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CLAUSE 4.6 VARIATION REQUEST (AMENDED) - HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

**PROPOSED APARTMENTS – 96-98 LETHBRIDGE ST +
42-46 EVANS ST, PENRITH**

FEBRUARY 2022

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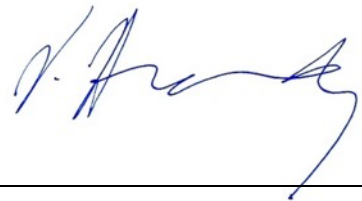
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cityscape planning + projects, 2022

This report is provided to accompany a Development Application to be lodged on the subject land and is to be used for that purpose solely and for the client exclusively. No liability is extended for any other use or to any other party. Whilst the report is derived in part from our knowledge and expertise, it is based on the conditions prevailing at the time of the Report and upon the information provided by the client.

TABLE OF CONTENTS

1.0	INTRODUCTION.....	4
2.0	WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?	4
3.0	WHAT IS THE ZONING OF THE LAND?.....	4
4.0	WHAT ARE THE OBJECTIVES OF THE ZONE?.....	5
5.0	WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?	6
6.0	UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?	6
7.0	WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?	6
8.0	WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?	7
9.0	WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?	8
10.0	WHAT IS THE PERCENTAGE VARIATION?	8
11.0	MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6	8
12.0	HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?...	12
13.0	HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN THE ACT.	18
14.0	IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?	20
15.0	WOULD STRICT COMPLIANCE WITH THE STANDARD BE UNREASONABLE OR UNNECESSARY?.....	20
16.0	ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?	22
17.0	PUBLIC INTEREST	29
18.0	CONCLUSION	29

1.0 INTRODUCTION

This report seeks a variation to a development standard prescribed by the Penrith Local Environmental Plan (PLEP) 2010. The report relates to a Development Application (DA) seeking consent for the development of Residential Flat Buildings at No. 42-46 Evans St and No. 96-98 Lethbridge St, Penrith (the subject site).

The variation is sought pursuant to Clause 4.6 under the PLEP in relation to the maximum building height standard applicable to the subject development site.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline *Varying Development Standards: A Guide, August 2011* and has also incorporated the relevant principles identified in relevant NSW Land and Environment Court judgements.

2.0 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The Environmental Planning Instrument (EPI) to which this variation relates is the Penrith Local Environmental Plan 2010 (PLEP).

3.0 WHAT IS THE ZONING OF THE LAND?

In accordance with clause 2.2 of the PLEP the subject site is zoned **R4 High Density Residential**.

4.0 WHAT ARE THE OBJECTIVES OF THE ZONE?

The land use table under the PLEP provides the following objectives for the zone:

1 Objectives of zone

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that a high level of residential amenity is achieved and maintained.*
- *To encourage the provision of affordable housing.*
- *To ensure that development reflects the desired future character and dwelling densities of the area.*

COMMENT:

The site is located within a precinct going through transition from single dwellings to high density residential development, with many adjacent sites either being developed or having receiving approvals for apartment type development.

The proposed development provides for the community's housing needs in an emerging high-density residential environment. It does through providing a mix of bedroom and apartment styles and arrangements inclusive of smaller units that will provides affordable housing options within the building

A high level of residential amenity is provided for in the design of the proposal through the provision of high architectural design, private courtyards, terraces and balconies and common open spaces.

Accordingly the development is considered to be consistent with the relevant zone objectives.

5.0 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

The development standard being varied is the maximum height of buildings.

6.0 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The development standard being varied is prescribed under clause 4.3. of PLEP.

7.0 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objectives of the relevant development standard are set out below:

4.3 Height of buildings

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

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,
- (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,
- (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

