



AMENDED CLAUSE 4.6 – BUILDING HEIGHT

Development Application for alterations and additions to an approved residential development seeking consent for three additional storeys to Building A, and an additional storey to both Building B and C.

25 George Street, North Strathfield
Prepared for: *Urban Property Group*

REF: M230119
DATE: 23 July 2024



Clause 4.6 Variation – Building Height



Clause 4.6 Variation Statement – Building Height (CBLEP Clause 4.3 and Housing SEPP Section 16(3))

1. Height of Buildings Standard

Clause 4.3 of the *Canada Bay Local Environmental Plan 2013* (CBLEP 2013) relates to the maximum height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the subject site as having a maximum height of 16m to George Street, and 22m centrally and to the rear of the site.

It is noted however that this application is made pursuant to *Part 2 Development for affordable housing, Division 1 In-fill affordable housing, Section 16 Affordable housing requirements for additional floor space ratio*, subsection (3) of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). Specifically, this application seeks to benefit from the 30% floor space ratio (FSR) and building height bonuses under Section 16(3) of the Housing SEPP, where an affordable housing component of 15% of the total floor space ratio (FSR) is provided for a minimum 15-year period. Accordingly, and per the Housing SEPP, the subject site is permitted a maximum building height of 20.8m (where the 16m limit applies) and 28.6m (where the 22m limit applies).

Building height is defined as:

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.

As identified above, when applying the 30% building height bonus afforded by Section 16(3) of the Housing SEPP, a maximum height of 20.8m is permitted to George Street, and 28.6m centrally and to the rear of the site.



Figure 1 Extract from the Height of Buildings Map [20.8m, 28.6m]

2. Proposed variation to height of buildings development standard

Where the 20.8m height limit applies, the architectural plans indicate that the proposed development has a maximum height of 22.607m to the central portion of the parapet roof of Level 6 (seventh storey), Building A. This is measured from 'ground level (existing)' in accordance with the definition of 'building height' under the CBLEP 2013.

Accordingly, the proposal varies the 20.8m building height development standard set by the Housing SEPP Section 16(3), and seeks a maximum variation of 1.807m, or 8.6%.

It is noted that the six storey portion of Building A complies with the 20.8m maximum building height. Additionally, both Building B and Building C are situated well below the 28.6m development standard for this portion of the site, with a maximum height of 26.64m and 25.55m, respectively. **Figure 2** below provides a height blanket diagram of the proposed development, with building heights dimensioned.

It should be noted that the proposal, as amended from that as originally lodged, has been reduced in height by 0.513m (where the 20.8m limit applies, on Building A). The reduction in height is the result of setting back the 7th storey of Building A further from George Street (which has reduced the technical non-compliance as the topography of the site slopes downwards to George Street) and deletion of the lift overrun.

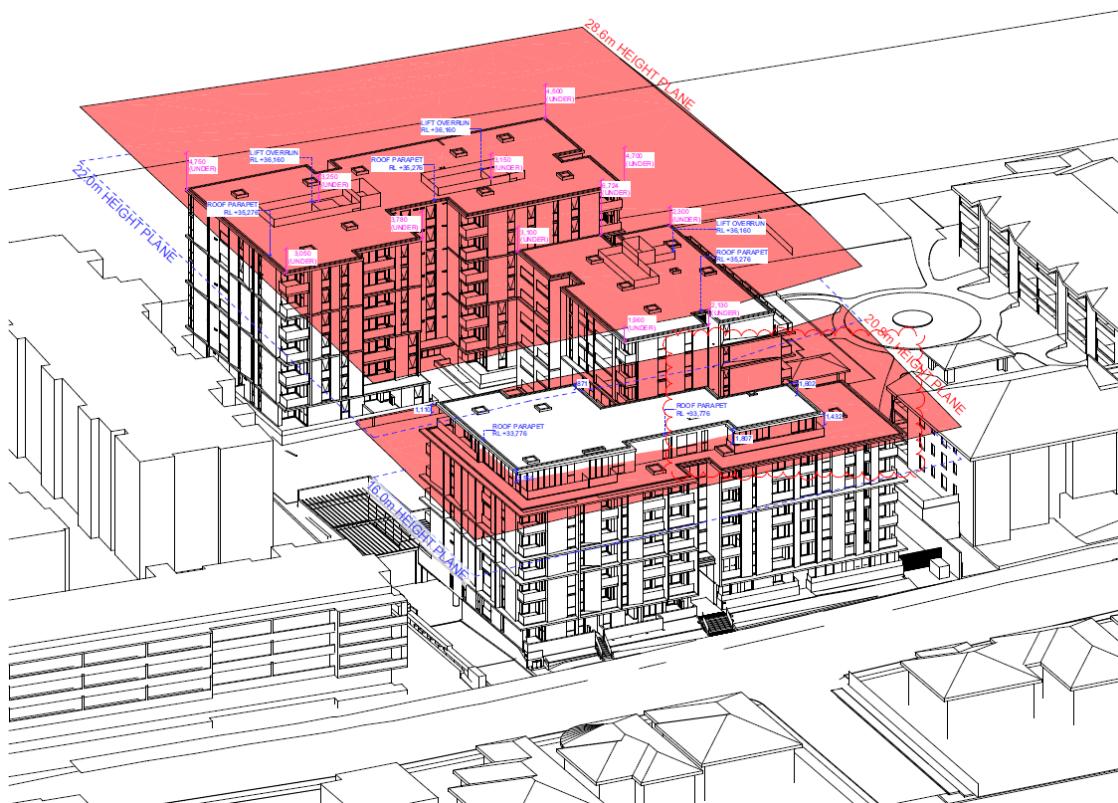


Figure 2 Height Blanket Diagram

3. Clause 4.6 to CBLEP 2013

The objectives and provisions of clause 4.6 of the CBLEP 2013 are as follows:

- (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.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(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.

