

Attachment E

Clause 4.6 Statement

**CLAUSE 4.6 VARIATION
REQUEST
SYDNEY LEP 2012
CL. 4.3 BUILDING HEIGHT
BLOCK A - 56A ASHMORE
STREET, ERSKINEVILLE**

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Stephen White
Associate Director	Danielle Blakely
Senior Consultant	Anna Wang
Project Code	SA7021

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1. INTRODUCTION

This request has been prepared in support of a development application (DA) for the development of Block A at 56A Ashmore Street, Erskineville (the **Site**).

The DA seeks development consent for the following:

- Staged construction of a residential flat building with 173 dwellings, one basement level providing 113 car parking spaces, servicing areas and waste management facilities.
- Public domain work in association with D/2015/966 Voluntary Planning Agreement.
- Site landscaping throughout the site, including the embellishment of the ground, podium and level 3 rooftop communal areas, and green rooftops.
- Removal of one jacaranda tree on Ashmore Street.

This request seeks to vary the maximum height of building development standard prescribed for the subject site under Clause 4.3 of the *Sydney Local Environmental Plan 2012* (SLEP 2012). The variation request is made pursuant to Clause 4.6 of the SLEP.

This request should be read in conjunction with the Statement of Environmental Effects, revised Architectural Drawings prepared by Turner Architects, and other supporting documentation submitted with the DA.

The following section provide a brief history of the development application.

1.1. DEVELOPMENT APPLICATION HISOTRY

1.1.1. Design Competitive Process

- The Design Competitive Process commenced on 6 October 2017 and concluded on 22 December 2017 for Buildings A and D.
- The competitive process was undertaken in accordance with the Design Excellence Strategy for the site and the Competitive Design Alternatives Process Brief prepared by Urbis and endorsed by Council on 5 October 2017.
- Final Architect Submissions were issued on 10 November 2017 and Submissions Compliance Assessment were issued on 15 November 2017. The Submissions Compliance Assessment highlighted all the non-compliances and identified the bulk and scale non-compliances proposed by Turner for Building A, which includes height non-compliance proposed by the eighth and fourth storey.
- The Panel resolved that the Turner's (Building A) scheme is capable of achieving design excellence as per Clause 6.21 of the Sydney LEP 2012 and the Design Brief requirements. Accordingly, Turner was awarded the winner of the Competitive Design Alternatives Process for Block A and is to progress the design development of Buildings A to Stage 2 development application (DA) stage.
- Details of the winning schemes and Selection Panel's deliberations and recommendations are contained within the Design Competition Process Report endorsed by Council 22 December 2017.

1.1.2. Pre-DA Meetings with Council

The proponent and the project team have had two pre-lodgement meetings with Council post Design Competition and prior to formal lodgement.

- The first Pre-DA meeting was held on 29 January 2018. The purpose of this meeting was to discuss the post design competition modifications and key non-compliances.
- Following the first Pre-DA meeting, the schemes were further refined, and a second Pre-DA meeting was held on 12 December 2018.
- In the second Pre-DA meeting Council did not raise any issues on the overall height of Building A. Council requested shading to be provided on the rooftop communal open space and to explore options for planting over the lift overrun.

- Council also acknowledged that a Section 4.55 Modification is required to modify the Stage 1 Concept Approval to be consistent with the detailed Building A scheme.
- The design scheme for Building A were further refined before formal lodgement.

1.1.3. Lodgement

A total of two applications were lodged in respect of Buildings A:

- Building A development application was lodged with Council on 23 April 2019 (D/2019/393), which included two separate Clause 4.6 Variation Statements addressing the proposed FSR and height non-compliances.
- A Section 4.55 (2) Modification application was lodged on 21 May 2019 (D/2015/966/C). The Section 4.55(2) application seeks to modify Stage 1 Concept Approval to be consistent with proposed Building A and D schemes.