8.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

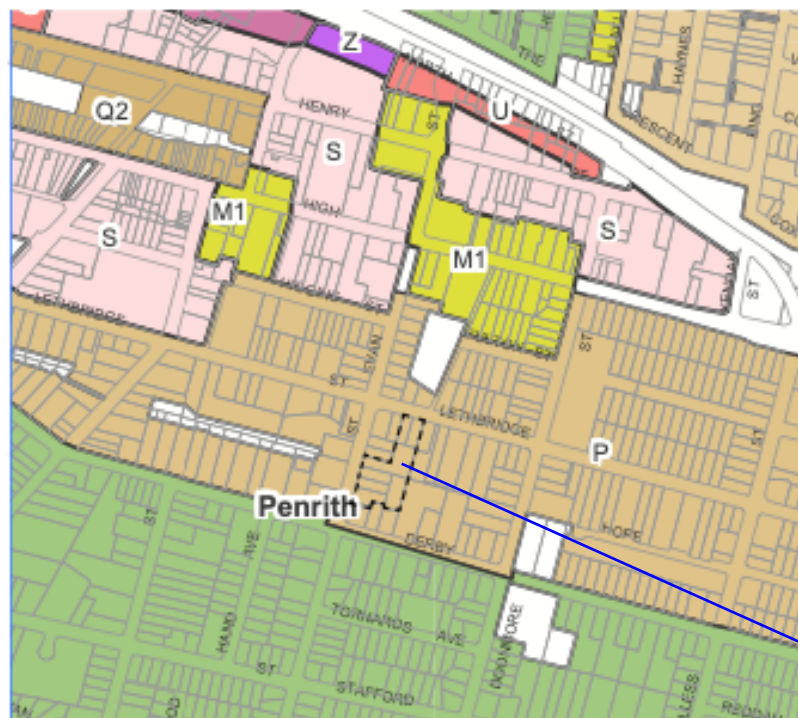
The relevant map pertaining to clause 4.3(2) of the PLEP provides a maximum building height of 18m. An extract of that map is provided at Figure 1 below:

FIGURE 1: EXTRACT OF BUILDING HEIGHT MAP

Height of Buildings Map -
Sheet HOB_013

Maximum Building Height (m)

A	0
C	5
I	8.5
J	9
K	10
M1	12
M2	12.5
O	15
P	18
Q1	19
Q2	20
R	21
S	24
T	27
U	32
Z	56
AB	80
	Refer to Clause 7.16, 8.2 & 8.4



Subject site

Height of Buildings Map -
Sheet HOB_013

9.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?

The lift overrun of the western building provides a RL of 55.8 over an existing ground level of 34.87 which results in a building height of 20.93m.

10.0 WHAT IS THE PERCENTAGE VARIATION?

The lift overrun represents a 16.27% variation to the building height standard.

11.0 MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the PLEP and a response as to where each is addressed in this written request:

TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6

Requirements/Sub-clause 4.6	Response/Comment
(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.	It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

(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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in

The maximum building height development standard is not expressly excluded from the operation of this clause.

This written request justifies the variation by demonstrating (a) is achieved in Section 12, and (b) is achieved in Section 16.

This written request addresses all requirements of sub-clause (3).

which the development is proposed to be carried out, and
(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
(b) the public benefit of maintaining the development standard, and
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

As set out in Section 4, 12 and 17 of this written request the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.

Concurrence is assumed. Due to the extent of the variation, the application is required to be determined by the relevant consent authority.

There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

Pursuant to *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are only minor public disadvantages.

The public advantage of the development is that it facilitates urban renewal of the site in a manner that is consistent with both local and metropolitan strategic planning objectives.

(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

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

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

Not relevant to the proposed development or the subject site.

This is a matter for the consent authority.

This does not apply to the subject site or its proposed development.

- (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.

12.0 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, It is believed that it is still useful to address these considerations and this too has been confirmed by more recent judgements inclusive of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90.

The five part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard

The relevant LEP clause objectives together with an assessment of the development against them is provided below:

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

(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,

The desired future character of the area provides for development with a 18m building height. The development provides a building that sits largely within that height limit, other than sections of the upper floor of Building A and the very upper portion of the lift towers and ventilation stacks on Building B.

A building height plane has been imposed over the development and demonstrates the extent of the non-compliance. This is represented at Figures 2-3.

Accordingly, the development does not provide a total building volume, bulk or scale beyond that contemplated by the development standard and planning framework.

It is therefore Accordingly, the development does not contribute to perceivable bulk as viewed from the surrounding area and public domain, and the proposal maintains a scale as anticipated for a high density zoned residential areas.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