Note— The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this Plan was made it did not include all of these zones.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,



- (caa) clause 5.5,
- (ca) clauses 6.4 and 6.5,
- (cb) clause 6.10,
- (cc) clauses 7.3 and 7.8(2)(a)–(c).

The development standards in clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

In *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:





...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

The objectives and relevant provisions of clause 4.3 of CBLEP are as follows:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,*
- (b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—*
 - (i) visual and acoustic privacy, and*
 - (ii) solar access and view sharing,*
- (c) to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,*
- (d) to ensure that buildings respond to the natural topography of the area.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.3 are addressed in turn below. Whilst it is noted that there are no objectives for the height bonus afforded by the Housing SEPP, the objective of *Division 1 In-fill affordable housing* of the Housing SEPP is also addressed.

Objective (a): “to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces”

It is noted that objective (a) refers to being “compatible” with the height, bulk and scale of the desired future character of the locality. It is considered that “compatible” does not promote “sameness” in built form, but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of *Roseth SC in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*:

“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

Council does not have any specific desired future character objectives under CBLEP but reiterates that the desired future character is set by the applicable planning controls. However, the use of a DCP to determine desired future character of an LEP was overturned by Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115*. That is, the desired future character of the locality is not defined under CBLEP and is subjective.

Therefore, the desired future character of the neighbourhood must be set by the existing, recently approved and proposed buildings within the neighbourhood. The subject site is zoned R3 Medium Density Residential, opposes R2 Low Density Residential land to the west (which is anticipated to undergo significant transformation, as detailed below) and SP2 Railway land to the east. The site and surrounding locality is anticipated to undergo change and an increase in density, consistent with the existing and future planning controls, accessible location and proximity to Concord West and North Strathfield Railway Stations.



Design of proposal and compatibility in the streetscape

Firstly, the site contains an existing approval for the delivery of three residential flat buildings, ranging from four to six storeys in height, under DA2020/0143, which contributes to the desired future character of the locality through its high quality design and arrange of built form, significant landscaping and communal zones. These key attributes are not proposed to be compromised by the proposed amendments to the design, and are not affected by the minor height breach. Compatibility is achieved through a consistent approach to site planning, architectural and landscaped design, cognisant with DA2020/0143.

Furthermore, the 7th storey of Building A, to which the minor height variation relates, includes a substantial setback to George Street. This significant setback ensures that the uppermost level will be concealed when viewed from numerous points from the public domain and that the development will sit comfortably in its context, presenting to the public domain as six storeys in height. As shown in the streetscape images in **Figures 3 to 5** below, the 6 storey form presenting to George Street sits comfortably and in harmony with neighbouring properties and within the streetscape. The building will present with a human scale, and will set a desirable precedent for transit orientated, affordable housing development in this locality.



Figure 3 Streetscape perspectives of revised proposal from Argonne Street



Figure 4 Streetscape perspectives of revised proposal, looking south-east along George Street



Figure 5 Streetscape perspectives of revised proposal looking north along George Street

Compatibility with the desired future character the locality

Imperative to the consideration of the proposal's compatibility with the desired future character of the locality is the *Homebush Transport Orientated Development Precinct* (Homebush TOD Precinct). Specifically, Homebush TOD Precinct Rezoning Proposal seeks to:

- rezone the R2 Low Density Residential land immediately to the west of the subject to R4 High Density Residential, and also increase the maximum permitted FSR to 2.2:1 and building height to 28m. This increase

in density will permit a maximum height of 8 or 9 storeys, which will result in a bulk and scale greater than that proposed in the subject application; and

- Land to the south of the site on the eastern side of George Street is also proposed to be upzoned to R4 High Density Residential and MU1 Mixed Use, with increases in FSR from 2.8:1 – 4:1, and heights between 42m – 103m.

This considerable uplift in density forms a critical part of the desired future character of North Strathfield and George Street, inclusive of 8 to 9 storey built forms, and must be considered for the subject application (and minor height variation). Whilst the approved and surrounding developments contribute to desired future character, the locality is earmarked for significant change. That is, the subject site and surrounding properties are located within 800m walking distance to Concord West and North Strathfield Railway Stations and are capable of accommodating an increase in density as desired for transit orientated developments, per the Homebush TOD Precinct, and as also afforded by the Housing SEPP.

Therefore, the proposal, at 7 storeys, is considered entirely compatible with the desired future character of the locality as set out above.