1.1.4. Post Lodgement

- On 26 June 2019, Council issued a Request for Additional Information letter in respect of Building A main works application D/2019/393 and early works application D/2019/307.
- Urbis responded to Council on 18 July 2019 and submitted a package of documentations to support the response to the requests outlined in the letter.
- On 1 August 2019 the applications were presented by the planning assessment team in the Design Advisory Panel (DAP) meeting. On 7 August 2019, Council issued a Request for Additional Information letters in respect of Modification to Stage 1 approval and Building A application (D/2015/966/C, D/2019/393).
- The letter focused on the GFA non-compliance, built form concern in relation to the four storey element fronting Ashmore Street and eight storey street wall.
- It is important to note, the final design scheme for Building A is largely consistent with Design Competition winning Scheme and the draft architectural plans submitted for Pre-DA meetings. The Design Competition Scheme and the draft architectural plans all presented a four storey element fronting Ashmore Street and eight storey street wall.
- After receiving Council's letters, Greenland and the project team met with Council on number of occasions (15 August 2019, 19 August 2019, 20 August 2019 and 11 October 2019), to discuss the issues outlined in the letter and present design refinement progress to address Council's concerns.
- Revised architectural plans and an updated Clause 4.6 Statement for Block A were submitted to Council on 10 December 2019 for review and comments.
- Council provided further comments on the draft revised plans and Clause 4.6 Statement in the week of 16 December 2019. The comments relate to the following three key issues:
 - Sun shading
 - Green walls
 - Solar panels
 - The interface of ground floor internal apartments

This updated Clause 4.6 Statement assess the revised proposal as a result of the above-mentioned ongoing consultation with Council and addresses Council's comments on the previous Clause 4.6 Statement.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF SLEP

Clause 4.6 of SLEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone, and the concurrence of the Secretary has been obtained.

In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- a) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- b) The public benefit of maintaining the development standard, and*
- c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document forms a clause 4.6 written request to justify the contravention of the height development standard in Clause 4.3 Height of buildings. The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP Clause 4.6 Exceptions to Development Standards.

2.2. NSW LAND AND ENVIRONMENT COURT: CASE LAW

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the way variations to development standards are required to be approached. The current case law which outlines the approach to preparing and dealing with a request under Clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

- [13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

- [14] *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
- [15] *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
- [16] *As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. 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.*
- [17] *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
- [18] *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
- [19] *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
- [20] *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
- [21] *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
- [22] *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*
- [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. 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]*.*
- [25] *The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd at [39]*, the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council at [38]*.*
- [26] *The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant’s written request has adequately addressed the matter in cl 4.6(4)(a)(ii).*
- [27] *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*
- [28] *The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.*
- [29] *On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41]*.*

The approach outlined by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 has been applied in this written Clause 4.6 request.

3. SITE DESCRIPTION

3.1. SITE LOCATION

The Site is located at 56A Ashmore Street, Erskineville. It is legally described as Lot 2 DP123642 and has an area of 5,235sqm.

The Site is known as Block A and is located at the northern edge of Ashmore Estate and has four street frontages. These comprise of Ashmore Street to the north, Foundry Street (to be constructed) to the east, Stovemakers Lane (to be constructed) to the south and Kooka Walk (to be constructed) to the west.

Figure 1 - Site Location



3.2. SITE CONTEXT

The Site is located within Erskineville, which is a suburb identified as being contained to Sydney’s Economic Corridor within Greater Sydney Region Plan. Erskineville is an important location within the City of Sydney LGA, providing a variety of housing types, retail tenancies, industrial complexes and public open spaces. Spatially, the site is centrally located, being approximately 2.6km from Sydney Airport and approximately 3km to Sydney CBD.

The following key contextual characteristics are noted:

- The western portion of Ashmore Street (directly adjacent to the north-western corner of site) is predominantly characterised by low scale residential dwellings.
- Directly to the north, on the other side of Ashmore Street is the Erskineville Public Housing Estate, the Alexandria Erskineville Bowling Club and the Erskineville oval.
- To the east of the subject site is characterised by one to two storey residential dwellings interspersed with some retail/commercial uses located along Mitchell Road.

- To the south and west of the subject site are recent residential flat building developments with a built form ranging from 4-7 storeys, and others are construction sites for future residential uses.
- To the west of the site are lots within the Ashmore Precinct. These sites are at various stages of transition with new residential development alongside existing and functioning warehouse / light industrial tenancies.

3.3. PLANNING CONTEXT

The site is zoned 'B2 Local Centre'. Within the B2 zone, '*residential flat buildings*' are permitted within consent. The proposal is permissible with consent.