FIGURE 2: BUILDING HEIGHT PLANE

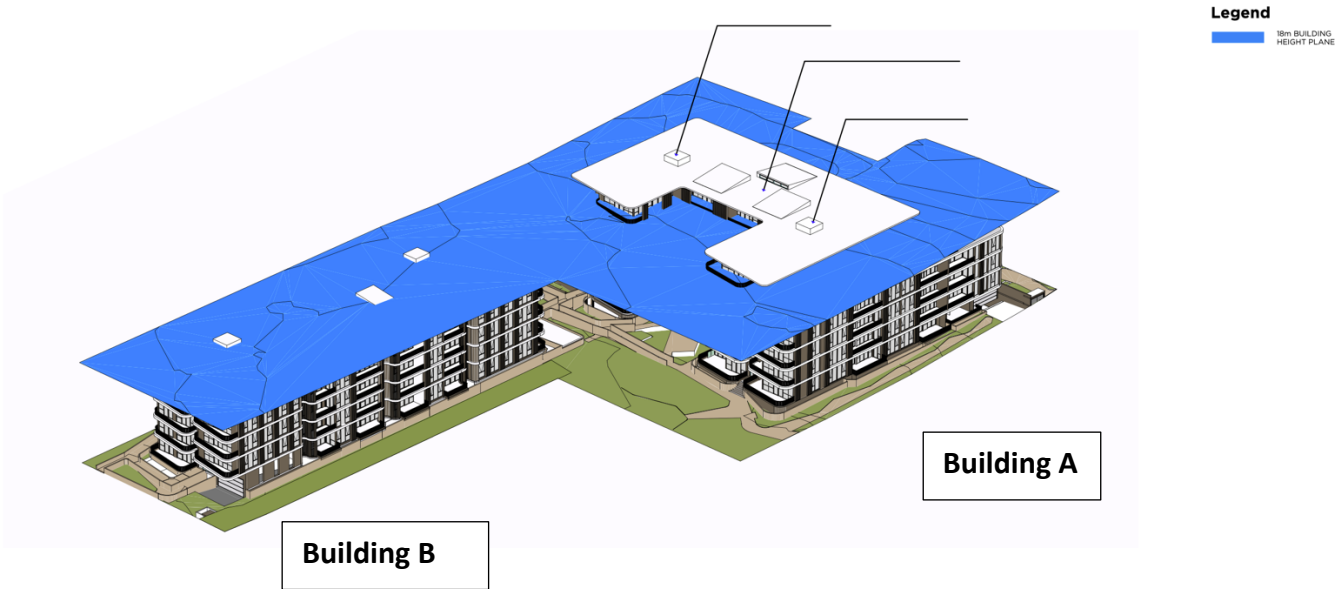
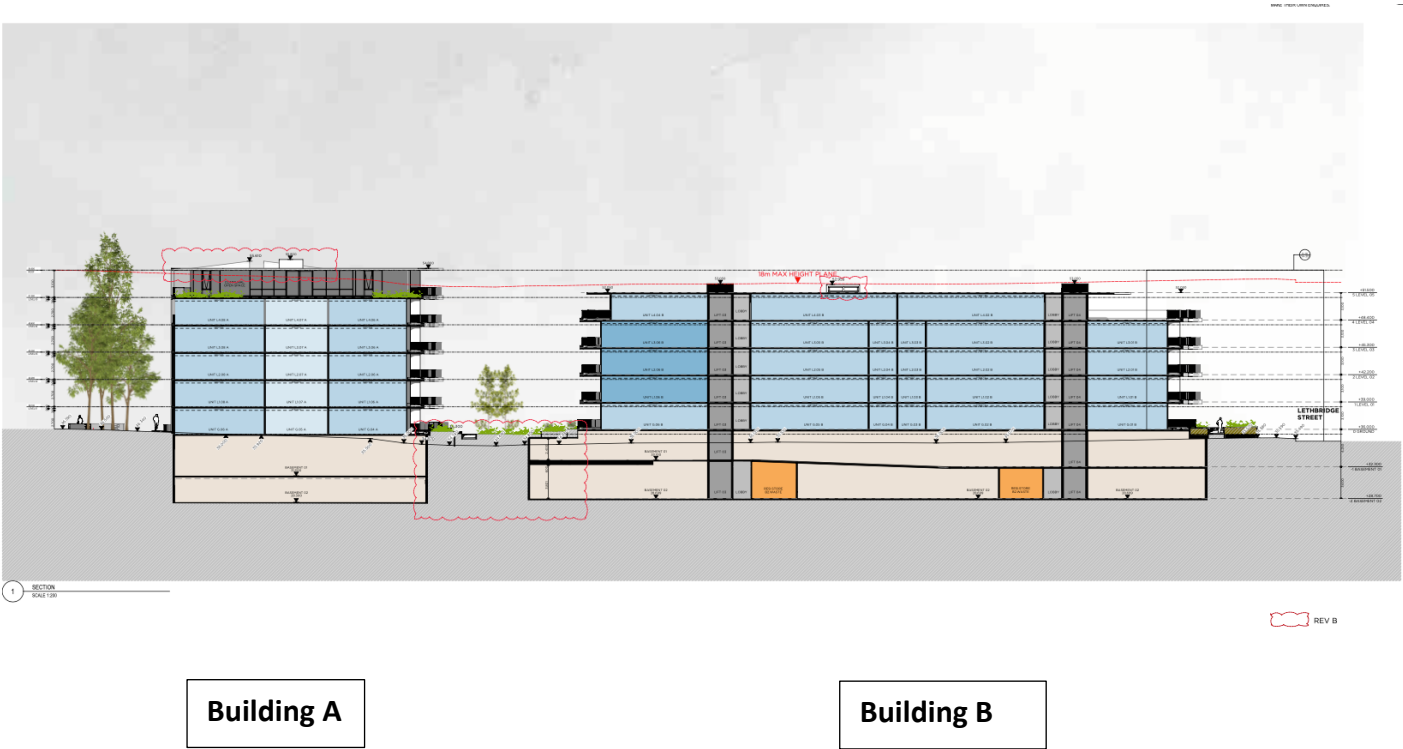


FIGURE 3: BUILDING HEIGHT PLANE -SECTION



(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,

The development is not located in an area that enjoys key views to any important scenic or landscape features. Nevertheless, the broader locality does enjoy views to the Blue Mountains, particularly from elevated view-points such as the upper floor areas of this and adjacent development.