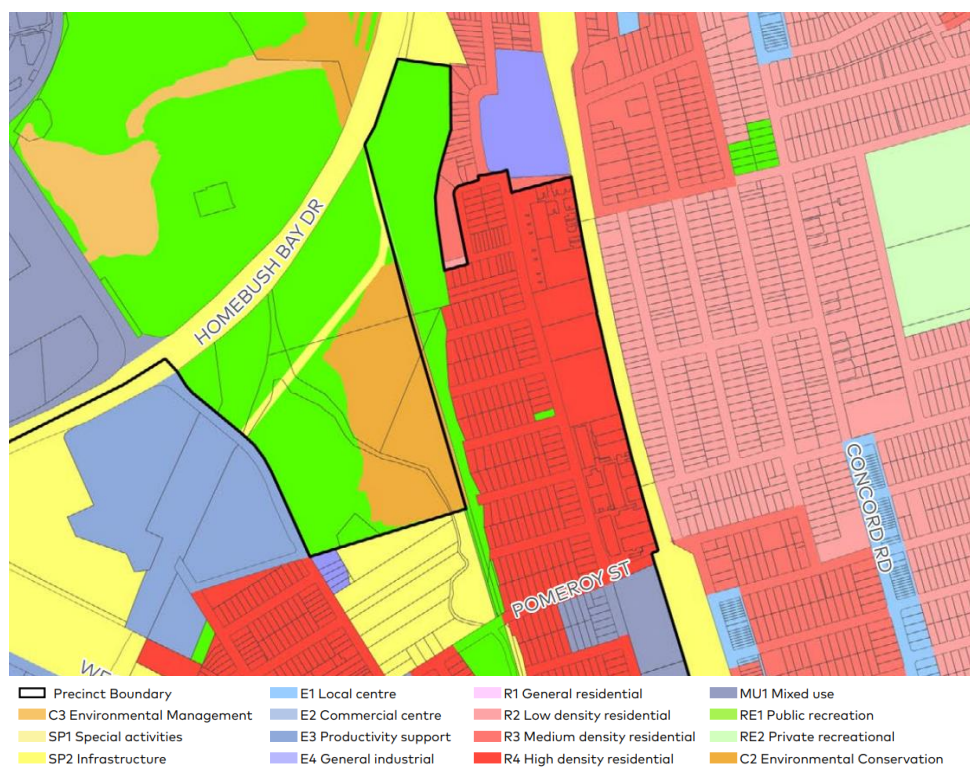


Figure 6 Homebush TOD Precinct – Proposed Zoning

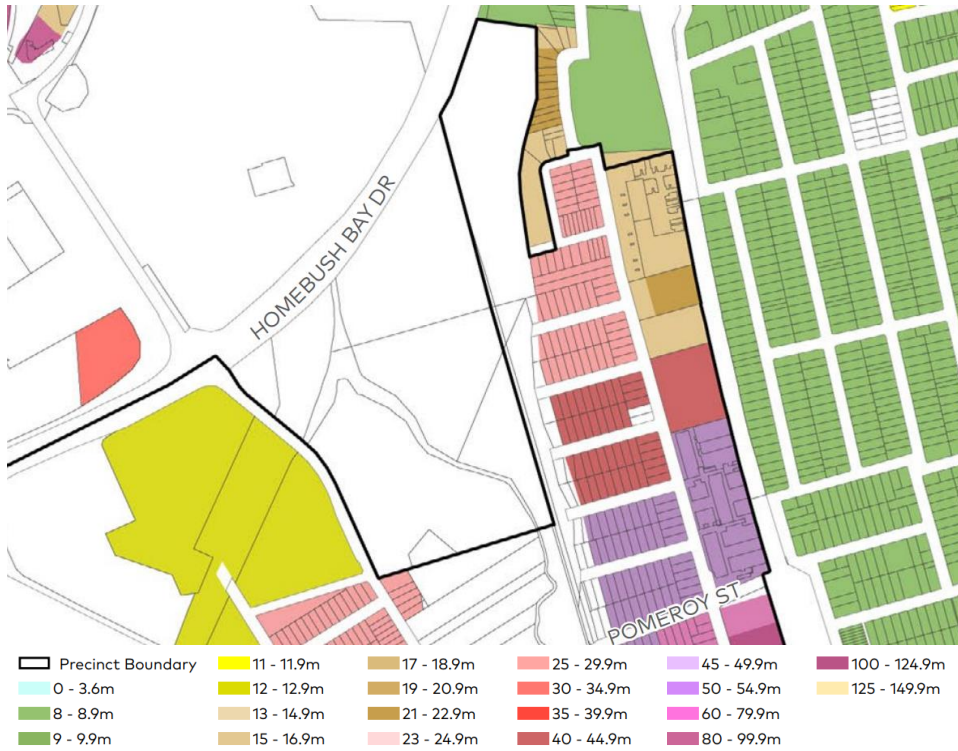


Figure 7 Homebush TOD Precinct – Proposed Building Height

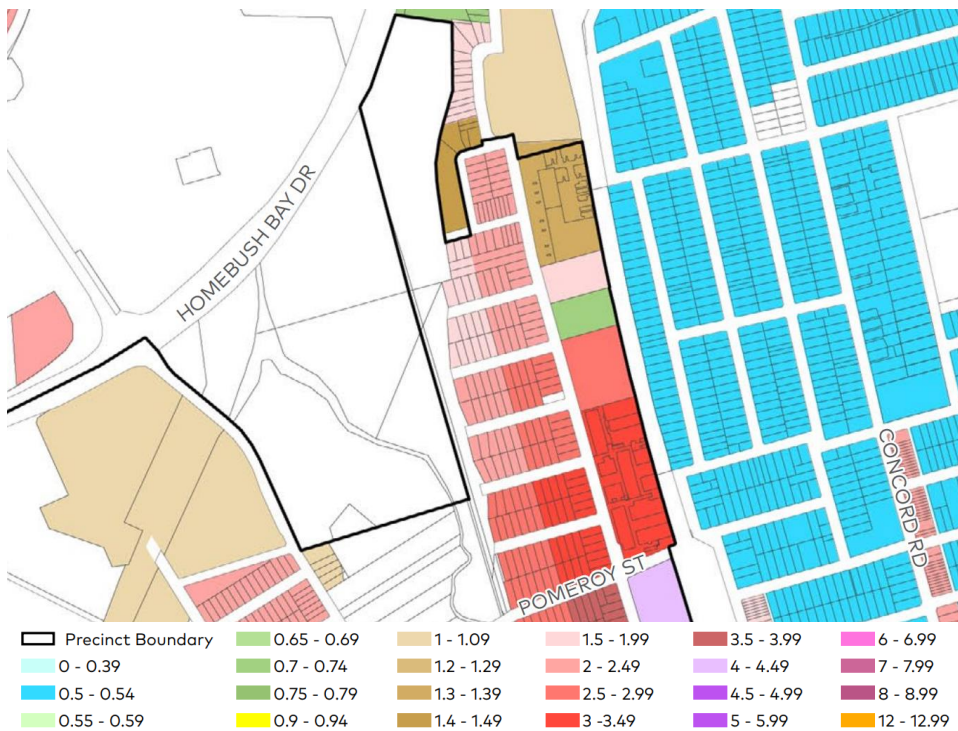


Figure 8 Homebush TOD Precinct – Proposed FSR



Figure 9 Homebush TOD Precinct – Perspective Images

Accordingly, the burden on insisting on strict compliance would result in the removal of high quality, residential apartments which would be an unreasonable and unnecessary outcome given the bulk, scale and character of the proposal is entirely compatible with both the existing and future character of the locality.

