

Appendix 1

Clause 4.6 written request - Variation to Building Height Standard

7-9 Merriwa Street, Gordon

Prepared for

Giles Tribe Architects

MECONE.COM.AU



Mecone acknowledges the Traditional Custodians of the land on where this project is undertaken and across the Mecone offices that this report is prepared, paying respect to the Elders past and present. We recognise the ongoing connection of Aboriginal and Torres Strait Islander peoples to land, waters, and culture.

Project director

Georgia Sedgmen

Chris Shannon

Contributors

Tyson Ek-Moller

Revision	Revision date	Status	Authorised: Name & Signature	
A	12 June 2024	Development Application	Georgia Sedgmen	
B	08 October 2024	Response to RFI	Chris Shannon	
C	31 January 2025	Response to SNPP deferral	Chris Shannon	

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

Contact

MECONE

Level 15, 6 Hassall Street,
Parramatta, New South Wales 2150

info@mecone.com.au

mecone.com.au

© Mecone

All Rights Reserved. No part of this document may be reproduced, transmitted, stored in a retrieval system, or translated into any language in any form by any means without the written permission of Mecone. All Rights Reserved. All methods, processes, commercial proposals and other contents described in this document are the confidential intellectual property of Mecone and may not be used or disclosed to any party without the written permission of Mecone.



Table of contents

1	Introduction.....	1
2	Site description.....	2
3	Proposed development.....	3
4	Relevant planning instrument, development standard and proposed variations	4
	4.1 Environmental Planning Instrument to be varied	4
	4.2 Site zoning	4
	4.3 Development standard to be varied.....	5
	4.4 Details of proposed building height development standard variation	6
5	Assessment.....	9
	5.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary	9
	5.2 Clause 4.6(3)(b) –Environmental planning grounds to justify contravention of the development standard.....	12
6	Conclusion.....	20



1 Introduction

The Development Application (DA) for 7-9 Merriwa Street, Gordon (the site) seeks approval for mixed-use building comprising of 27 residential apartments and three commercial tenancies, civil works (including basement car parking), landscaping and tree removal. Due to the proposed Estimated Development Cost (EDC) of the proposal, the DA is required to be determined by the Sydney North Planning Panel (SNPP).

The DA proposes an exceedance of the building height development standard that applies to the site pursuant to clause 4.3(2) of *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

The proposed development includes variably sized breaches of the building height development standard, with a maximum proposed building height of 25.99 metres. The variations will affect the southern-most section of level eight (i.e. the topmost habitable level), and portions of structures on the rooftop level, including communal open space facilities, rooftop access and an associated lift overrun and other features such as a planter box and screens encasing necessary rooftop-mounted plant equipment.

This written variation request has therefore been prepared pursuant to clause 4.6 of the KLEP 2015, and justifies the contravention of the building height development standard with regard to the specific circumstances of this proposal. This written request has also been amended in response to a request for additional information from the SNPP following a determination meeting on 18 December 2024, at which time the SNPP resolved to defer determination of the DA pending the submission of amended and additional information. Revisions to this written request have also responded to issues raised by Council regarding the proposed variations to the building height development standard.

To summarise, it is submitted that permitting the proposed variation to clause 4.3(2) will allow for improved planning outcomes at the site.



2 Site description

The subject site comprises of a single allotment that is legally identified as Lot 2 in Deposited Plan 566663, and has an address of 7-9 Merriwa Street, Gordon. The site is located within the Ku-ring-gai Government Area (LGA) and is located within the MU1 Mixed Use zone on the northwest side of the Gordon local centre.

The subject site is a dual frontage 'parallel allotment' that it is located on the north-western side of Merriwa Street and the southern side of Fitzsimon Lane. It is an irregularly shaped allotment with an area of approximately 2,786.6m², which features a large rear-to-front downhill slope with maximum falls of approximately 10.1-11.1 metres. The construction of existing development (undertaken in the mid-1970s) has significantly modified the topography of the site by cutting into the slope to enable the construction of a part five-and-six-storey commercial building with a five storey semi-basement carpark between the commercial building and the Fitzsimons Lane frontage; driveways run up both side setbacks from the Merriwa Street frontage to the aforementioned carpark.

The remainder of the site is landscaped, with numerous large (i.e. 20+ metre) trees within the Merriwa Street setback area.

There is a small separate parcel (Lot 1, DP 566663) that does not form part of the subject site but is encompassed by the subject site's Merriwa Street setback; development on that site contains a small substation.

3 Proposed development

Pursuant to Section 4.16 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), consent is sought for the demolition of all existing structures and the construction of an eight storey (plus basement and rooftop terrace) mixed use development comprising of residential apartments and commercial tenancies.

An overview of the works being proposed is as follows:

- Demolition of all structures of the site,
- The construction of a mixed-use development, which will comprise of a single building and is proposed to contain:
 - 27 residential apartments, including:
 - One x two-bedroom apartment,
 - 13 x three-bedroom apartments, and
 - 13 x four-bedroom apartments,
 - Three commercial tenancies, which will address the Fitzsimons Lane frontage,
 - A rooftop communal open space area,
- Civil works (including stormwater and services),
- Landscape works (including the removal of 15 trees),
- The provision of new onsite utilities and connections,
- Strata subdivision.

The use of the proposed commercial tenancies will be subject to separate proposals following approval of this development application.

Due to the significantly sloped topography of the site, while the building will contain a uniform footprint, habitable levels within the building will be stepped (refer to **figure 1** below). The carpark and associated facilities (such as residential storage, etc.) will comprise of both a single level basement below the proposed building, and three part-basement carpark levels that will be located below the northern part of the proposed building.

