request**) is prepared on behalf of Shayher Alliance Pty Ltd (**the applicant**) to accompany an amendment to DA/2020/1094 (**the DA**) which seeks development consent for a mixed use development (**the proposal**) at 2 – 6 Cavill Avenue, Ashfield (**the site**).

This request seeks to vary the height of building development standard under Clause 4.3B of Ashfield Local Environmental Plan 2013 (**LEP**) that applies to the primary part of the site (**subject land**), comprising:

- Lot 9 in DP 940918;
- Part Lot 101 in DP 234926;
- Lot 1, Lot 2, and Lot 5 in DP 6262;
- Lot 1 and Lot 2 in DP 556722; and
- Lot 1 in DP 971932.

The subject land to which this Clause 4.6 variation relates is shown in **Figure 1** below.

Figure 1 Site to which Clause 4.6 Variation Request applies



Source: SixMaps

This request to vary the height of building development standard is made pursuant to clause 4.6 of the LEP.

As a consequence of the undulating topography of the site, the proposal presents several small areas of the roof top which exceed the 30 metre maximum height of building development standard under clause 4.3B.

The maximum exceedance of the building height control is at the top of the lift overrun to Building A, which has a building height of 31.2 metres as measured from existing ground level (at RL 22.7m) to the top of the lift overrun (at RL 53.9m). This results in a 1.2 metre exceedance of the maximum height of building development standard of 30 metres under Clause 4.3B.

This request is to be read in conjunction with the response to Council's RFI prepared by Urbis (dated 14 May 2021) and the revised architectural plans prepared by PTW Architects at **Appendix B** to that submission.

1.2. HEIGHT OF BUILDING DEVELOPMENT STANDARD

Clause 4.3(2) of the LEP states that:

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

The maximum building height shown on the Height of Buildings Map for the subject land is 23 metres.

Notwithstanding the maximum building height control under Clause 4.3, Clause 4.3A of the LEP provides:

- (1) *The objective of this clause is to increase the supply of affordable rental housing by providing height incentives for the development of certain types of affordable rental housing.*
- (2) *This clause applies to development for the following purposes on land identified as “Area 1” on the Height of Buildings Map—*
- (a) *residential flat buildings,*
- (b) *shop top housing that forms part of a mixed use development.*
- (3) *Despite clause 4.3 (2), development consent may be granted to development to which this clause applies that exceeds the maximum height shown for the land on the Height of Buildings Map (the maximum height) by no more than 7 metres if—*
- (a) *the development will contain at least 1 dwelling used for the purpose of affordable rental housing, and*
- (b) *at least 25% of the additional floor space area resulting from the part of the building that exceeds the maximum height will be used for the purpose of affordable rental housing.*
- (4) *In this clause, affordable rental housing has the same meaning as in State Environmental Planning Policy (Affordable Rental Housing) 2009.*

The subject land is identified as “Area 1” and the development is for the purposes of mixed use development (including a residential flat building) and the development will contain affordable rental housing.

Accordingly, pursuant to Clause 4.3A the maximum height of building on the subject land is 30 metres.

1.3. BACKGROUND

The DA site (being 2-6 Cavill Avenue) was the subject of a planning proposal referred to by Department of Planning, Industry and Environment (**DPIE**) as PP_2017_IWEST_012_01. This sought to amend Ashfield Local Environmental Plan 2013 to facilitate high density mixed-use development on the site. The planning proposal was gazetted by Inner West Council (as the Relevant Planning Authority) on 5 April 2019.

The stated objectives of the planning proposal were to facilitate:

- Urban renewal and growth within an established centre;
- Increased housing in an existing centre, delivering economic, environmental, and social benefits;
- Increased housing variety; and
- Development of urbanised land with low biodiversity.

Shayher Alliance Pty Ltd has acquired the site with the ambition to deliver development that strongly aligns with the strategic vision and development objectives of the planning proposal.

The proposal seeks to achieve a contemporary, landmark, mixed-use development that leverages the site's highly accessible and strategic location on the western fringe of the Ashfield town centre. Urban renewal and growth of the site will contribute new and diverse homes and deliver a wide range of employment opportunities in a highly accessible location. The proposal will create obvious and tangible economic, environmental, and social benefits for the local community and the wider Ashfield town centre.

2. SITE AND CONTEXT

2.1. SITE DESCRIPTION

The site to which the DA relates is 2 – 6 Cavill Avenue, Ashfield NSW 2131 (see **Figure 2**).

The site is on the western fringe of Ashfield town centre in the Inner West Local Government Area (**LGA**) (former Ashfield LGA). Ashfield is approximately 8 kilometres south-west of Sydney CBD.

Figure 2 DA Site Location



Source: Urbis

The key features of the site are summarised in **Table 1** as follows.