The proposal is therefore consistent with objective (a), despite the height breach.

Objective (b): “to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—

(i) visual and acoustic privacy, and

(ii) solar access and view sharing”

The extent of variation associated with the seventh storey of Building A has been designed to protect the amenity of future residents, neighbouring properties and the public domain. As described under the Environment Planning Grounds (Section 5 of this Variation Statement), the proposed additional floor space has been purposefully distributed across the three buildings (including on Building A) to limit any adverse amenity impact to the neighbouring properties or residents on the subject site.

Privacy

In terms of privacy, the height variation does not result in any adverse additional privacy impacts beyond a compliant building envelope. The non-compliant building height is concentrated towards George Street, and is set back considerably from the boundaries shared with neighbouring properties. When facades (including glazed openings) of the 7th storey are setback 10.8m to the northern boundary, and 14.9m to the southern (side) boundary, which comply with the ADG Design Criteria under Part 3F, therefore mitigating any adverse privacy impact. As such, objective (b)(i) is satisfied.

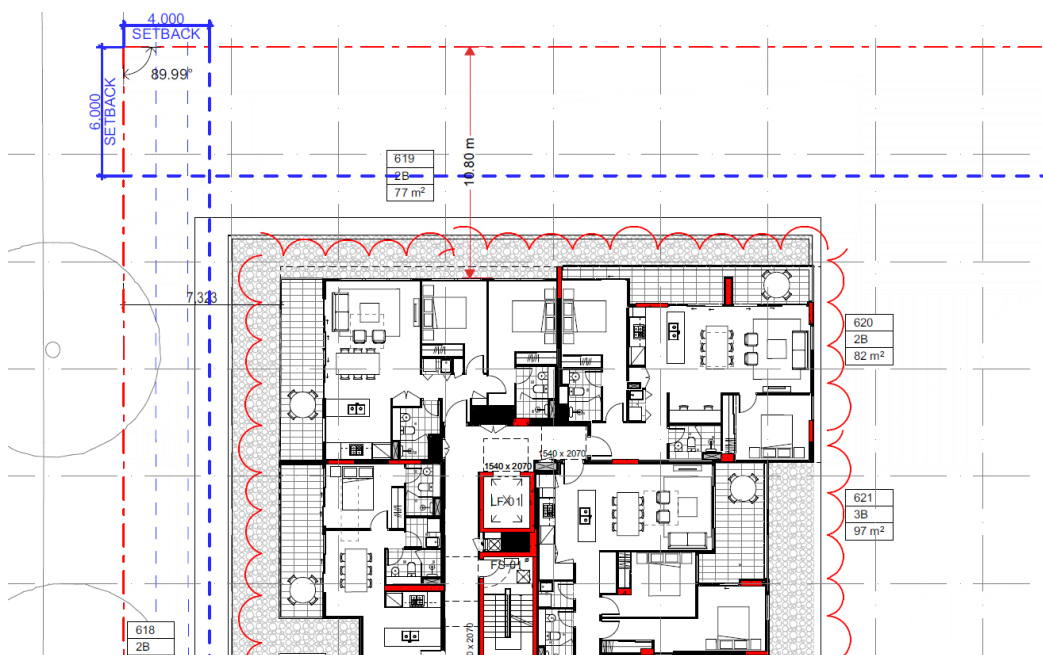


Figure 10 Proposed 10.8m setback to northern (side) boundary

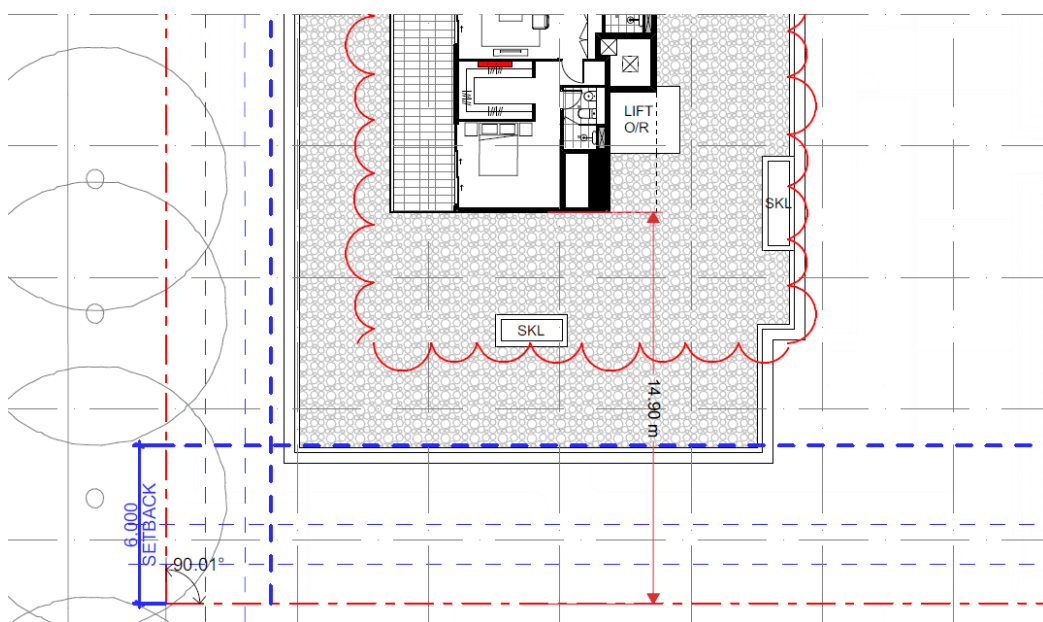


Figure 11 Proposed 14.9m setback to southern (side) boundary

Overshadowing

With regards to overshadowing, the proposed height variation will not result in any adverse overshadowing as opposed to an entirely compliant built form. The shadow diagrams submitted with the architectural plans confirm that whilst the variation itself will result in a minor increase in overshadowing, this is primarily cast onto the public domain of Argonne Street to the west from 9am to 10am during mid-winter. Throughout the remainder of mid-winter, additional shadow resulting from the non-compliant element is cast onto the roof top of the proposed Building A. As a result, the proposed

variation will not result in any adverse solar impact to the properties to the south, including their communal open space, and will not impact the communal open space proposed on the subject site.