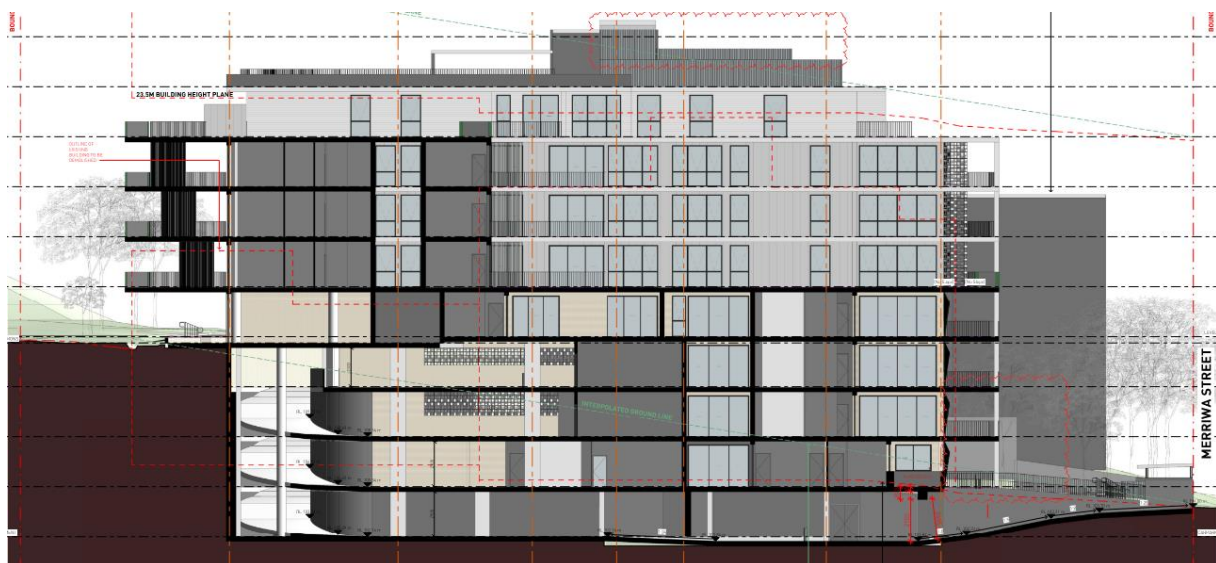


Figure 1: An extract of the proposed section plans, showing the proposed development's relation to the sloped topography (both existing and extrapolated) of the site.

Source: Giles Tribe, 2024

4 Relevant planning instrument, development standard and proposed variations

4.1 Environmental Planning Instrument to be varied

The Environmental Planning Instrument (EPI) to be varied is the *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

4.2 Site zoning

The site is zoned as an MU1 mixed use zone; refer to **figure 2** below for an extract of the LEP land zoning map.

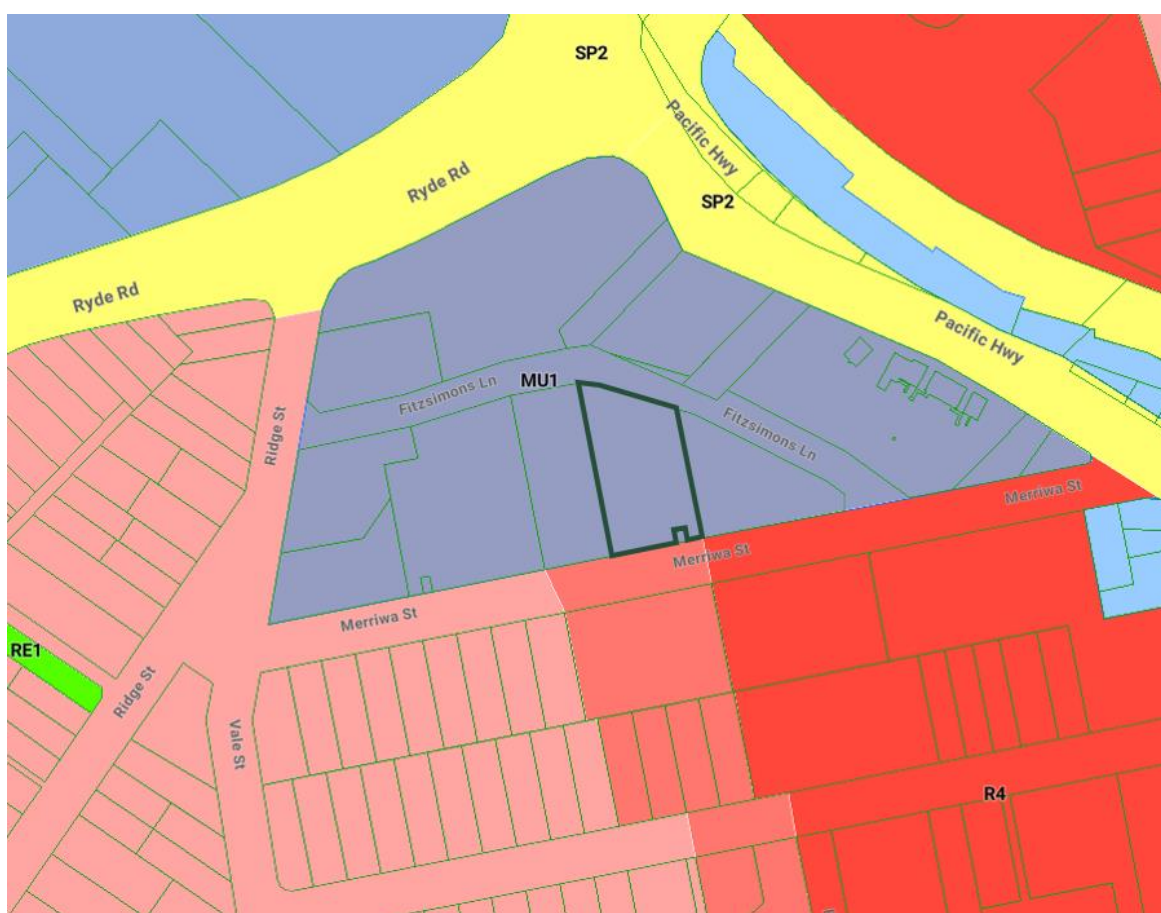


Figure 2: An extract of the KLEP 2015 land zoning map. The site is denoted by the dark green border.
Source: Mecone Mosaic, 2024

4.3 Development standard to be varied

The development standard to be varied is clause 4.3(2) (Height of buildings) of the KLEP 2015. For reference, clause 4.3 provides the following:

4.3 Height of buildings

- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*
 - (b) *to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*
 - (c) *to enable development with a built form that is compatible with the size of the land to be developed.*
- (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.*
- (2A) *Despite subclause (2), the height of a building on land in Zone R4 High Density Residential where the site area is within a range specified in Column 1 of the table to this subclause must not exceed the height specified opposite in Column 2 of the table.*

Column 1

1,800 square metres or less

More than 1,800 square metres but less than 2,400 square metres

Column 2

11.5 metres

14.5 metres

- (2B) *Despite subclause (2), the height of a building used for the purposes of commercial premises on land identified as “Area 1” on the Height of Buildings Map must not exceed 26.5 metres.*

Note: Clauses 4.3(2A) and 4.3(2B) are not applicable to this site, and as such will not be discussed further.