Table 1 Site Description

Site Feature	Description
Legal Description	<p>The legal property description of the site comprises the following nine allotments:</p> <ul style="list-style-type: none">▪ Lot 9 in DP 940918;▪ Lot 17 in DP 168456;▪ Lot 101 in DP 234926;▪ Lot 1, Lot 2, and Lot 5 in DP 6262;▪ Lot 1 and Lot 2 in DP 556722; and▪ Lot 1 in DP 971932.
Site Area	<p>The site has a consolidated area of 8,422 sqm.</p>

Site Feature	Description
Existing Improvements	<p>Existing site improvements include the following:</p> <ul style="list-style-type: none"> Two standalone commercial office buildings within a six-storey (plus rooftop) built form; A mix of at-grade and basement car parking; Two access handles providing single entry and exit vehicular access to The Avenue; and Perimeter landscaping and tree plantings.

2.2. SURROUNDING CONTEXT

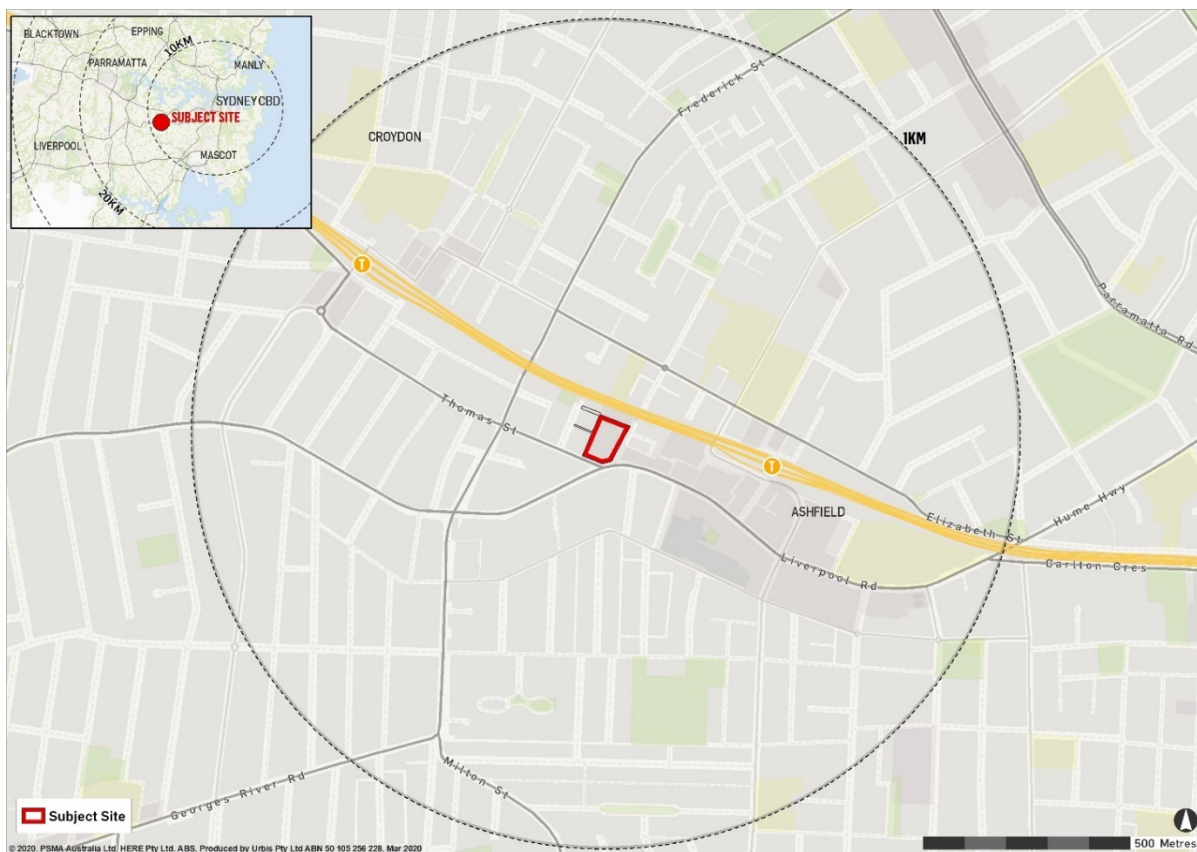
Land to the east comprises commercial and retail uses, and mixed-use shop-top buildings fronting Liverpool Street, medium density residential flat buildings along Cavill Avenue, and recently completed high-density residential flat buildings along The Esplanade (including Markham Place).

The west boundary of the site adjoins freestanding residential flat buildings fronting The Avenue. Beyond The Avenue, residential land uses are generally low density detached dwelling houses.

The north boundary of the site adjoins a medium density residential building (Nos 8-10 Cavill Avenue), beyond which lies the railway line servicing Ashfield Railway Station and the T1, T2, T3 and T9 lines.

The location of the site within the broader Ashfield town centre is shown in **Figure 3** below.

Figure 3 Surrounding Context



Source: Urbis

3. AMENDED DEVELOPMENT

This variation request has been prepared to accompany a revised DA that responds to Council's Request for Additional Information (RFI) (dated 11 March 2021) in relation to development application DA2020/1094.