Figures 12 and 13 below show the extent of additional shadow cast by the 7th storey on Argonne Street in midwinter, in the morning (additional shadow in red).

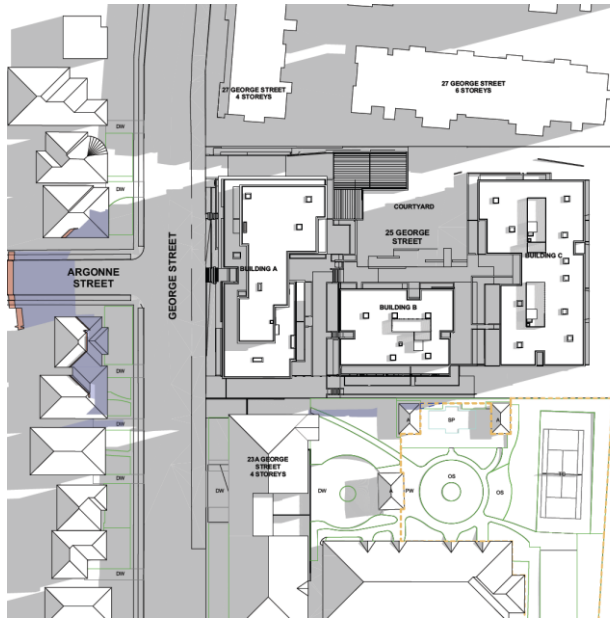


Figure 12 Mid-winter shadow diagram at 9am (additional shadow in red)

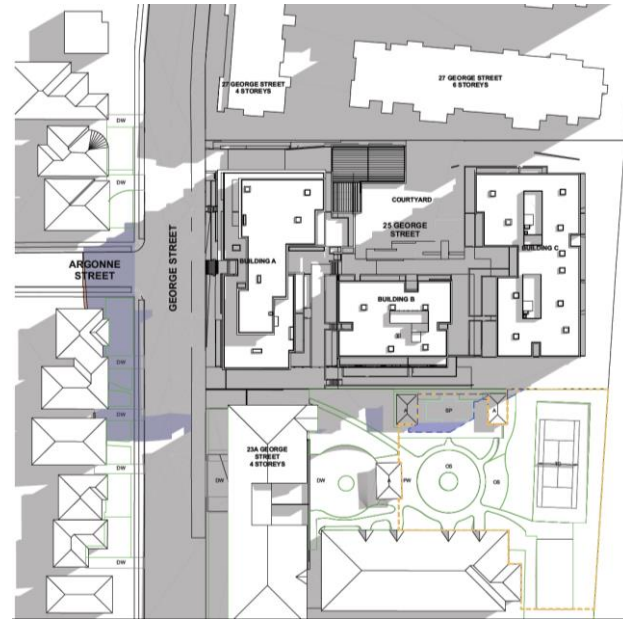


Figure 13 Mid-winter shadow diagram at 10am (additional shadow in red)

Further to the above, it is noted that the distribution of floor space and resultant height variation to Building A results in a superior outcome in terms of overshadowing and solar access to No. 23A George Street. That is, whilst a height compliant development can be achieved through locating additional floor area and distributing greater mass above Buildings B or C, this would result in additional overshadowing to the residential apartments and communal open space of the southern neighbour. As a result of the massing strategy employed, 23A George Street will retain 2 hours of solar access during mid-winter to 66% of residential apartments, which is the same number as approved under DA2020/0143, per **Figure 14**.