There is no existing adjacent development that will have any visibility of the upper floor area so the subject development cannot cause any disruption of views.

It is also important to note that any overshadowing as a result of the height breach is negligible when compared to the shadows generated from the lower 5 levels of the proposed built forms. This is because the entire development across all levels achieves the rear setback requirements of the ADG's.

Similarly, the development does not have any close proximity to any parks or key public domain features that could experience any undue loss of solar access by the proposed height variation.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

The proposed building will be setback from the adjoining boundary to the adjacent heritage item by 6m for the first four levels and a minimum of 20.13m for all levels above.

A detailed Heritage Impact Statement accompanies the development application and concludes that the impacts of the proposal on the setting of the adjoining Victorian period cottage at No. 163 Derby Street are managed by providing a setback from the common boundary that allows the retention of existing mature trees that contribute to the setting of the cottage and provides for the planting of new trees. The ground floor of the new building closest to the item lies below the level of the cottage and the upper floors are setback. The retention of mature canopy trees across the subject site and the planting of new ones means that the building will sit within the tree canopy.

The existing view corridors towards this item at street level are retained. The public will still be able to view and appreciate this item as a Late Victorian period cottage set on a suburban allotment.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

(d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

The 18m height limit could be reasonably be expected to deliver 5-6 storey developments and the proposed development does not exceed this expected building scale.

The development generally achieves the building height, other than sections of upper floor of Building A and the lift towers and ventilation stacks of Buildings A and B. These features are located centrally within the building and as such do not contribute do not contribute to distinguishable bulk, scale, volume or density of the building as viewed from the surrounding area and public domain.

The upper floor area of Building A is also setback and recessed from the lower levels which reduces its visibility and perceivable bulk.

It is therefore considered that the and the proposal maintains a scale as anticipated for a high density zoned residential areas.

The development is also not located immediately adjacent to different zoned lands or lands that have a lower building height standard therefore the minor non-compliance will not cause any disruption to any planned transition in height and density.

The proposed variation of the standard therefore does not affect achievement or consistency with this objective.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

We do not rely on this reason. The underlying objective or purpose of the standard is relevant to the development and is achieved.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

We do not rely on this reason.

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;

We do not rely on this reason.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

We do not rely on this reason.

13.0 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN THE ACT.

Section 1.3 of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,***
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,***
- (c) to promote the orderly and economic use and development of land,***
- (d) to promote the delivery and maintenance of affordable housing,***

- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The development proposal has been able to assemble consolidate eight (8) land holdings that has in turn allowed for a large-scale urban renewal type development and better urban planning outcome than would otherwise be achieved by redevelopment of the site as part of separate or isolated development proposals.

The proposed height variation at the upper floors form part of this better planning response for the site and its broader precinct given local flooding a, tree retention and heritage constraints.

This outcome also demonstrates the development will achieves the following object of the EP& A Act.

- (c) to promote the orderly and economic use and development of land,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*

Strict compliance with the development standard may hinder the attainment of these development outcomes and the object of the Act.

14.0 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is clearly a numerical standard.

15.0 WOULD STRICT COMPLIANCE WITH THE STANDARD BE UNREASONABLE OR UNNECESSARY?

The 18m height limit could be reasonably be expected to deliver 5-6 storey developments and the proposed development does not exceed this expected building scale.