The SLEP 2012 applies a maximum 15m and 27m height control across the Site (as shown in **Figure 2** below).

Figure 2 – Height of Buildings control



3.3.1. Stage 1 DA

On 9 July 2015 the Stage 1 DA (D/2015/966) approved building envelopes and indicative gross floor area (GFA) for the Ashmore Estate masterplan, including:

- Approximately 1,400 dwellings,
- A local shopping village, containing a full line supermarket, specialty retail, cafes and bars,
- Childcare centre, and
- Public open space including a public park.

The building envelopes approved by the CSPC as part of D/2015/966 are identified in Figure 3.

A variation request has been prepared to amend the Stage 1 building envelope in accordance with this proposal, and this has been addressed in a separate Section 4.55 Modification application.

4. PROPOSED DEVELOPMENT

4.1. OVERVIEW

The DA seeks development consent for the following:

- Staged construction of a residential flat building with 173 dwellings, one basement level providing 113 car parking spaces, servicing areas and waste management facilities.
- Public domain works including:
 - Construction of a footpath along western edge of Building A fronting Kooka Walk.
 - Dedication of 102sqm land free of cost to Council comprising the footpath along the western frontage of Building A (forming part of Kooka Walk) between Ashmore Street and Stovemaker Lane.
 - Construction of permanent footpath along eastern edge of Building A fronting Foundry Street.
 - Construction of Stovemaker Lane pedestrian and cycle link between Building A and McPherson Park connecting Foundry Street to Kooka Walk.
 - Dedication of 450sqm of land free of cost to Council comprising Stovemaker Lane West.
- Site landscaping throughout the site, including the embellishment of the ground, level 3 communal open space and the green roof.
- Removal of one jacaranda tree on Ashmore Street.

Early works are proposed under the Early Works DA which has been submitted concurrently with this DA.

Table 1 provides a numeric overview of the proposed development.

Table 1 – Numeric Overview

Component	Proposed	
Maximum height (m)	27.5m to the top of the lift overrun.	
GFA	13,976sqm	
Apartments	Studio	16 (9.3%)
	One bedroom	54 (31.2%)
	Two bedroom	87 (50.2%)
	Three bedroom	16 (9.3%)
	Total	173

5. EXTENT OF CONTRAVENTION

5.1. VARIATION TO HEIGHT

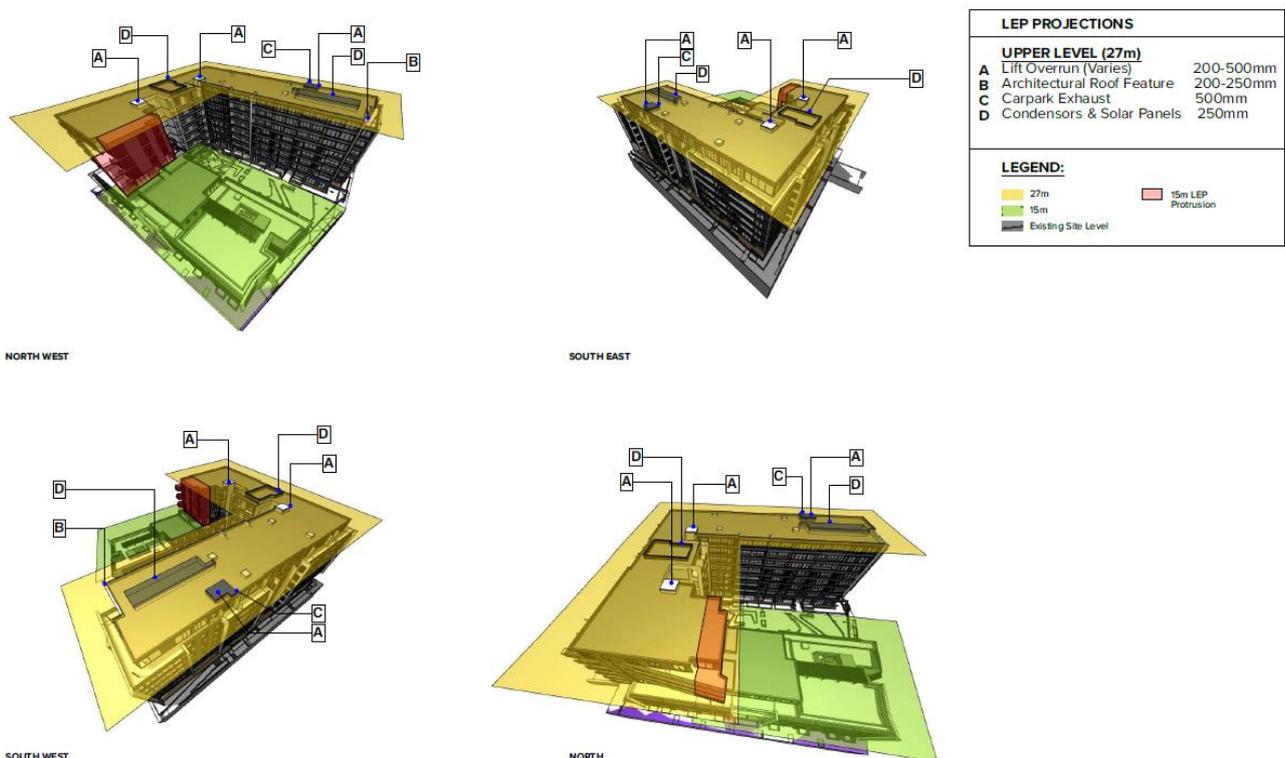
The proposed development seeks to vary the height of buildings standard under the SLEP 2012 in the following locations. The development complies with the floor space ratio development standard (with design excellence), and the height non-compliance is not a result of providing additional gross floor area beyond the permissible gross floor area (with design excellence).