The revised DA seeks development consent for demolition of existing buildings and construction of a part-seven, part-nine, and part-ten storey mixed use building comprising a part-two, part-three storey basement car park, residential flat buildings containing 264 apartments, a ground floor tenancy, a new through-site pedestrian link, and associated works at 2 – 6 Cavill Avenue, Ashfield (**the site**).

A summary of the key features of the amended proposal is provided in **Table 2** below.

Table 2 Key Aspects of the Development

Component	Proposed Development
Land Uses	Mixed use' comprising 'commercial premises' and residential flat building'.
Maximum Building Height	31.2 metres as measured from existing ground level (at RL22.7) to the topmost part of the lift overrun to Building A (at RL53.9).
Gross Floor Area	<ul style="list-style-type: none"> Basement parking (in excess of minimum RMS requirements): 479.5 sqm Ground level retail: 118.9 sqm Residential: 23,484.4 sqm <p>Total GFA: 24,082.8 sqm</p>
Dwelling Mix	<p>The proposal achieves the following dwelling mix:</p> <ul style="list-style-type: none"> 89 x one-bedroom apartments 142 x two-bedroom apartments 33 x three-bedroom apartments <p>Total: 264 apartments</p>
Landscaping	The proposal includes a new through-site link public domain and a central (internal) communal courtyard and rooftop communal gardens for exclusive resident use.
Car Parking	The proposal provides a basement car park which contains a total of 320 spaces.

The proposal is illustrated in the revised architectural drawings at **Appendix B** to the RFI submission.

4. PROPOSED VARIATION TO DEVELOPMENT STANDARD

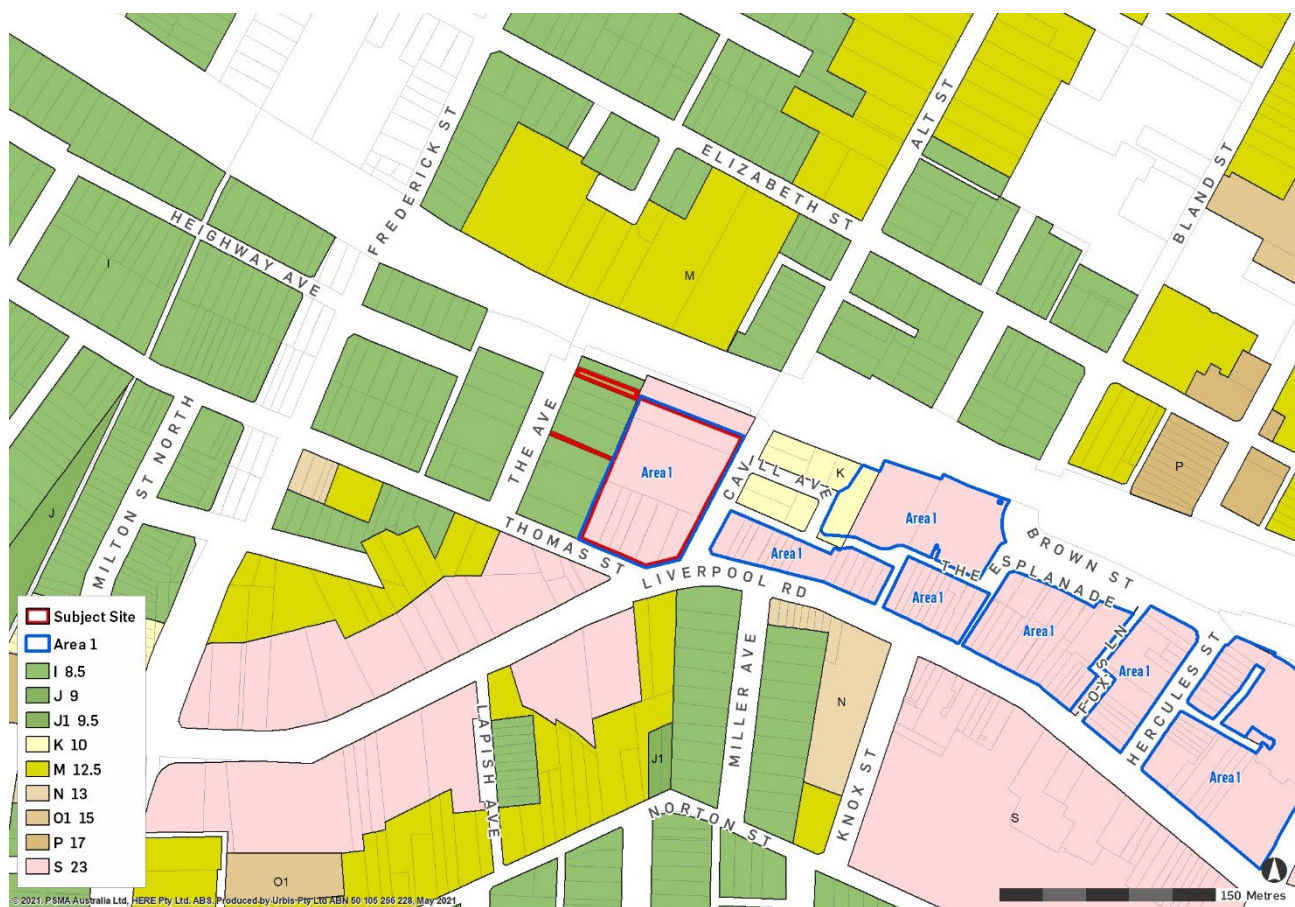
4.1. HEIGHT OF BUILDING DEVELOPMENT STANDARD

This variation request relates to the primary part of the development site (**subject land**), comprising:

- Lot 9 in DP 940918;
- Part Lot 101 in DP 234926;
- Lot 1, Lot 2, and Lot 5 in DP 6262;
- Lot 1 and Lot 2 in DP 556722; and
- Lot 1 in DP 971932.

Under Clause 4.3, the maximum building height that applies to the subject land is 23 metres (refer **Figure 4**).

Figure 4 Maximum Building Height Control



Source: Ashfield LEP 2013

Notwithstanding the provisions of Clause 4.3, LEP Clause 4.3A provides as follows:

- (1) *The objective of this clause is to increase the supply of affordable rental housing by providing height incentives for the development of certain types of affordable rental housing.*
- (2) *This clause applies to development for the following purposes on land identified as “Area 1” on the Height of Buildings Map—*
 - (a) residential flat buildings,*
 - (b) shop top housing that forms part of a mixed use development.*

- (3) *Despite clause 4.3 (2), development consent may be granted to development to which this clause applies that exceeds the maximum height shown for the land on the **Height of Buildings Map** (the maximum height) by no more than 7 metres if—*
- (a) the development will contain at least 1 dwelling used for the purpose of affordable rental housing, and*
- (b) at least 25% of the additional floor space area resulting from the part of the building that exceeds the maximum height will be used for the purpose of affordable rental housing.*
- (4) *In this clause, affordable rental housing has the same meaning as in State Environmental Planning Policy (Affordable Rental Housing) 2009.*

In relation to Clause 4.3A(1), the proposal provides 14 dwellings to be used for the purpose of affordable rental housing. The location of the affordable rental housing units are identified in the revised architectural plans (at **Appendix B** of the RFI submission). The mix of dwelling sizes cater for individual housing needs and address a spectrum of affordability.

In relation to Clause 4.3A(2), the site is identified as “Area 1” on the Height of Buildings Map (refer **Figure 4** above) and the proposal is for mixed use development, to include a residential flat building.

In relation to Clause 4.3A(3)(a), the 14 affordable rental housing units are distributed throughout the development in Building A, Building B, and Building C. The design of the units aligns with established international and national practice to create affordable rental accommodation to be ‘tenure blind’.

In relation to Clause 4.3A(3)(b), the part of the development that is to be used for the purpose of affordable rental housing (a total of 913.71 sqm) comprises 25.04% of the additional floor space area resulting from the part of the building that exceeds the maximum building height control (23 metres).

In relation to Clause 4.3A(4), the affordable rental housing units will be operated as consistent with the definition prescribed in State Environmental Planning Policy (Affordable Rental Housing) 2009.

Accordingly, pursuant to Clause 4.3A the maximum height of building on the subject land is 30 metres.

4.2. PROPOSED VARIATION TO DEVELOPMENT STANDARD

The LEP defines ‘building height’ (or ‘height of building’) to mean as follows:

- (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.*

Measured in accordance with the above definition, the proposal generally achieves compliance with the 30 metre building height control (including bonus provisions under Clause 4.3A) with the exception of several small areas of lift overrun on the roof top of buildings. This is a consequence of the topography of the site.