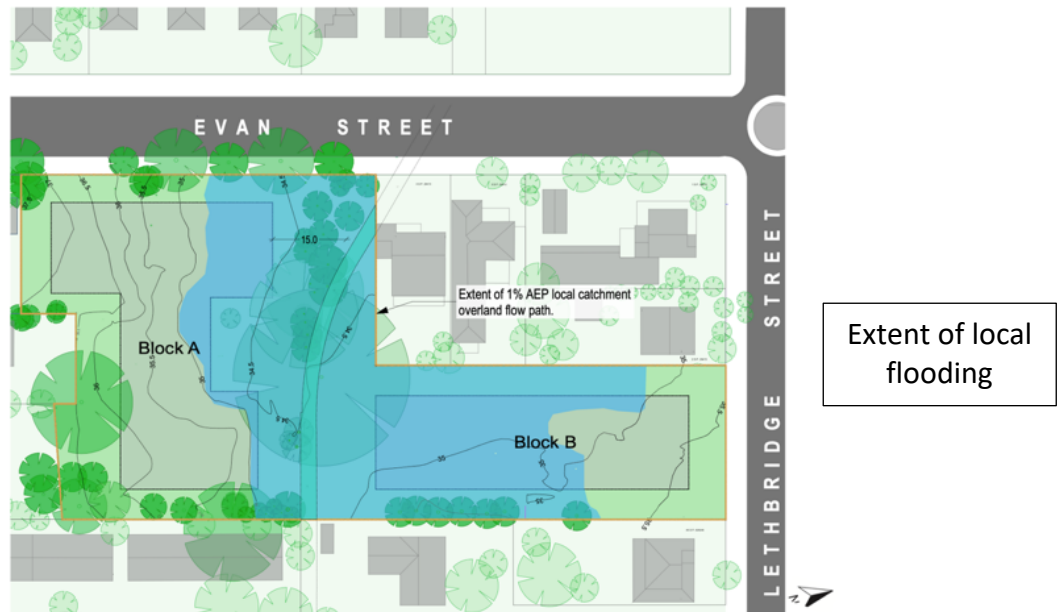
The site is also flood prone which has necessitated the raising of the ground level of the apartments to the Flood Planning Level (FPL) of 36.0 AHD. This has resulted in increases in building height of up to 1.6m

Strict compliance with the development standard would demand that an alternate development proposal be advanced that reduces the building height and provides just 5 storeys at the southern end of the site.

A review of the building height planes and envelopes represented at Figure 2-3 demonstrate that the development would almost be entirely compliant with the building height development standard if the development were not required to be raised to that FPL.

Alternatively, strict compliance with the development standard would demand a more intrusive engineering response, similar to that provided to the concrete drainage channel to the east of the site, as a means of mitigating the flood impacts of the site to allow the buildings to be sited at or near existing ground level.

FIGURE 4: LOCAL FLOODING



Alternative engineering response to local flooding – as currently provided at eastern boundary

Figure 5 demonstrates the extent of flooding impacts on the site, the building footprint and landscape response and the type of alternative engineering response that may otherwise be required to mitigate those flood waters.

Further, an otherwise compliant development model has been prepared with a complying building height and complying *SEPP 65 - Apartment Design Guide* (ADG) setbacks (See Figure 4). This development model demonstrates that a compliant built form actually results in a much larger footprint which results in:

- more significantly adverse impacts upon the adjacent heritage item
- the removal of a greater number of existing trees on site
- a smaller allocation of deep soil landscape and communal open space areas

In the context of these factors, it is considered that strict compliance with the development standard is both unreasonable and unnecessary in the circumstances of the case.

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

To achieve the urban objectives envisioned for the site, a compliant building model has been prepared. This model applies an 18m building height to the site. Assuming a 3.1m floor to floor height for each level, this would typically equate to a five-six storey building with parapets and lift over- runs.

The application of ADG and DCP compliant building setbacks to that model would then generate a building form that facilitate a large building footprint over the site as represented in yellow at Figure 5.

However, proper planning demands a site responsive building form and site constraints pertaining to local overland flows in the central sections of the site and the retention of existing mature canopy trees, demands a significantly reduced building footprint. This too is represented at Figure 5 with the site responsive development proposal marked as Block A and B.

To compensate for this reduced footprint the site responsive design proposes a sixth-floor level to a portion of Building A only. Whilst this results in a minor non-compliance with the height of building standard it results in the following improved or better environmental planning outcomes:

Flood compatible development

Parts of the site are flood prone and therefore requires development to achieve a floor level of 36.00 AHD to ensure that it is located at or above that FPL. The development provides a site responsive design that raises the ground floor level up to 1.6m in places to ensure the FPL is achieved, which in turn causes a breach of the height of building development standard.

Importantly, the development response reduces the building footprint in areas of proximity to that flooding, which causes the otherwise complaint building volume to be shifted vertically. This outcome ensures that the building footprints do not displace the floodwaters in such a manner as to impact on the flooding behaviour in terms of loss of flood storage, increase in velocity and risk.