Figure 4 and Figure 5 indicates the locations of each height variation.

- A – Lift Overrun: 27.2m - 27.5m (0.2m – 0.5m variation)
- B – Architectural Roof Features: 27.2m - 27.25m (0.2m - 0.25m variation)
- C – Carpark Exhaust: 27.5m (0.5m variation)
- D – Condenser units and solar panel: 27.25m (0.25m variation)
- A portion of the building also protrudes the 15m height limit along the Ashmore Street (northern) boundary, this is also known as the L Shape element (shaded in red in Figure 4 and shown on the floor plan in Figure 5). The maximum height of the L Shape element is to the parapet of the building (RL 35.85) and has a height variation of 11.85m.

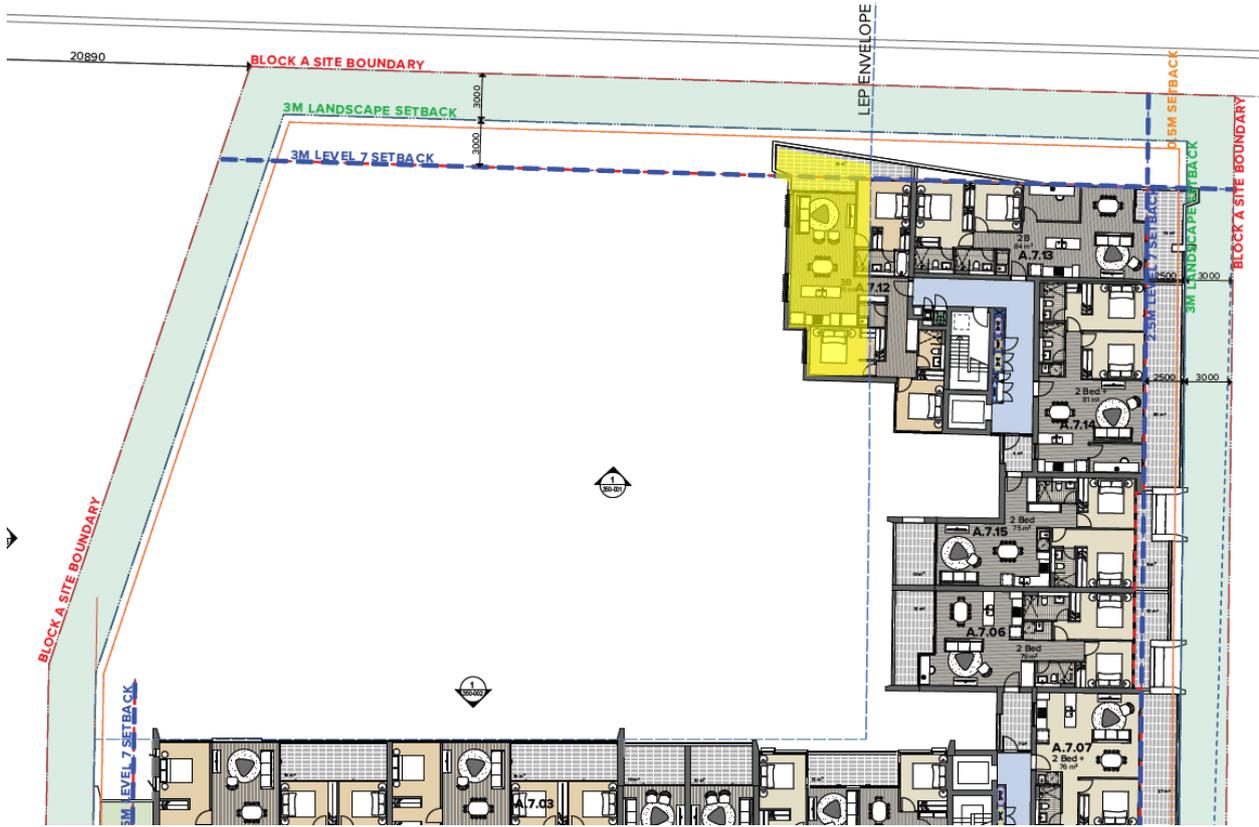
The development complies with the floor space ratio development standard (with design excellence), and the height non-compliance is not a result of providing additional gross floor area beyond the permissible gross floor area (with design excellence).