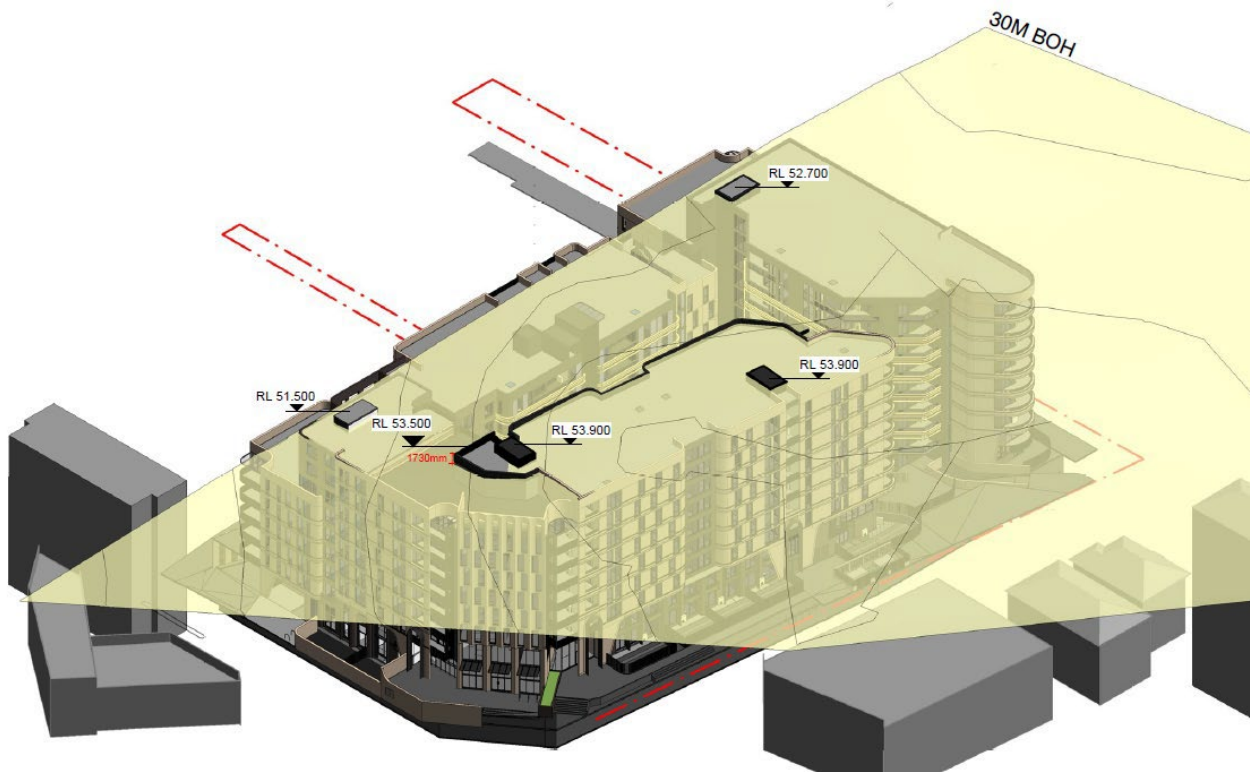
The proposal results in an exceedance of the maximum building height control of 30 metres by 1.2 metres.

The components of the development that exceed the maximum building control are:

- Lift overruns on the roof top to Building A (comprising areas of 12.36 sqm and 15.97 sqm).
- Lift overrun on the roof top of Building B (comprising an area of 9.59 sqm);
- Lift overrun on the roof top of Building D (comprising an area of 17.71 sqm).

Figure 5 provides a 3D height plane diagram indicating the extent of the proposed lift overrun elements that exceed the maximum building control of 30 metres (under Clause 4.3A). This diagram indicates that the areas of non-compliance occur as a consequence of the undulating topography of the site.

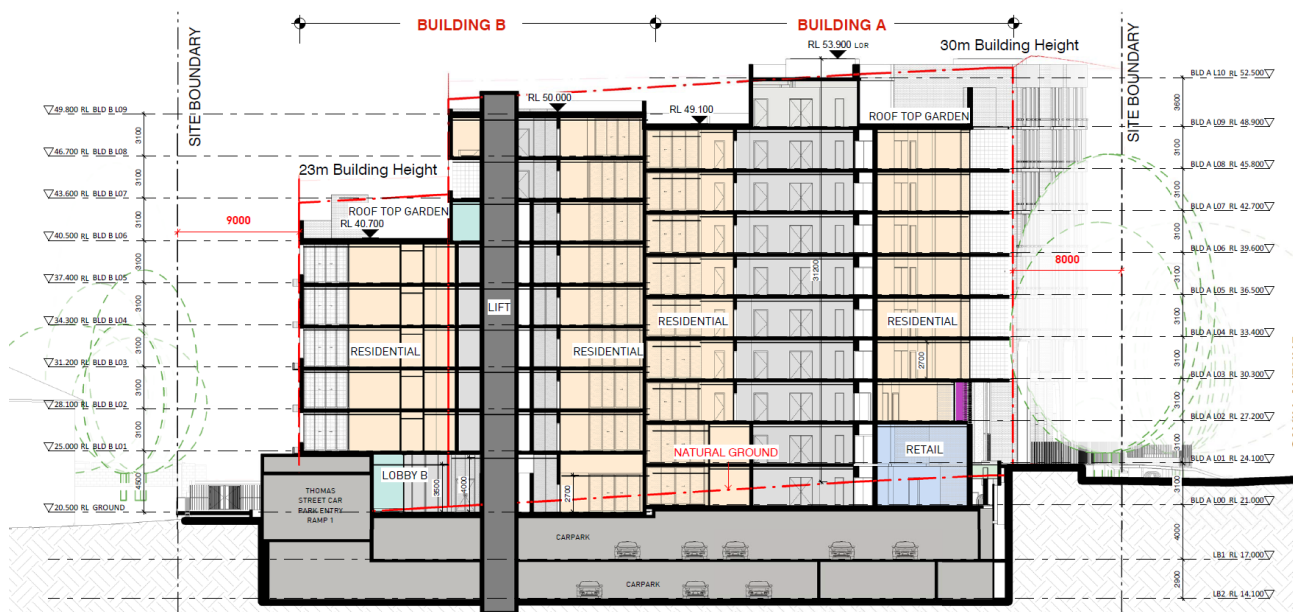
Figure 5 3D Height Plane Diagram



Source: PTW Architects

The maximum exceedance of the proposed building height control is at the top of the lift overrun to Building A, which has a building height of 31.2 metres as measured from existing ground level (at RL 22.7m) to the top of the lift overrun (at RL 53.9m). The maximum building height is shown on **Figure 6**.