Figure 3: An extract of the building height standard map for areas within the Gordon Centre. The site is denoted by the dark green border. Note: The pale blue border in the centre of the image relates to clause 4.3(2B) of the KLEP 2015, and is not relevant to the proposed variation of the building height development standard pursuant to clause 4.3(2).

Source: Mecone Mosaic, 2024



The prescribed building height development standard that applies to the site pursuant to clause 4.3(2) of the KLEP 2015 is 23.5 metres (refer to **figure 3** below); the development standard to be varied is therefore a numerical development standard.

4.4 Details of proposed building height development standard variation

Given that prior development has significantly modified the topography of the site, measurement of the building height based upon “existing” ground levels have therefore been calculated based upon extrapolated ground levels in accordance with relevant caselaw¹.

Due to the steeply sloped topography of the site, based on extrapolated levels the locations of elements that breach the building height development standard are located towards the centre and southern side of the building.

Elements that are breaching the 23.5-metre building height standard includes:

- The southern and top-most part of level 8 (i.e. the top habitable level), including
 - The southern-most portion of the roof, and
 - The top-most sections of the southern building line on this level, and
- The rooftop level, including
 - Portions of a roof/ pergola and associated supporting structures that cover communal open space areas (such as outdoor cooking and eating facilities),
 - The uppermost sections of the vertical circulation core (i.e. stairs, lifts and lift overruns) that provide access to the rooftop communal area,
 - Part of a planter box on the southeast corner of this rooftop level, and
 - A screen that encompasses building plant equipment.

Due to the site’s sloped topography, the size of variations associated with the above elements varies, with the most sizable variations being located towards the western/south-western parts of the building. As demonstrated **figure 4** below, the greatest point of noncompliance based on extrapolated floor levels² is the southwest-most point of the screen surrounding the rooftop plant area; with a maximum height of 25.99 metres; this constitutes a 2.49 metre (a 10.6%) variation to the building height development standard prescribed by clause 4.3(2) of the KLEP 2015.

¹ *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582

² For reference, when measured from non-extrapolated existing ground level, the tallest part of the building is the building’s circulation core and the lift overrun, with a maximum height of 29.45 metres (refer to **Figure 5**).

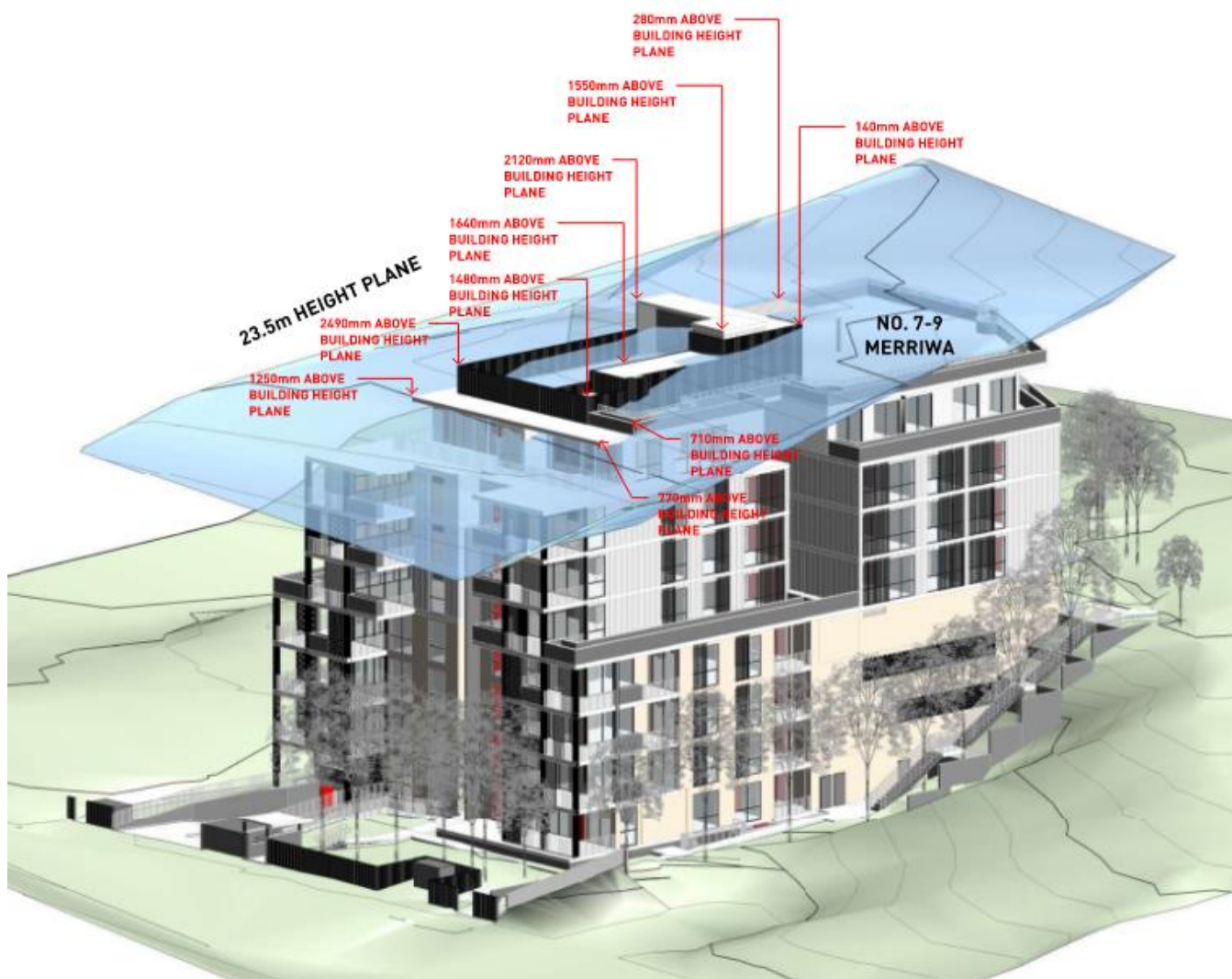


Figure 4: An extract of modelling the architectural plans (based upon an elevated viewpoint to the southeast of the site), showing elements of the proposed development that will breach the 23.5 metre building height development standard (denoted by the blue overlay). The building height development standard portrayed by this image is based on extrapolated levels from information contained within the survey plans which form part of this proposal.
Source: Giles Tribe, 2024