Figure 4 - Proposed Building height variation



Source: Turner Architects

Figure 5 - Area of Block A which exceeds the height control within the 15m height control plane (area of non-compliance highlighted in yellow)



Source: Turner Architects

6. CLAUSE 4.6 VARIATION REQUEST

The following sections of the report provide an assessment of the request to vary the development standard relating to the maximum height of buildings in accordance with clause 4.6 of SLEP.

6.1. KEY QUESTIONS

6.1.1. Is the Planning Control a Development Standard?

The height of buildings prescribed under Clause 4.3 of the SLEP is a development standard capable of being varied under clause 4.6 of SLEP.

6.1.2. Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of clause 4.6.

6.1.3. What is the Underlying Object or Purpose of the Standard?

The objectives of the height of buildings development standard are as follows:

- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,
- (b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,
- (c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.

6.2. CONSIDERATION

6.2.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater* [2007] NSWLEC 827. These tests are outlined in Section 2.2 of this report (paragraphs [17]-[21]).

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way

The development is justified against the first of the Wehbe tests as set out below.

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objectives of the height of buildings standard as outlined in clause 4.3(1) of the SLEP as detailed in Table 2 below.

Table 2 – Demonstrated achievement of the objectives of Clause 4.3 height of buildings standard.

Objective	Assessment
(a) to ensure the height of development is appropriate to the condition of the site and its context.	The height non-compliance is a result of the following: <ul style="list-style-type: none">• The lift overrun, exhaust, solar panel and the condenser are building servicing structures that provides accessible lift access, cooling/heating system and energy saving measures, which are all necessary to improve the amenity of the development.

Objective

Assessment

- The condensers units have been relocated to the roof to achieve the objective under control 4.2.7 of the DCP. The relocation of the condenser is able to reduce heat and noise impact to the internal apartment units. The consolidated and centralised condensers is a more efficient design outcome and is consistent with DCP control.
- The architectural feature is a minor element at the edge of the elevation and is considered as part of the building design and form an integral part of the building. It does not create adverse visual impact or amenity impact.
- The L Shape element is the direct result of relocating the GFA incentive resultant from running the design competition and the result of an architectural expression to achieve a transitional built form along Ashmore Street, which achieves a stepped height along Ashmore Street ranging from 3-storeys at the west to 8-storeys to the east.
- In addition, the ground level of the overall building has been raised approximate 1 metre above existing ground level to ensure minimum flood planning levels are achieved.