Figure 6 Proposed Building Height



Source: PTW Architects

5. RELEVANT ASSESSMENT FRAMEWORK

This section outlines the provisions of the environmental planning instrument which applies to the height of building development standard and allows for its variation.

5.1. CLAUSE 4.6 OF ASHFIELD LEP 2013

Clause 4.6 of the Ashfield LEP 2013 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives prescribed in Clause 4.6(1) of the LEP 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(2) 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.

In accordance with Clause 4.6(3), the applicant requests that the maximum height of building development standard prescribed under LEP Clause 4.3 and Clause 4.3A be varied for the proposed development.

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 DPIE 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 concurrence of the Secretary can be assumed for the purpose of this request as the DA is declared to be regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

This request demonstrates that compliance with the maximum height of building development standard prescribed for the subject land in Clause 4.3 of the LEP 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.

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standard relating to the maximum height of building in accordance with Clause 4.6 of the LEP.

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

- *Varying development standards: A Guide*, prepared by DPIE (dated August 2011); and
- Relevant planning principles and judgements issued by the NSW Land and Environment Court (**LEC**).

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

This variation request has been informed by an assessment of the proposal on:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- Whether there are sufficient environmental planning grounds to justify contravening the development standard; and
- Whether the proposed development is in the public interest.

This assessment concludes that the variation request is well founded and that the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED?

The height of building development standards prescribed by Clause 4.3 and Clause 4.3A are development standards capable of being varied under Clause 4.6(2). The proposed variation is not excluded from 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 the LEP.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

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 variation 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 variation 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 variation 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 development standard are achieved notwithstanding non-compliance

Table 3 below assesses the consistency of the proposal against the objectives of Clause 4.3 of the LEP.

Table 3 Assessment of Consistency against Clause 4.3 Objectives

Clause 4.3 Objectives	Assessment
<i>(a) to achieve high quality built form for all buildings,</i>	<p>The proposal demonstrates a high quality built form in that:</p> <ul style="list-style-type: none"> ▪ It establishes an urban landmark for a transit-oriented community within Ashfield town centre. High quality built form is achieved through extensive architectural refinement and building articulation. ▪ The urban design intent is to offer a contemporary urban experience within a local centre context. The rich architectural detail and treatment of the street and pedestrian level elements will activate and articulate the surrounding public domain. ▪ The built form comprises four elegantly proportioned residential flat buildings with a vertical expression, within an extensive public domain and set around integrated central landscaped setting. ▪ The proposal has been subject to a detailed architecture and urban design review by Council's Architectural Excellence Panel. The Panel was generally supportive of the architectural language of the proposal, subject to further design refinement and articulation.
<i>(b) to maintain satisfactory sky exposure and daylight to existing buildings, to the sides and rear of taller buildings and to public areas, including parks, streets and lanes,</i>	<p>Notwithstanding the minor exceedances of the building height control, the proposal maintains satisfactory sky exposure and daylight to surrounding land uses. The building elements that exceed the building height control (lift overruns at roof top level) are not perceptible from the public domain and will have no material impact on the streetscape.</p>
<i>(c) to provide a transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings,</i>	<p>The site is recognized as a 'transition site' between the Ashfield Town Centre and the prevailing residential land uses to the west. To respond to the adjoining low density residential uses, the proposal achieves a transition in built form through generous and landscaped setbacks.</p> <p>The nearby heritage item at No 9 The Avenue sits within an altered context comprising late twentieth century residential buildings along The Avenue and the existing improvements at the subject site. The proposal will achieve a sympathetic transition to this heritage item.</p>
<i>(d) to maintain satisfactory solar access to existing buildings and public areas.</i>	<p>The components of the development that exceed the building height control (the lift overruns to the roof top) are not perceptible from the public domain and will have no material impact on solar access to the surrounding streetscape, public areas, or adjoining land uses.</p> <p>The revised architectural plans (at Appendix B to the RFI submission) contain shadow analysis diagrams to assess the impact on solar access to neighbouring properties. These demonstrate that the roof top components of the proposal which exceed the height of building development standard do not cause significant overshadowing.</p>

Table 4 below assesses the consistency of the proposed development against the objective of Clause 4.3A.