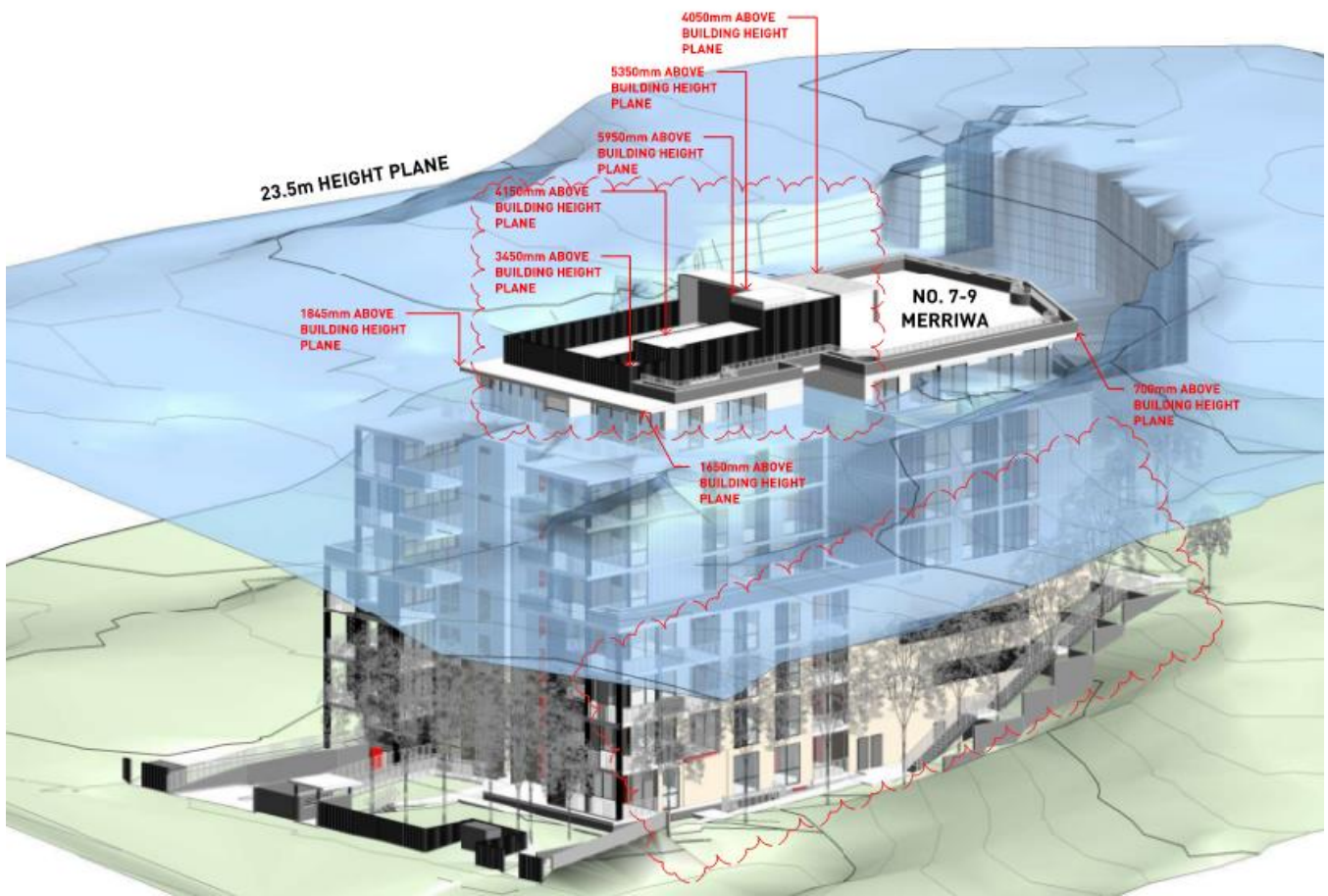


Figure 5: An extract of modelling the architectural plans (based upon an elevated viewpoint to the southeast of the site), showing elements of the proposed development that will breach the 23.5 metre building height development standard (denoted by the blue overlay). The building height development standard portrayed by this image is based on existing levels, which are associated with prior development that heavily modified the subject site's topography. Note: This information has been provided for reference only, and in accordance with relevant caselaw should not be used to assess the proposed height of the development.

Source: Giles Tribe, 2024

When measured from existing ground level, the tallest part of the building is the building's circulation core and the lift overrun, with a maximum height of 25.44 metres; this constitutes a 2.49 metre (a 10.6%) variation to the building height development standard prescribed by clause 4.3(2) of the KLEP 2015.



5 Assessment

5.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe V Pittwater Council (2007)* 156 LGERA 446 (Wehbe), Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded and under which a proponent could demonstrate that compliance with a development standard is unreasonable or unnecessary as per clause 4.6(3)(a)).

For reference, the five ways in which a variation may be well founded are listed as follows:

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.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above scenarios. In this instance, the first point has been investigated and is considered to be well founded for the proposed development.