The structures on the roof are minor building servicing structures that provide essential amenity to the residents. These structures are setback from the building edge and will not be visible from the surrounding public domain and adjoining apartment buildings.

As mentioned, the L Shape element is the result of relocating built form to support the stepped presentation of the building to Ashmore Street. The western end of the building achieves this through being well below the applicable 15 metre height control, however this built form has been relocated into the L-Shaped element, which formed part of the winning Design Competition Scheme. This area of non-compliance has been designed to have minimal amenity impacts to surrounding developments, including solar access and privacy and this is justified in Section 6.2.2 of the Statement.

The architectural expression of the L-Shaped element is to achieve a transitional built form along Ashmore Street and has been designed to be sympathetic to the streetscape context and does not contribute to additional built form bulk. This is achieved in the following ways:

- The L-Shaped element is able to contribute a staggered built form transition from three storeys at the corner of Kooka Walk and Ashmore Street, to four storeys at the centre of the Ashmore Street frontage and eight storeys further to the corner of Foundry Street and Ashmore Street. This architectural expression creates visual interest and a better

Objective

Assessment

urban design outcome, transitioning between the existing conservation area to the west and north characterised by two-storey form and the contemporary urban infill scale of Block B with a height of eight storeys. Overall, the L-Shaped element is able to respond to the character of Ashmore Street.

- The L-Shape element comprises a mix of three-storey, four-storey and eight-storey built form fronting Ashmore Street. The glass line has been setback a further 3m from Ashmore Street, providing a total setback of 6m from Ashmore Street boundary, while the balconies are setback 3m from site boundaries consistent with the levels below. The 3m setback to the balconies is consistent with the Design Competition winning scheme. The setback minimises visual impact and minimise bulk, while the angled balcony layout provides visual interest and respond to site merits.

Furthermore, the proposal is consistent with the built form control detailed in Section 5.5.8 of the SDCP 2012, which indicated the four and eight storeys in brackets. This implies the site has been considered as providing opportunity to support additional height when design excellence has been demonstrated.

While Section 5.5.8 of the SDCP 2012 is silent on the interpretation of the bracketed number, other sections of the SDCP 2012 specify the heights in brackets are permissible subject to a competitive design process and design excellence. This is evident in precincts including Epsom Park Precinct described in Figure 5.68 of the DCP (Section 5) and North Rosebery Precinct described in Figure 5.176 of the DCP (Section 5). Therefore, it is reasonable to assume that the same definition and allocation of additional floorspace control should be applied to Ashmore Precinct through a competitive design process, which has already been undertaken. Accordingly, the proposed built form is consistent with the desired future character envisioned by the DCP.

In summary, the non-compliance with the 15 metre height control is considered suitable for the Site, as it is located adjacent to the 27 metre height control zone, and will continue to deliver a built form which transitions between with existing conservation area to the west and north characterised by two-storey form and the contemporary urban infill scale of Block B with a height of eight storeys.

The height non-compliance with the 27 metre height control resulting from the lift overrun, exhaust, solar panel and condenser units are minor in nature and has been located on the highest built form element which will have limited visibility

Objective	Assessment
	<p>from surrounding development and public domain spaces. The elements exceeding the height control are setback from the edge of the building and will largely be screened from view by the building parapet.</p>
<p>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas</p>	<p>The site is not classified as a heritage item, nor is it located within a heritage conservation area. The site is surrounded by two heritage conservation areas:</p> <ul style="list-style-type: none"> • C22 - Erskineville Estate Heritage Conservation Area • C24 - Malcolm Estate Heritage Conservation Area <p>A Heritage Impact Assessment prepared by Extent provides heritage assessment of the proposal in relation to the surrounding heritage conservation areas. The Impact Assessment concluded:</p> <p><i>“The proposed scope of works for this stage of the redevelopment will see the formation of a single, split level block ranging from 4 to 8 storeys in height. This residential apartment will be separated by new roads and pedestrian pathways providing a network which connects the estate with the existing urban environment. The existing industrial site does not contribute or relate to the significance of the surrounding HCAs. Demolition of the existing structures is understood to be acceptable, considering the age, aesthetic and general contribution the structures make to the heritage setting of the site.</i></p> <p><i>While the works will have a minor visual impact on the Erskineville Estate HCA, the works do not adversely impact the heritage values of the conservation area. The new development illustrates considerable effort to minimise the visual impacts on the surrounding HCAs through sympathetic design with regards to bulk, scale, height, use of materials and retention of mature vegetation to maintain a consistent aesthetic to the urban environment and sympathetic modern development. The proposed works do not impact on the heritage significance of the Malcolm Estate Conservation Area or the Electrical Substation 101.</i></p> <p>.....</p> <p><i>This assessment has found the works to be compliant with the heritage controls and guidelines outlined in the Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012.”</i></p>