Table 4 Assessment of Consistency against Clause 4.3A Objectives

Clause 4.3A Objectives	Assessment
<i>(1) The objective of this clause is to increase the supply of affordable rental housing by providing height incentives for the development of certain types of affordable rental housing.</i>	The proposal utilises the provisions of Clause 4.3A by dedicating 14 dwellings as affordable rental housing. The affordable housing is distributed throughout Buildings A, B, and C. The affordable housing units comprise a mix of dwelling sizes to cater for a variety of individual housing needs and address a spectrum of affordability.

The above assessments demonstrate that the proposal is consistent with (as required by Clause 4.6(4)(a)(ii)) and will achieve (as required by Clause 4.6(3)(a)) the objectives of the height of building development standard, notwithstanding the minor non-compliance with the 30 metre maximum building height control.

Objectives of the development standard would be thwarted by a compliant development

The objectives of the height of building development standard would be thwarted by a compliant scheme (within a built form of 30 metres height) for the following reasons:

- A reduction in the building height to achieve strict compliance with the building height control would compromise the efficiency and amenity of the development given that it would require reduced floor-to-ceiling heights or even the removal of an entire storey of built form. The removal of an entire storey would significantly compromise the achievement of density envisaged for the site commensurate with the new FSR and building height development standards under the recently gazetted planning proposal.
- A scheme that achieved strict compliance with the 30 metre building height and utilised the allowable GFA would require some redistribution of floor space across the site and result in a more horizontal built with increased footprint, longer elevations without building breaks, and increased massing and physical bulk orientated towards the adjoining properties and the streetscape.
- A horizontal extension of the built form would compromise the side and rear setbacks which provide relief and amenity to adjoining properties. It would also increase the dominance of the built form from the public perspective, thus increasing visual impact and minimising privacy. A better design outcome in terms of visual and solar access amenity is achieved by redistributing GFA into a more slender, well-proportioned built form and extending the building vertically (as compared to horizontally).
- Strict compliance with the building height control would result in an irregular and asymmetrical built form which would not be able to achieve a high quality architectural form or building design.
- A compliant scheme extending horizontally across the subject land would reduce the area of landscaped open space terraces on Level 09. This would have the effect of reducing the amenity for residents.

Taking into account the above and the particular circumstances of the proposal and the subject land it is neither reasonable nor necessary to require compliance with the height of building development standard.

The proposed minor non-compliance with the height of building control demonstrates a superior planning outcome compared to a compliant scheme and better achieves the objectives of the development standard.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

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 sufficient environmental planning grounds to justify contravening the building height development standard for the following reasons:

- The maximum variation is numerically minor (1.2 metres) and the impacts resulting from the variation affect only supporting features of the roof top (being the lift overrun) which have limited external impact.
- The proposed non-compliance with the height of building control achieves a superior planning outcome compared to a ‘compliant’ scheme and better achieves the objectives of the building height standard.
- Given the location of the lift overruns and the substantial depths of the residential flat buildings, the non-compliant components of the roof form are indiscernible from the streetscape or public domain. The minor variations will have negligible consequential impacts on the amenity of neighbouring properties uses in terms of visual intrusion, solar access, privacy, and overshadowing. The positioning of the non-compliant roof elements result in the building appearing similar to that of a compliant building envelope.
- The proposal complies with the maximum permitted FSR control that applies to the subject lot (3:1), demonstrating that, notwithstanding the minor non-compliance with the building height control, it is highly consistent with what could be reasonably expect in terms of density, site layout, design, and land use intensity of the site. The minor variations to the height of building control do not result in any additional floor area or intensity of development within the site compared to that proposed for the site.
- The minor non-compliances with the building height development standard are not perceptible from the public domain and will have no material impact on solar access to the site or surrounding properties.

Taking into account the above and the particular circumstances of the proposal and the site, it is neither reasonable nor necessary to require strict compliance with the 30 metre maximum building height control.

Given the high level of compliance with other planning controls and the high quality design of the overall proposal, the variation to the development standard is supportable from environmental planning grounds.

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

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)?

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 addressed in this variation request, including detailed consideration of whether compliance with the 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 subject lot, to justify the proposed variation to the development standard.

6.5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST?

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.

Tables 3 and **4** above demonstrate the consistency of the development with the objectives of the height of building development standard (under Clause 4.3) and the maximum height of buildings in Ashfield town centre (under Clause 4.3A). **Table 5** below demonstrates the consistency of the development with the land use objectives that apply to the subject land under the B4 Mixed Use Zone.