FIGURE 5: BUILDING SETBACKS - ADG COMPLIANT + PROPOSED

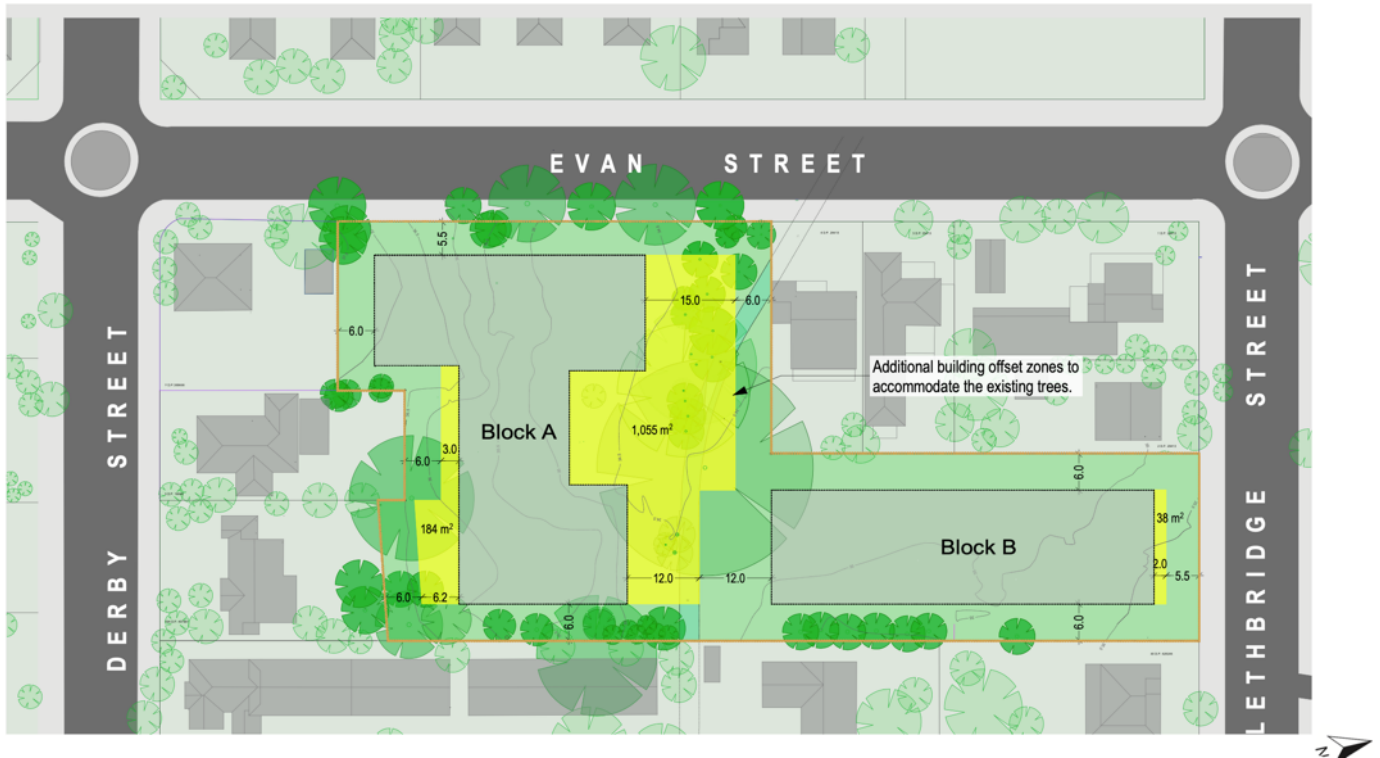
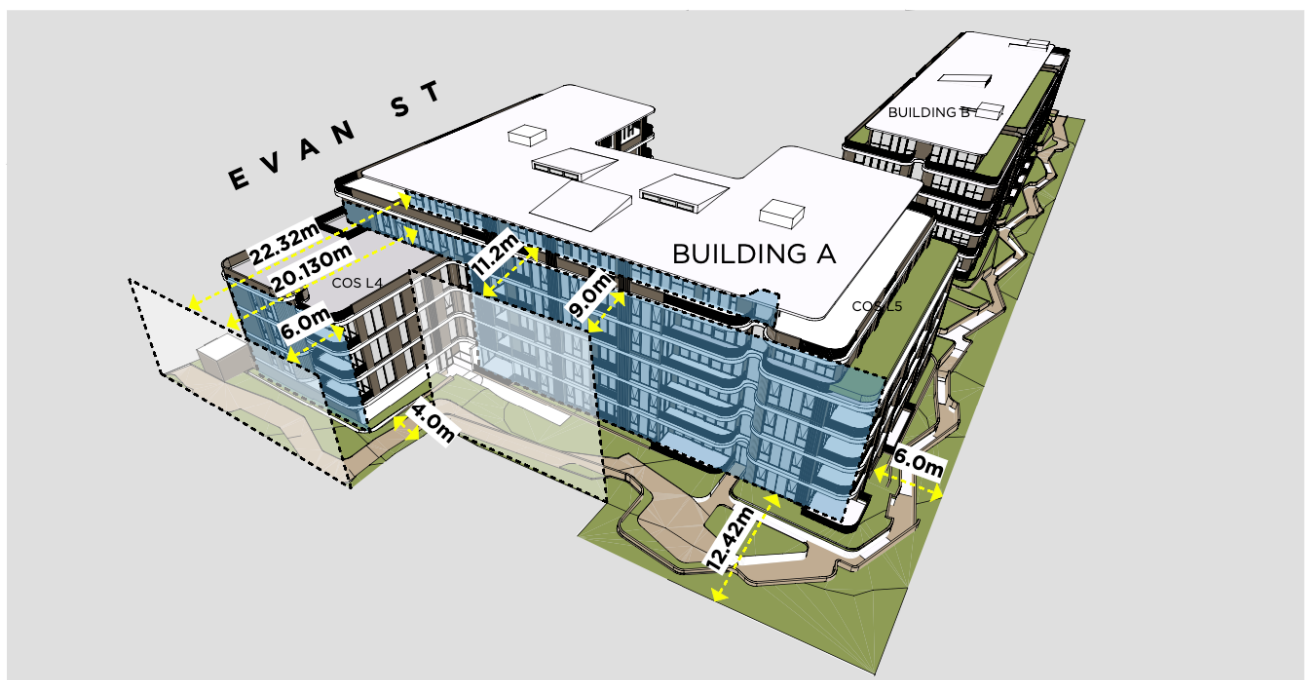