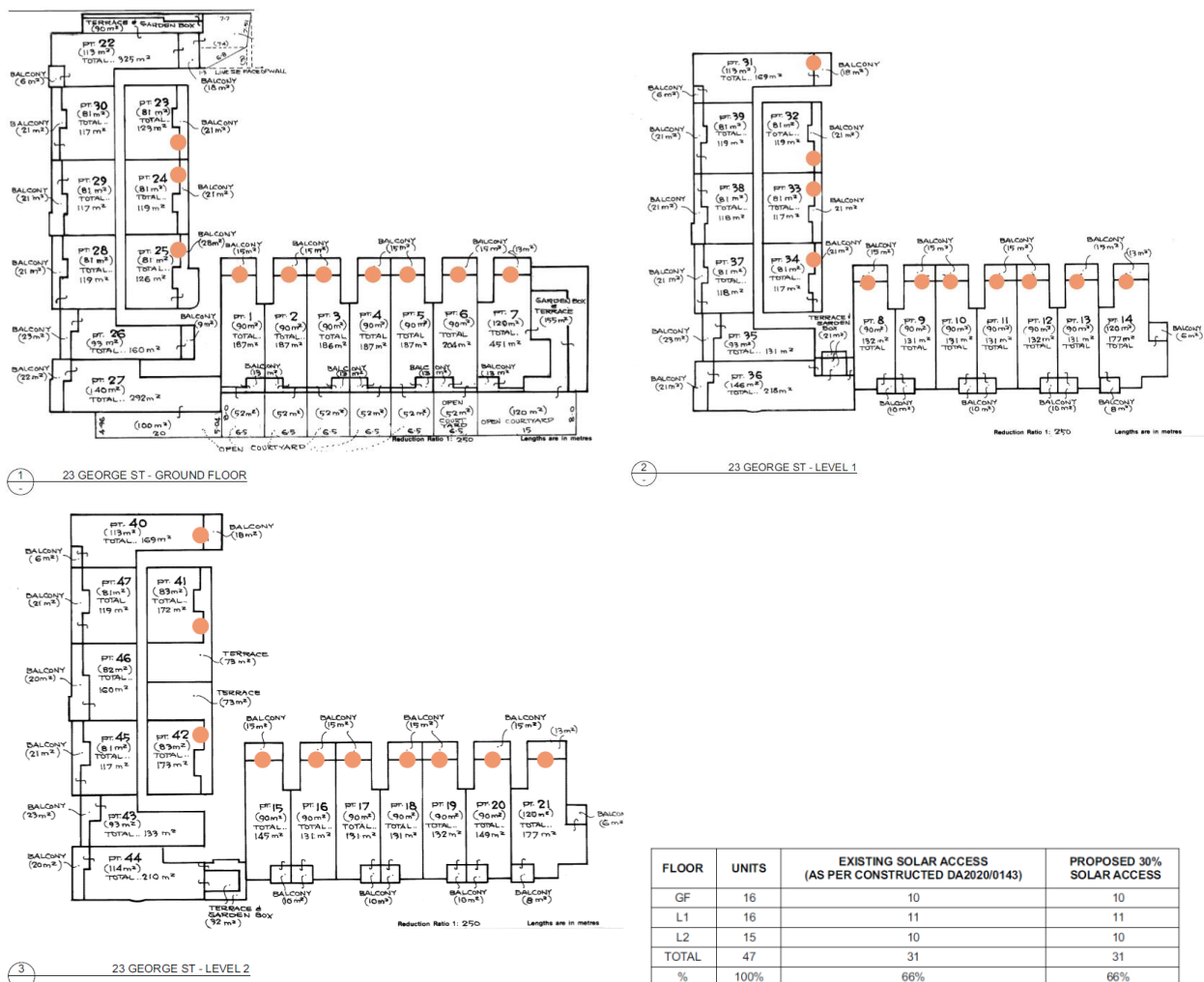


Figure 14 Solar access of residential apartments at No. 23A George Street

Furthermore, this modification improves the solar access to the communal open space compared to the lodged proposal. The communal open space of 23A George Street will continue to outperform the ADG requirement for solar access in midwinter, with a total of 53% to 99% of the communal open space achieving more than 2 hours of direct solar access between 9am-3pm (well above the 50% requirement of the ADG), which also satisfies the ADG requirement. The massing strategy will also ensure the swimming pool of 23A George Street will retain full solar access from 9am to 3pm in mid-summer, when the swimming pool will be most frequently used.

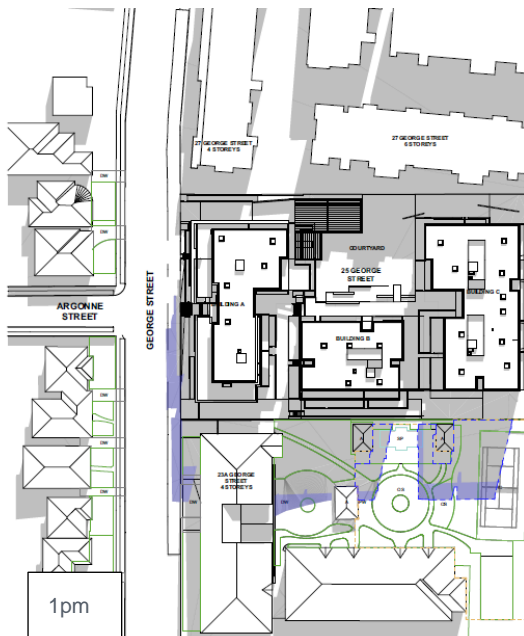
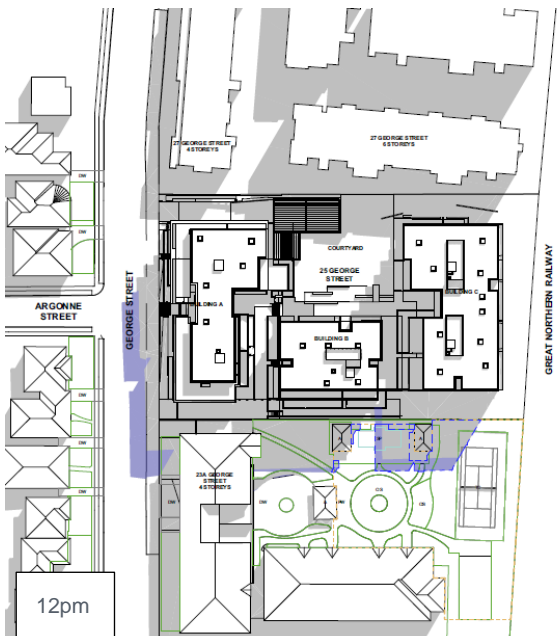
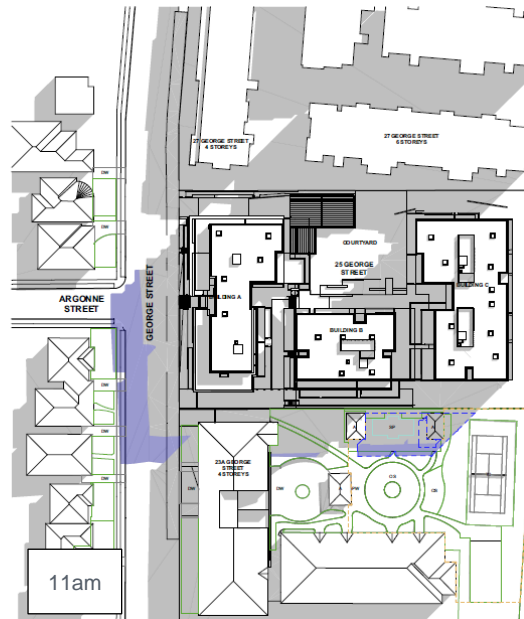
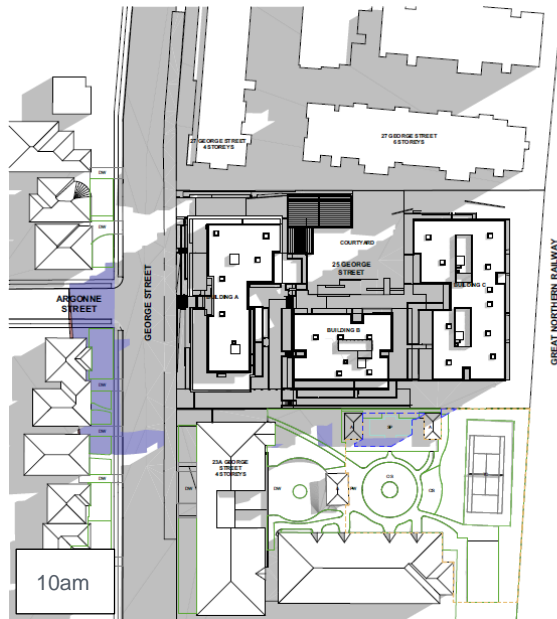