Table 5 Assessment of Compliance with Land Use Zone Objectives

Zone B4 Mixed Use Objective	Assessment
<i>To provide a mixture of compatible land uses.</i>	<p>The proposed retail and residential land uses are compatible given their complementary functions and are typical of development in Zone B4 Mixed Use. The residential land uses are complimentary to the retail use and will not result in any unacceptable land use conflicts. Operating conditions for the retail tenancy will mitigate any potential conflicts.</p> <p>The residential accommodation provides a diversity of dwelling types and sizes. The new retail tenancy can suit a range of tenants and future operators which will deliver retail sales to the residents of the development and the surrounding locality.</p>
<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 proposal will integrate compatible retail and residential land uses in a highly accessible location on the fringe of Ashfield town centre and within close proximity to public transport (including Ashfield train station). The proposal will maximise public transport patronage and encourage walking and cycling through the creation of new pedestrian links within the public domain and the provision of secure bicycle parking.</p>
<i>To enhance the viability, vitality and amenity of Ashfield town centre as the primary business activity, employment and civic centre of Ashfield.</i>	<p>The ground floor retail tenancy will contribute to the viability and vitality of the western fringe of Ashfield town centre along Liverpool Street. Future residents will utilise and contribute to the ongoing economic vitality and amenity of the town centre.</p>
<i>To encourage the orderly and efficient development of land through the consolidation of lots.</i>	<p>The development site comprises nine parcels of land. The proposal will consolidate these allotments and achieve orderly and efficient development of land.</p>

Overall it is considered that strict maintenance of the 30 metre maximum height of building development standard in this instance is not in the public interest as:

- The proposed GFA is compliant which the permissible FSR on the subject site (3:1) which demonstrates that the proposed building height is not associated with over development.
- The protrusion is not attributed to any additional visual bulk or scale impacts nor does it unreasonably impact on the amenity of adjoining properties in terms of outlook privacy, overshadowing, or views.
- The use of a combination of high quality external materials, finishes, and colours further reduces the overall bulk and scale of the development and contributes to a well-designed outcome.
- Given the site's context on the fringe of Ashfield town centre and the diverse range of nearby land uses, the proposal is entirely consistent with the existing and desired future character of the locality.
- The proposal achieves and is consistent with the objectives of the building height development standards provided in Clause 4.3 and Clause 4.3A of the LEP, as outlined in **Section 6.2** of this variation request.
- The proposal is consistent with the objectives of Zone B4 Mixed Use, as outlined in **Table 5** above.
- The proposal achieves a superior planning outcome compared to a 'compliant' scheme and better achieves the objectives of the relevant development standard (as described in **Section 6.3** above).
- Compliance with the building height standard is an unnecessary hindrance to the ability of the proposal to deliver a vibrant mixed-use development and establish an urban landmark for Ashfield town centre.

The above demonstrates that the localised and central nature of the lift overrun structures and the extent of the non-compliances do not attribute to any additional external amenity impacts nor does it increase the perceived bulk and scale of the built form. Therefore, strict compliance with the maximum height of building control is unreasonable and unnecessary in the circumstance of the case and strict compliance would not result in any beneficial outcomes in terms of streetscape character, built form, visual bulk, or amenity

Accordingly, it is considered that, notwithstanding the proposed variation to the building height development standard, the proposed development is in the public interest.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED?

The concurrence of the Secretary can be assumed to have been granted in accordance with the DPIE Circular PS 18–003 '*Variations to development standards*', dated 21 February 2018. The DA is declared regionally significant development and will be determined by the Sydney Eastern City Planning Panel.

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

The proposed minor non-compliance with the maximum height of building development standard 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 subject site 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 height of building development standard (under Clause 4.3) and the maximum height of buildings in Ashfield town centre (under Clause 4.3A) and Zone B4 Mixed Use objectives notwithstanding the technical non-compliance.

Overall it is considered that the strict maintenance of the height of building development standard in this instance is not in the public interest for the reasons detailed above in **Section 6.5**. 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. CONCLUSION

For the reasons set out in this written request, strict compliance with the height of building development standard contained within Clause 4.3 of the LEP is unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation.

In this regard, it is reasonable and appropriate to vary the height of building development standard to the extent proposed. For the reasons set out in this variation request, strict compliance with the numerical standard in this circumstances is both unreasonable and unnecessary, there are sufficient environmental planning grounds to justify the contravention, and it is in the public interest to do so.

In summary:

- The proposal satisfies the objectives of the building height development standard notwithstanding the minor non-compliance such that to require compliance with the standard on this site would be unnecessary. The minor proposed variation to the height development standard is a consequence of the site topography and will result in a development that is compatible with the existing site context and is consistent with the desired future character of the site and locality.
- The proposal minimises visual impacts and achieves adequate solar access and privacy to adjoining land uses by adherence to the required building setbacks and separation distance of the ADG.
- The proposal on the subject land is consistent with the scale and intensity of the emerging future character of the locality in that it generally complies with the recently gazetted controls for the site.
- The application of Clause 4.6 to vary the development standard is not numerically limited. The consent authority has broad discretion under Clause 4.6(2) and Clause 4.6(4)(a)(i) to determine variations of any numeric value above a development standard with the concurrence of the Secretary. This is confirmed in the published planning system circular PS 17-006 '*Variations to development standards*'.
- In addition, no provision of Clause 4.6(8) restricts the variation sought in this instance. The consent authority can therefore be satisfied that this variation request can be lawfully approved pursuant to Clause 4.6 of the LEP.

For the reasons outlined above, the Clause 4.6 request is well-founded. Compliance with the building height 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 building height development standard should be applied.

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