The objectives of the building height development standard pursuant to clause 4.3(1) of the KLEP 2015 are provided below, with a response as to how that objective is achieved notwithstanding noncompliance with the standard:

- (a) *to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*

Mecone's assessment:

The Ku-ring-gai Development Control Plan (KDCP) identifies the Gordon Local Centre as comprising of five precincts, with the subject site forming part of precinct G4 (Mixed Use). As shown by **figure 3**, the KLEP 2015 anticipates that the tallest development will be located within the E1 zone (located southeast of the site), with the next tallest areas being located on sites to the north and east/northeast of the subject site that generally have at least one frontage to Ryde Road and/or the Pacific Highway. From that point, zoning and different building height development standards provide for variable building heights that will provide progressive transitions in density and scale from larger development to the north and east of the site to medium and low-density residential areas that are located respectively immediately south and further to the southwest of the subject site.

Being located within an MU1 zone that forms part of the Gordon Local Centre, the KLEP 2015 anticipates that mixed use development within the centre will be of a greater height and scale than medium and low-



density residential areas to the south and southwest. Except for relatively small proportions of the development that will be located considerably behind the building's southern frontage, the proposal is otherwise consistent with anticipated development height and scale that is envisioned for mixed use precincts surrounding the local centre. The proposal is therefore consistent with this objective.

(b) *to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*

Mecone's assessment:

While the subject site is located within the Gordon local centre, as demonstrated by **figure 3**, it is located within a part of Gordon that provides a varying building height transition away from:

- The Gordon local centre to the southeast, and
- The Pymble Business Park local centre to the north/northwest.

Development and associated building heights within the Gordon Local Centre/MU1 Mixed Use zone to the south and west of Ryde Road and the Pacific Highway respectively is highly diversified. As anticipated by the KLEP 2015, newer development located on sites with frontages to the Pacific Highway and/or Ryde Road have greater heights of approximately (i.e. approximately eight to 10 storeys), while development on the southern side of Fitzsimons Lane are of varying heights (i.e. approximately four to seven storeys). Sites opposite the subject site to the south and southwest of the site are within an R3 Medium Density Residential zone that permits development with heights of up to 11.5 metres, while sites further to the southwest are located within an R2 Low Density Residential zone, with prescribed 9.5 metre building heights allowing for predominately one and two storey buildings.

With regard to the above, the KLEP 2015 therefore anticipates that there will be a transition involving progressive decreases in development height and scale within higher density zones as follows:

- Transitional decreases in development height within the MU1 zone will occur in a north-to-south/southwest direction from sites adjoining the Pacific Highway and Ryde Road, and
- Transitional decreases in development height within the E1, R4 and R3 zones on the southern side of Merriwa Street will occur in an east-to-west direction from sites adjoining the Pacific Highway.

Noting the above, development on the MU1-zoned block that includes the subject site is highly variable, and moving from east to west comprises of:

- A part four and five storey building at 1 Merriwa Street,
- The existing part six storey development on the subject site,
- A vacant site at 11-15 Merriwa Street, that was the subject of a DA approval (DA0447/14) in 2015 for an eight-storey mixed used building, and
- Part five, six and seven storey buildings at 17-23 and 27 Merriwa Street and 71 Ridge Street.

The existing and approved heights of development within this block are therefore highly varied; while there is no transitional character established on the southern end of the subject MU1 zone when moving in an east-to-west direction, the scale of such development is however less than that of development to the north/northeast of the site. In addition to the proposed redevelopment of the subject site, it is also anticipated that both 1 and 11-15 Merriwa Street (i.e. the sites adjoining the subject site) will be redeveloped (however the timeframes of such redevelopment are not currently known), noting that:



- The commercial development at 1 Merriwa Street was constructed in the late 2000s, and contains a built form and scale that is considerably less than what is currently permitted by relevant development standards and controls, and
- The eight-storey mixed use proposal approved by Development Consent no. DA0447/14 at 11-15 Merriwa Street does not appear to have proceeded, given that there is no information suggesting that consented works on that site have substantially commenced since its approval in October 2015.

The proposed development will be situated towards the eastern end of this block, and heights associated with its proposed eight storey form and associated height will provide a transition between eight-to-10 storey development to the east/northeast of the site and five/six/seven storey development further to the west.

While the site has been subject to excavation which has altered its natural topography, the topography of adjoining allotments (being 1 Merriwa Street and 11-15 Merriwa Street) have been modified 'levelled' and have existing ground levels of RL 112.563 and RL 107 respectively. These existing ground levels are higher than the subject site which has a ground level around RL 105m AHD at the site boundaries.

Given the FSR and building height permitted on adjoining sites, the higher levels of those adjoining sites are such that future development on those adjoining sites is likely to be situated at higher existing ground levels than the subject site. Even if the future redevelopment of those adjoining sites is undertaken in accordance with the applicable principal development standards (i.e. building height and floor space ratio development standards), the maximum perceived building heights from the adjoining street frontages is likely to be similar to that proposed by the subject development application.

It is therefore submitted that once sites within the subject MU1 zone are fully redeveloped as envisioned by the KLEP 2015, the height and scale of the subject proposal will be consistent with the height transition provided between taller buildings to the north and lower buildings to the south. The proposal is therefore consistent with this objective.

(c) to enable development with a built form that is compatible with the size of the land to be developed.

Mecone's assessment:

The built form and associated height and scale of the development is compatible with the size of the subject site, with regard to the following:

- Except for requirements relating to building height, the development is otherwise mostly consistent with applicable development standards and controls (such as setbacks, building separation and parking),
- The scale of the development will be consistent with the existing and likely future built character of the local area, in that it will not have an incongruent appearance and will facilitate an orderly transition of building height and scale between higher- and lower-density areas to the north and south of the site respectively. It should be noted that while there is a small (i.e. 1.25 metre/5.3% variation to the building height standard at the far southern end of level 8, the tallest points of the building (based on extrapolated and existing ground levels) are located well behind the front of the building,
- The development will provide large landscaped and deep soil space that will enable retention of significant trees and vegetation, in addition to providing additional large canopy trees at rates far greater than Council's requirements. While the proposal does not comply with the DCP-prescribed 50% deep soil control (refer to separately prepared information for a more detailed



assessment), proposed deep soil areas will account for 42% of the site's area, which is significantly greater than existing deep soil areas and the requirements of the NSW Apartment Design Guide (ADG), and is consistent with relevant planning outcomes sought by Council,

- The development will not give rise to significant, adverse and unreasonable impacts on surrounding sites (such as excessive overshadowing or adverse visual privacy outcomes), and
- The development will provide a variety of high-quality housing in a high amenity setting.