Objective	Assessment
(c) to promote the sharing of views.	<p>As supported by the HIS, the additional height will not impact on the significance of the surrounding heritage conservation areas to the north. The design will have no heritage impact overall.</p> <p>The additional height will not be perceivable when viewed from Sydney Park and therefore will not create a visual obstruction of the CBD skyline from Sydney Park's vista.</p> <p>The L Shaped Element along Ashmore Street is able to maintain adequate northern views to the future residents of the upper level north facing apartments along the southern wing of Building A (see Figure 11).</p>
(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas	<p>The subject site is not within close proximity to Central Sydney nor Green Square Town Centre. Accordingly, this objective is not applicable to the proposed variation.</p>

In summary, the objectives of the development standard are achieved by the proposed development notwithstanding the non-compliances with the height of building standard.

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

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

Test 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

Not relied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Not relied upon.

6.2.2. Clause 4.6(3)(b) – Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variations to the development standard and are discussed in the following sections. The justifications are specific to the areas of non-compliance.

Massing and Built Form

The area of non-compliance on the roof, such as the lift overrun, carpark exhaust, solar panels and the condenser units are apartment servicing structures, which are limited in size, all are less than 0.5m above the building height control, are setback from the roofline parapet and will not be visible from the surrounding streets, including the corner of Ashmore and Foundry Street and Kooka Walk (refer to **Figure 6**). These elements are necessary in servicing the upper level apartments and to provide internal amenity to residents.

- Ensuring compliance with Section 5.5.4.2 of SDCP 2012 can continue to be achieved. Section 5.5.4.2 of the SDCP requires a minimum of 60% of the total area of McPherson Park is to have direct solar access between 10am and 2pm at the winter solstice. Compliance with this control is achieved with the proposed height control non-compliance.
- The stepped built form to the north is able to maximise solar amenity to the communal rooftop terrace and retain solar access to level seven balconies and living rooms.

In addition, the following architectural response assist in minimising the bulk of the L-Shape element:

- The architectural character and materiality of the fourth storey has been reduced in scale and is refined to include a light weight pergola style awning, reduced height partition wall and to mirror similar colour and materiality to the eighth storey form to the east. This has assisted in blending in the fourth storey, including the area of noncompliance with the upper storeys to represent a recessed built form.
- The profile of the green roof and window shading element to the fourth storey has also been refined and setback to significantly reduce the prominence of the fourth storey, which includes the bottom portion of the L shaped element. The fourth storey cannot be easily perceived from Ashmore Street, and the built form would be viewed primarily as a three-storey terrace style building with fourth storey further setback from the street frontage.
- The eighth storey building glass line has been setback a further 3m from Ashmore Street, providing a total setback of 6m from Ashmore Street boundary, while the top floor terraces are setback 3m from site boundaries consistent with the levels below. The terraces fronting Ashmore Street have been retained (setback 3m from Ashmore Street) as part of the design as it represents the design competition merit.

Overall, the proposal is a contextual fit and the areas of non-compliance have been appropriately designed to maintain the height transition from the approved eight storeys Building B to the Malcolm Estate conservation area.

Figure 7 – Ashmore Street Elevation



Source: Turner

Amenity

The lift overrun, exhaust, solar panels and the condensers are building servicing structures that provide accessibility to all levels, cooling/heating system and energy saving measures, which are all necessary to deliver contemporary amenity to the future residents of the development. These structures satisfy the objectives of the *Environmental Planning and Assessment Act 1979*, specially objectives (b) and (g) which relate to promoting ecologically sustainable development and good amenity in the built environment.