FIGURE 6: INCREASED BUILDING SETBACKS TO SOUTH



Heritage Conservation

The development has deliberately sought to substantially set back the upper floors of Building A from the southern boundary where it adjoins a heritage item (See Figure 6). This increased setback represents a means of mitigating the visual impacts the upper floors of the apartment building have on that heritage item and its conservation values.

These significantly increased setbacks have resulted in that otherwise compliant building volume being shifted more centrally and vertically on the site and as such caused a breach of the height of building development standard. Nevertheless, this site responsive design is considered to cause a better environmental planning outcome for the site and its development.

Increased Landscaped Aea

The development of a slightly taller form than the LEP would otherwise allow has in turn reduced the building footprint and allowed for large areas of the site to be provided as landscaped area inclusive of larger deep soil landscaping areas.

In this regard the Penrith DCP seeks high density zoned parcels to achieve 35% landscaped area and the ADG's required 7% of deep soil landscaping.

However, the subject development actually provides 46.4% landscaped area and 35% deep soil landscaping which are considerably greater than required. The development also exceeds the Communal Open Space (COS) requirements with 42.2% of the

site provided as COS whereas the ADG's only require 25% of the site to be provided as COS.

Retention of existing trees

The reduced building footprint also provides for better retention of the existing and extensive large canopy tree planting and therefore provides a better landscape outcome than a height compliant development with a larger building footprint.

Mitigation of Urban Heat Island Effect

The retention of these existing trees together with larger landscaped area allows for mitigation of the impacts of the urban heat island effect which will provide greater amenity for users of the site and will decrease energy demands from artificial cooling devices.

Reduced extent of overshadowing

The developments reduced building footprint results in reduced extent of overshadowing to COS areas and landscaped areas on site and adjoining lands.

Similarly, there will be no significantly adverse amenity impacts to the surrounding properties or the public domain areas as a result of the proposed variation to the building height standard.

The areas at most risk from overshadowing caused by the non- as a consequence of the proposed building height standard variation are the sites located to the immediate south of the subject site in Derby St. In this regard, the shadow diagrams demonstrate the increase

building height actually results in increased shadowing in the rear yards of these area (see Figure 7).

However, each of those Derby St sites have a long-term historical use (over several decades) and indeed are currently operating as health professional facilities with their rear yard areas fully occupied by formal car parking areas. This is demonstrated at Figures 8. Therefore, despite the increased overshadowing, these sites will not experience any loss of solar amenity.

The above points are environmental planning grounds that warrant the non-compliance. They are not "generic" grounds, but rather, specific to the site and circumstances of the development.

In that context, there is considered to be sufficient environmental and planning grounds to justify a contravention of the development standard.