Given that the development will not present inconsistently with the surrounding area and that its scale will not give rise to adverse and unreasonable impacts, it is submitted that the development's form and scale is compatible with the size of the subject site. The proposal is therefore consistent with this objective.

5.2 Clause 4.6(3)(b) –Environmental planning grounds to justify contravention of the development standard

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 the Court found at [23]-[25] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *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.*
25. *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].*

In this regard, we submit that there are numerous and substantive environmental planning grounds to justify the proposed contraventions of the building height development standard, and are detailed below.

Consideration of site conditions and amenity

The provision of a single building on the site is responsive to the unusual site conditions, which includes:

- A site that is generally oriented in a north-south direction,
- Dual road frontage,
- A significant north-to-south downhill slope, which creates varying maximum elevation changes of up to 11.1 metres, and



- Significant modifications to site levels by commercial development undertaken in the mid-1970s which cut straight into the slope from lower areas across the entire width of the site.

The proposed building's eight storey form and levels are therefore an outcome of both:

- Placing the building upon a large and relatively flat platform within what was previously a sloped area, and
- Providing residential and commercial levels that match those of both road frontages.

Based upon extrapolated ground levels and as shown by **figure 4**, the eighth level of the building and some rooftop elements would subsequently breach the building height standard towards its southern end when based on extrapolated ground levels.

It is acknowledged that the eight-storey design of the building is a variation to the seven-storey control prescribed on the site by Section 7C.7 of the KDCP, and that such a variation is in part attributable to the proposed building height variation. The constraints of the site (in particular its steeply sloped and heavily modified topography) are such the northern ends of Levels 1, 2 and 3 are subject to very poor amenity.

Such topographical and associated amenity impacts effectively 'sterilises' residential development within a large portion of the building. The provision of an eighth storey is therefore needed to offset the loss of habitable floor area that is unable to be placed within large parts of Levels 1, 2 and 3 if the proposal is to be feasible. If the eighth storey of the building were required to be removed in order to comply with the DCP control and by association the building height development standard, then it will negatively impact on the feasibility of redeveloping the site.

A design alternative to a full eight storey building that was considered during the design stage would have created 'stepped' upper levels that, while still noncompliant with the storey control within the DCP, may have been capable of complying with the building height development standard if based on extrapolated levels. Such an alternative was however disregarded for the following reasons:

- given the higher extrapolated levels at the northern end of the site, to provide an additional storey(s) at the site's northern end would have increased adverse overshadowing impacts on adjoining sites (in particular 11-15 Merriwa Street) in mid-winter
- there would have been insufficient space on the building's northern end to provide a single rooftop communal open space area that would meet relevant numerical requirements (refer to environmental planning grounds below regarding the design rationale for proposing a rooftop communal open space area), however:
 - to provide a compliant amount of rooftop communal open space with split upper levels would have necessitated splitting the communal open space into two areas (i.e. one at the higher northern end and another at the lower southern end)
 - a split level communal open space area would result in the southern/lower area being heavily overshadowed by the northern/higher area in mid-winter
 - such overshadowing would have a deleterious effect on amenity on the lower section, thereby reducing its amenity and attractiveness, resulting in large portions of the communal space going unused for substantial periods of the year
- a layout with stepped upper levels would have necessitated split/separated internal circulation areas (i.e. separate lift and stair cores to service both lower and higher sections of the building), to enable lift access to all parts of the building. Given the necessary location of parking at the northern end of Levels 1, 2 and 3 (and a parking layout that responds to the conditions of the site), it was not possible to provide a northern lift core that could access all parking levels and



all habitable levels of the building. A building layout providing two separate vertical circulation cores would have subsequently resulted in convoluted internal access arrangement that would adversely affect building functionality and wayfinding, since it would require people within the southern part of the building to travel to a middle level, before transferring to the northern lift core and taking the northern elevator to the roof.

In summary, the subject site is somewhat unusual, in that it is affected by a unique combination of constraints. While such constraints themselves are not necessarily an environmental planning ground, different design outcomes that responds to such a unique combination of constraints found that:

- a scheme similar to that proposed but with only seven storeys would not enable a feasible redevelopment of the site
- a feasible alternative that complied with the building height development standard would have resulted in a design outcome that would have:
 - worse overshadowing of adjoining sites (in particular 11-15 Merriwa Street
 - both split up and reduced the amenity of the communal open space area
 - worse internal functionality and wayfinding.

We therefore submit that:

- the proposed design is a more orderly and economic means of developing the site
- allowing for a variation to the building height development standard will in this instance provide for better planning outcomes, including a better design and amenity
- regard the previous points, compliance with the building height development standard is unreasonable and unnecessary in the circumstances of this particular case.

Visual privacy and amenity improvements for communal open space areas

As detailed within both Section 4.4 of this document and the assessment of objectives of the building height development standard, elements of the building that breach the building height standard include vertical circulation cores that provide access to the rooftop communal open space area.

In terms of suitable communal open space placement, the site is constrained in that:

- dual road frontages prevent the placement of suitably sized and dimensioned communal open space areas within the road setback parts of the site, given that:
 - the Fitzsimons Lane frontage is required to provide an active frontage with commercial tenancies
 - the Merriwa Street frontage is to provide a supporting active frontage with road access and boundary fencing of a limited height,adherence with planning requirements to provide the above thereby prevents opportunities to establish suitably sized communal open space areas within these parts of the site
- the site's sloped topography and existing/likely future development at higher levels on adjoining sites would significantly overshadow side setback areas. Any communal open space areas located at ground level would therefore be subject to poor solar amenity, in addition to likely overlooking from adjoining sites (in particular from the existing commercial development at 1 Merriwa Avenue).

The proposed rooftop placement of the communal open space areas will subsequently provide level and well-sized areas that will be:

- subject to high levels of solar amenity



- highly accessible to persons with physical disabilities
- placed and designed in such a way that will afford visual privacy to both users of the communal open space area and surrounding sites.