Figure 15 Overshadowing during mid-winter to communal open space at No. 23A George Street

As such, the additional overshadowing impact as a result of the height breach when compared to a compliant development are insignificant or nil.



View loss

In terms of view loss, the proposed variation will not result in any loss of views or outlook compared to a building with a compliant height. Importantly, there are no significant views currently enjoyed across the subject site from the public domain or neighbouring properties. The maximum height non-compliance is limited and any potential view loss would be caused by the approved and compliant building envelope. As such, objective (b)(ii) is satisfied.

Objective (c): “to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity”

As illustrated in the streetscape diagrams, the proposed development establishes an appropriate transition between the medium and low density zones and scale of development on the eastern and western sides of George Street, respectively. This is because the uppermost level (seventh storey), which includes the minor height variation, is set back substantially from the compliant envelope below, to ensure it is generally not visible from the public domain, and that the development presents as a six storey building from the street. As established in the streetscape analysis discussed earlier in this Variation Statement, the 6 storey form is compatible with the 4 storey and 2 storey scale of development fronting George Street, and in the same vein, provides a transition in scale, as anticipated by the objective of the development standard.

Whilst the land to the west is currently zoned R2, as described, the Homebush TOD Precinct will result in a rezoning of that land to R4 High Density Residential, permitting a maximum height of 9 storeys (28m) and FSR of 2.2:1, and likewise, allow for heights as high as 42m – 103m along George Street. In this context, the proposal will also provide for an appropriate transition having regard to the future context, with height graduating from low to high southward along George Street. The proposed minor height variation on Building A does not detract from the ability of the proposal to contribute to this appropriate transition.



As such, the removal of the proposed variation will not result in any meaningful change to the objective of achieving a transition in density, when compared to a strictly compliant development. As such, the proposal is considered to satisfy Objective (c) irrespective of the minor height variation.

Objective (d): “to ensure that buildings respond to the natural topography of the area”

As described, this application seeks approval for alterations and additions to the approved development which was designed originally to respond to the topography of the subject site. The proposed height variation is a result of floor area being purposefully located on Building A, which represents a strategic response to the site constraints and relationship to neighbouring properties. Whilst the development will result in a variation with the maximum building height of 20.8m, the non-compliant elements have been designed with appropriate setbacks to mitigate any visual impact as viewed from the public domain.

Most importantly, the uppermost level is set back from George Street to ensure it is concealed as viewed from the public domain, as shown in the streetscape analysis contained within the architectural plans. The location and setback of the non-compliant elements represents an appropriate response to the natural topography and is consistent with the development as originally approved. Accordingly, Objective (d) is satisfied despite non-compliance.

Housing SEPP Cl. 15A objective: *The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.*

The proposed development, including the non-compliant building height, will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To request strict compliance and require deletion of the uppermost level of Building A will reduce the provision of affordable residential accommodation without any benefit to streetscape character or amenity of neighbouring properties.

The proposed distribution of floor space is strategic and has considered the site constraints and relationship to neighbouring properties. Whilst this can be located elsewhere on the subject site and technically comply, the proposed location (resulting in the non-compliance) is considered the most appropriate with minimal environmental impact, namely, as it pertains to the overshadowing of No. 23A George Street. As such, the proposal will satisfy the objective of *Division 1 In-fill affordable housing* despite non-compliance.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The proposal successfully redistributes floor space and height, resulting in the non-compliance.

- a. The proposed variation is a result of the strategic distribution of floor space across the approved Buildings A, B and C. The proposal situates part-of the additional floor area above Building A, to achieve a number of distinctive benefits. The benefits are as follows:
 - i. The positioning of additional floor area on Building A has the least amount of impact to the amenity of neighbouring properties, particularly as it relates to the solar access of No. 23A George Street;
 - ii. The uppermost level of Building A (to which the minor variation pertains) is setback significantly from the edge of the building, ensuring it is concealed from views on the public domain, as shown in the **Figures 16 to 18** below (extracted from the streetscape analysis);



Figure 16 Streetscape perspectives of proposed development from Argonne Street



Figure 17 Streetscape perspectives of proposed development from the north of George Street



Figure 18 Streetscape perspectives of proposed development from the south of George Street

- iii. Whilst Building B or C can potentially accommodate the additional floor space, this is considered to be an inferior location as it would result in adverse amenity impacts to the neighbouring properties to the south at No. 23A George Street, including solar access and privacy of the residents apartments and communal open space, and would also result in self-shadowing to the proposed development itself at 25 George Street.