FIGURE 7: INCREASED SHADOWS AS A CONSEQUENCE OF VARIATION OF HEIGHT OF BUILDING STANDARD

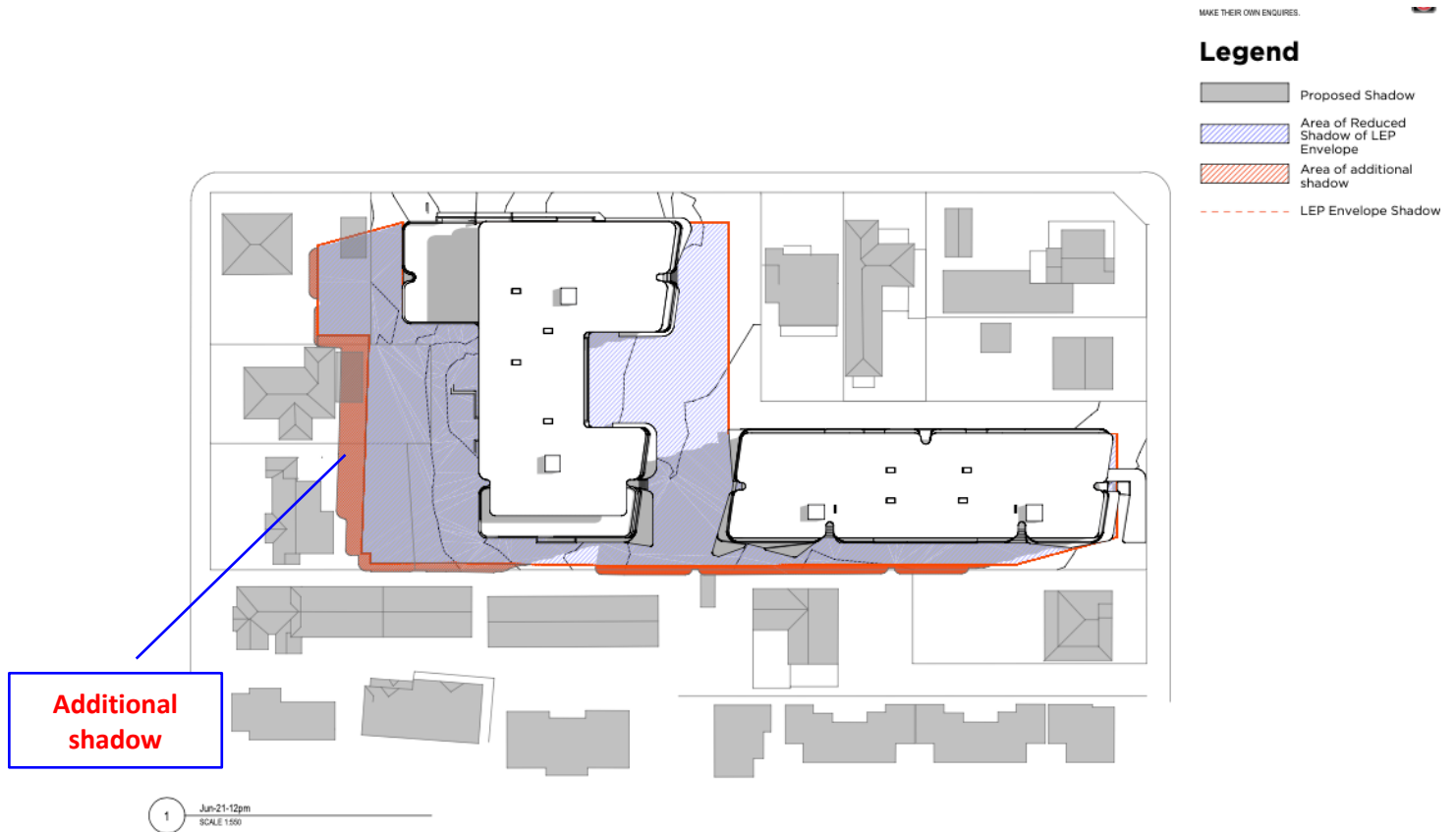


FIGURE 8: PARKING AREAS IN REAR YARD OF LOTS TO THE SOUTH OF THE SUBJECT SITE



163 Derby St



161 Derby St



159 Derby St

17.0 PUBLIC INTEREST

The development is in the public interest for the following reasons:

- The development proposal has been able to assemble consolidate eight (8) land holdings that has in turn allowed for a large-scale urban renewal type development and better urban planning outcome than would otherwise be achieved by redevelopment of the site as part of separate or isolated development proposals. The height variation at the upper floors form part of this better planning response for the site and its broader precinct. This outcome also demonstrates the development will *“promote the orderly and economic use and development of land”* which is clearly consistent with the objects of the EP&A Act.
- Provides a better environment planning outcome than a compliant development as demonstrated at Section 16 of this report.
- The development is consistent with the objectives of the R4 High Density Residential Zone as demonstrated by Section 4 of this report.
- Notwithstanding variation, the development is consistent with the objectives of the development standard as demonstrated by Section 12 of this report.

18.0 CONCLUSION

Given the circumstances of the case, as outlined in the preceding sections of this report, strict compliance with the standard would be unreasonable or unnecessary.

Further, this report has also demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.