To provide for the above does however necessitate rooftop lift and stairway access to provide adequate access from internal common circulation area. While the proposed location of such elements towards the southern end of the building will increase the maximum height of the building and therefore the size of the proposed height variation (when measured from both existing and extrapolated ground levels), to push the circulation cores further to the northern end of the building will both:

- encroach on proposed unencumbered spaces within rooftop communal areas
- create additional shading within communal open space areas.

It is acknowledged that in addition to the rooftop placement of the communal open space area and other rooftop elements, proposed breaches of the building height development standard by such features are in part attributable to the eight-storey building design, which is a variation to the seven-storey control prescribed Section 7C.7 of the KDCP. For reasons detailed within the previous environmental planning ground, to provide a seven-storey design to lower the height of the building (and therefore the variations caused by rooftop elements) is not feasible, and that an alternative design that both:

- complies with the building height development standard
- provides a rooftop communal open space area

would result in poorer amenity outcomes, noting that the primary purpose of the rooftop communal open space area is to provide for a high quality and high amenity space for use by residents.

To summarise, while they will result in larger height noncompliance, the proposed rooftop placement of the communal open space area and the associated circulation core will provide for vastly superior design outcomes (in terms of functionality, accessibility, amenity and visual privacy) when compared to a more compliant design that would locate communal open space at ground level. The proposed approach therefore promotes better design and amenity outcomes, and as such:

- permitting the proposed height variation will result in better planning outcomes
- compliance with the building height development standard is subsequently unnecessary and unreasonable in the circumstances of this particular proposal.

No significant or unreasonable impacts on the public domain

As indicated within the previous environmental planning ground above, the proposed design was selected over one with a more compliant building height as it responds better to the constraints of the site.

The design of the proposed building will present to the public domain as follows:

- from Merriwa Street, it will present as a part seven and eight-storey building (noting that the eighth storey will be set back from the periphery of the level below and will be obscured by both the existing and proposed tree canopies provided by large trees on the site), the perceived levels of which will be similar to nearby mixed use and residential development
- from Fitzsimons Lane, it will present as a five-storey building.

Such an appearance is consistent with surrounding development on sites that are within both the MU1 zone and the visual catchment of the site, which includes:



- the part six and seven storey development at 17-23 Merriwa Street
- the eight storey mixed-use building approved at 11-15 Merriwa Street by DA0447/14 in 2015
- the part five and six storey commercial development at 1 Merriwa Street
- eight, nine and ten storey development at 888 Pacific Highway (which has frontages to both Merriwa Street and Fitzsimmons Lane)
- six, seven and eight storey development on Fitzsimmons Lane.

While the height of the building's southern end does not comply with the building height standard, its design is responsive to site's conditions and presentation to the public domain, being the Merriwa Street road reserve³.

While reference is also made to responses to the objectives of clause 4.3 of the KLEP 2015, any potential visual impacts created by the proposed height variations will also be mitigated by the following:

- The progressive stepping back of level 8 and rooftop features (such as the circulation core) away from the southern and side building lines, so that higher/noncompliant building elements are obscured by elements on lower levels. In this regard, reference is made to **figure 6** for a 3D model of the proposed development as viewed from the southeast and southwest of the site, noting that:
 - such stepping of the upper building lines results in Level 8 being mostly obscured from the streetscape
 - the model does not show filtering of upper parts of the proposed development by tree canopies.
- The retention of six trees within the Merriwa Street setback (all of which feature existing heights and canopy spreads of at least 20 metres and 10 metres respectively), which in addition to new tree planting on all sides of the building, will heavily screen and filter upper parts of the building from the road reserve.
- High levels of building articulation (particularly towards the southern end of the building) will further reduce such perceived impacts.

³ The wider northern end of the building (which based on extrapolated ground levels complies with the building height development standard) and associated landscaping will obscure southern ends of the building. Once the adjoining site at 11-15 Merriwa Street is developed, the southern section of the proposed building will not be visible from the public domain to the north of the site (i.e. Fitzsimon Lane). As such, public domain impacts to the north of the site will not be discussed further within this written request.

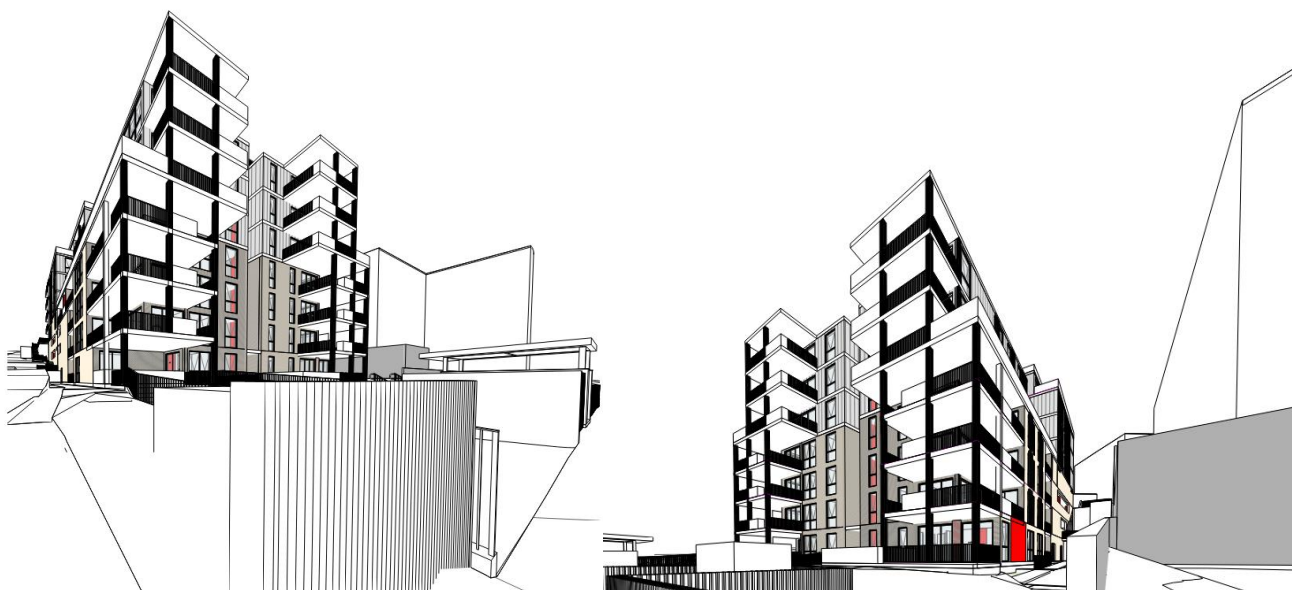


Figure 6: 3D models of the proposed development, as viewed from the southwest (left) and southeast (right).
Source: Giles Tribe, 2024