2. The site is in a precinct undergoing significant transition with respect to height, bulk and scale of development

- a. In addition to the above, it is imperative to consider the desired future character of the locality as set by the *Homebush Transport Orientated Development Precinct* (Homebush TOD Precinct) which has recently been publicly exhibited, as of 16 July 2024. As set out previously in this Statement, the Homebush TOD Precinct seeks to provide significant uplift in development density along both sides of George Street, permitting heights of between 25m and 80m. The character of the locality will transition to a high density, transport-oriented development precinct.
- b. In this regard, the minor height variation to part of the seventh storey of Building A, which is recessive and concealed as viewed from the public domain, will be insignificant in this changing context, and entirely subordinate in bulk and scale when compared to the future character along George Street. That is, the proposal addresses the public domain as a six storey form, despite the non-compliance, and will be compatible with the desired, transit oriented, future character of the locality.

3. The extent of non-compliance is minor



- a. The extent of variation is relatively minor and does not exceed 10%. It has been held in *Eather v Randwick City Council* [2021] NSWLEC 1075 that a particularly small departure from the actual numerical standard which lacks any material impacts consequential of the departure will be a sufficient environmental planning ground to justify contravening the development standard. The impacts created by the departure are discussed under Planning Ground 6.

4. The variation results from an environmental design response, based on site analysis

- a. The location of the variation is an appropriate response to the amenity of neighbouring properties, as discussed above, and limits the extent of adverse privacy and overshadowing impacts. The proposal has been designed following an analysis of the relationship of properties, particularly given the site orientation.
- b. Ultimately, the variation will merge, or be absorbed, into the anticipated bulk and scale of the locality. That is, the subject site is located within close proximity to the Concord West Railway Station, and it is anticipated that the subject site and other surrounding properties will benefit from the increase in density afforded by the Housing SEPP and as desired for transit orientated development (namely, the Homebush TOD Precinct). Given the extent of non-compliance is concealed from the public domain and is integrated into the remaining (compliant) built form, the impact will be minimal as viewed from the streetscape and surrounding properties.

5. Orderly and economic use of land

- a. The social benefits of providing affordable housing stock within a highly sought after location should be given weight in the consideration of the variation request. The distribution of floor space is



predicated on the relationship to surrounding properties and the public domain, and has resulted in a form and scale that breaches the 20.8m height limit. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of residential accommodation within a well located and well-designed development.



- b. As described, the relocation of this floor area to Building B and C will create adverse amenity impacts to the approved communal open space on the subject site, or residential apartments and communal open space of the neighbouring property to the south at No. 23A George Street. As such, the proposed height breach is considered to be the most suitable outcome to protecting amenity, whilst delivering additional residential accommodation within 800m of a railway station.

6. Limited environmental impacts

- a. It is considered that there is an absence of any significant material impacts attributed to the variation to the height standard on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:
 - i. The height non-compliance creates no significant adverse overshadowing impacts to adjoining properties when compared to a compliant building envelope. That is, although the additional height results in a minor degree of overshadowing, this is cast onto Argonne Street from 9am to 10am during mid-winter. From 10am to 3pm, the height non-compliance casts shadows onto the roof form of the subject development and will have no additional impact to the solar gain of neighbouring properties. Furthermore, the non-compliance does not result in any adverse additional impact to the solar access of the approved communal open space on-site.

Further to the above and as described under Objective (b), to provide for a strictly compliant development would exacerbate overshadowing to No. 23A George Street to the south. That is, to locate floor space above Buildings B and C will create additional overshadowing to the residential apartments and communal open space of the neighbouring properties. The proposal, as amended, will maintain solar access to 66% of the neighbouring apartments for 2 hours during mid-winter (as approved under DA2020/0143) and will maintain compliance with the communal open space solar access requirements of the ADG. As such, the increase to overshadowing caused by the non-compliant elements would be insignificant, as demonstrated in the submitted shadow diagrams;

- ii. The height breach does not result in any adverse additional privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy of adjoining properties when compared to the compliant portion of the proposed development. To the north, the proposal provides for a 10.8m setback to the non-



compliant, external façade. Whilst being situated above the permitted building height, the proposed setback, which exceeds the 9m Design Criteria contained within the ADG, will ensure any potential privacy impacts are mitigated. Similarly and to the south, the non-compliant portion of Building A is setback 14.9m from the boundary shared with the neighbouring property and satisfies the ADG. As such, the loss of privacy caused by the non-compliant elements would be insignificant; and

- iii. The height breach will not result in any significant view loss as the subject site does not contain any significant views across or from the public domain. The maximum height non-compliance is limited and any potential view loss would be caused by the approved and compliant building envelope. As such, the extent of view loss caused by the non-compliant element would be insignificant.

7. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard, objectives of *Division 1 In-fill affordable housing* of the Housing SEPP and objectives of the R3 Medium Density Residential zone;
- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site (1.3(c));
 - ii. To promote the delivery and maintenance of affordable housing (1.3(d));
 - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aims of Chapter 4 Design of residential apartment development, of the Housing SEPP. In particular:
 - i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. To achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. To contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are circumstances unique to the proposed development, particularly given the site specific massing approach in applying the bonuses afforded under the Housing SEPP. Further to this, the proposal has appropriately distributed the additional floor space throughout the site to ensure



there is minimal streetscape impact and that the additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development). Ultimately, the proposal has been designed to address George Street, with the height non-compliance recessed and concealed, ensuring it is not visually jarring from the public domain or neighbouring properties. Insistence on compliance with the height will result in the removal or relocation of a number of residential apartments which is a disproportionate outcome given the limited impacts of the proposal.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:



86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. Conclusion

This application seeks to benefit from the building height and floor space bonuses afforded by *Part 2, Division 1 In-fill affordable housing, Section 16(3)* of the Housing SEPP. This written request has been prepared in relation to the proposed variation to the 20.8m maximum building height, inclusive of a 30% bonus afforded by Section 16(3) of the Housing SEPP, to the base 16m development standard contained within Clause 4.3 of CBLEP.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard, as increased by the Housing SEPP in-fill affordable housing bonus, is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.



Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.