Further, noting that future development at 1 Merriwa Road and 11-15 Merriwa Road is likely to be consistent with higher density development within the surrounding MU1 zone, such development will further screen the proposed development to the east, southeast and southwest, noting that:

- the proposed Merriwa Street building line setback is substantially greater than required, therefore future development on the future site may encroach further towards the Merriwa Street frontage (and thereby providing additional screening of the development)
- existing ground levels (both natural and extrapolated levels) on these two adjoining sites are higher than the subject site due to both varying topography and prior development that has not excavated those sites to the same degree as the subject site. Future development on those adjoining sites undertaken in accordance with Council built form controls is therefore likely to be situated at higher ground levels than on the subject site. Even if such future development proposes slightly lower/more compliant building heights, as demonstrated by **figure 7**, the perceived maximum height and scale of those developments from lower density residential areas on the southern side of Merriwa Street, will be similar to those proposed by this application, and will obscure the height and scale of the proposed development to the east and west of the subject site.



Figure 7: A 3D model of the proposed development, as viewed from the southern side of Merriwa Street to the southwest. The existing building envelope at 1 Merriwa Street is shown to the left, while a future building envelope (assuming a compliant building envelope built upon existing levels) at 11-15 Merriwa Street is shown to the right. Source: Giles Tribe, 2024

As demonstrated by figures 6 and 7:

- elements that breach the building height development standard are not clearly evident from the Merriwa Street frontage nor lower-density residential areas to the south of the site
- the scale of the proposed development is not out of place with existing nor likely future development on surrounding sites within the MU1 zone
- given the lack of visual prominence and impact from the public domain and nearby sites, removal of the eighth storey to improve compliance with the building height development standard (noting that doing so would make redevelopment of the site unfeasible) would not substantially alter the appearance of the building's height and/or scale.

To require that the building comply with the building height development standard will therefore not result in substantially improved planning outcomes. As such, it is submitted that compliance with the building height development standard is unnecessary and unreasonable in the circumstances of this particular proposal.

No significant or unreasonable impacts on surrounding residential sites

In addition to matters already discussed above and as demonstrated through this written request, the SEE to which it is appended, the assessment of the Ku-ring-gai Development Control Plan (KDCP) (attached to the SEE as **Appendix 2**) and the submitted architectural plans, despite the proposed height non-compliances, the proposed development will not significantly nor unreasonably affect surrounding sites, noting that:

- additional overshadowing created proposed height breaches will be mostly internalised with the subject site's boundaries and the Merriwa Street road reserve to the south of the site. Compliance with applicable requirements relating to overshadowing will therefore be attained, noting that:
 - despite the adjoining site to the west being vacant, modelling by the architect (which includes further 3D modelling and analysis in response to the SNPP's deferral) has



assumed a building location and envelope on that site (based on applicable planning requirements) in demonstrating a relative lack of impact and that compliant levels of direct solar access will still be provided to that site on June 21

- additional overshadowing created by noncompliant elements will affect only positions of the front setbacks of sites opposite the subject site (i.e. on the southern side of Merriwa Street), with no immediate impact on dwellings on those sites until approximately 3:00pm on June 21.
- The proposed height variations will not create adverse visual privacy outcomes. The building's side setbacks and subsequent separation from future residential development on adjoining allotments is in accordance with Part 3F (Visual Privacy) of the Apartment Design Guide (ADG). Other appropriate design measures (such as screening windows as required) are also in accordance with the ADG and measures prescribed by the KDCP.
- The height variations will not affect the site's ability to provide for large trees with expansive canopies, noting that the number of additional canopy trees to be provided is well in excess of Council requirements.

As also demonstrated by submitted information (in particular additional solar analysis):

- elements of the proposed building that breach the building height development standard will not be primarily attributable to the overshadowing of adjoining sites (in particular 11-15 Merriwa Street)
- a more 'compliant' form of development that increases bulk and scale at its northern end to account for extrapolated site levels will likely result in a greater level of overshadowing of adjoining sites during mid-winter, in particular:
 - 11-15 Merriwa Avenue prior to 12:00pm on June 21
 - 1-3 Merriwa Avenue after 1:00pm on June 21.

As such, it is submitted that compliance with the building height development standard is unnecessary and unreasonable in the circumstances of this particular proposal.

For the reasons outlined above, it is evident that there are sufficient substantive environmental planning grounds which justify contravening the building height development standard.



6 Conclusion

Having regard to the provisions within both clauses 4.3(2) and 4.6 of the KLEP 2015, we have formed the considered opinion that:

- a) The contextually responsive development is consistent with the objectives of the building height development standard pursuant to clause 4.3(1) of the KLEP 2015, and
- b) The application does not propose a variation to a clause that is subject to the application of clause 4.6(8) of the KLEP 2015, and
- c) There are sufficient environmental planning grounds to justify contravening the development standard, and
- d) That having regard to a) and b), compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case.

Pursuant to clause 4.6(3) of the KLEP 2015, the consent authority can therefore be satisfied that the applicant's written request has adequately 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.*

In conclusion, we believe that in working with the constraints of the site, the proposed building height contraventions present superior planning and design outcomes when compared to alternative and more compliant options that were explored throughout the design process. Further, we have formed the considered opinion that there is no statutory or environmental planning impediment to the approval of a building height contravention in this instance.

As this written request has satisfied statutory requirements pursuant to clause 4.6 of the KLEP 2015, the proposed variation to the building height development standard can be approved.



mecone.com.au
info@mecone.com.au
02 8073 4677