The solar panels provide energy saving measure that promotes sustainable design. The condensers provide heat/cooling system that enhances internal amenity for future residents. The location and layout of the condenser is also consistent with control 4.2.7 of the DCP, which recommends locating the condensers to be consolidated in a centralised location and to allow building to readily adopt newer environmental technologies as they arise.

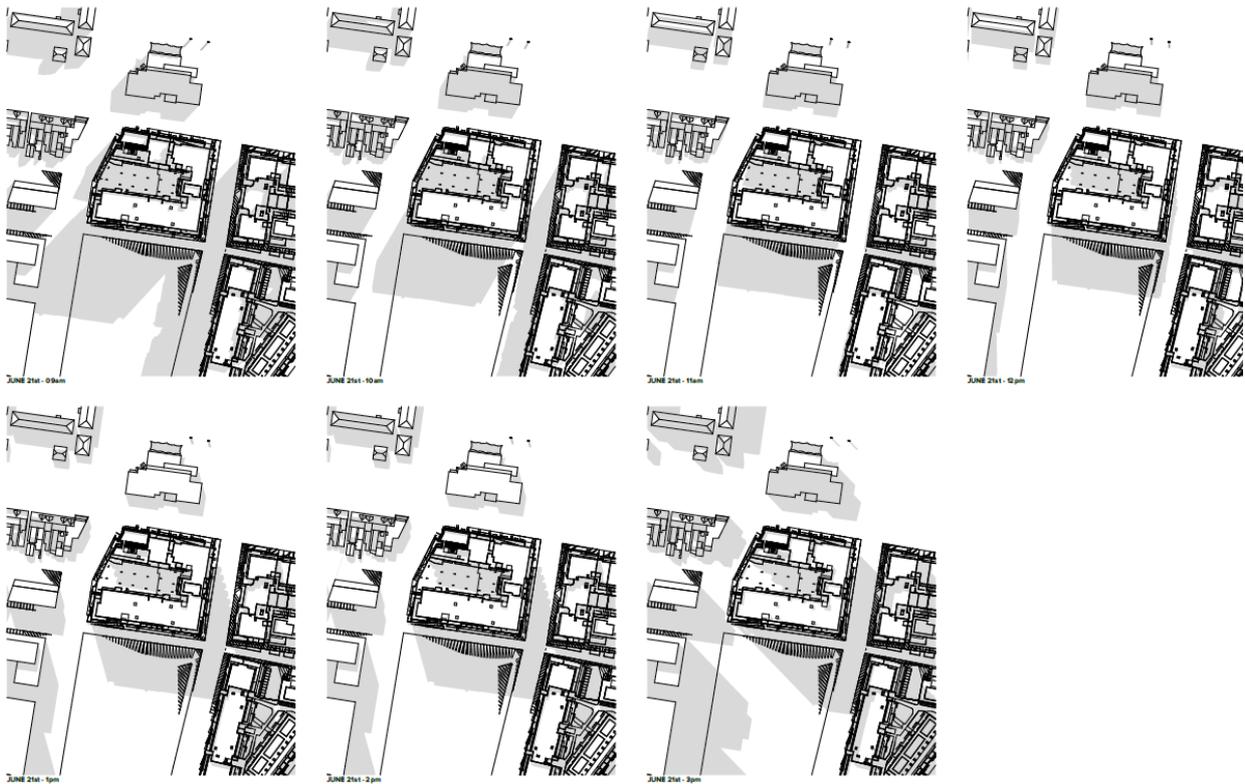
Overshadowing

The proposal overall will result in some additional overshadowing to the lower levels of the adjoining development to the east. As demonstrated by the Shadow Diagrams, throughout the day, most of the shadow is cast within the site, onto the streets or onto the northern portion of McPherson Park (refer to Figure 8).

Section 5.5.4.2 of SDCP 2012 requires a *minimum of 60% of the total area of McPherson Park is to have direct solar access between 10am and 2pm at the winter solstice*. Figure 9 below demonstrates that compliance with this control is achieved with the proposed building envelope (which includes areas on non-compliance), and more than 60% of the Park is able to receive solar between 10am and 2pm at the winter solstice.

Accordingly, the area of non-compliance maintains solar access to nearby developments and maintains compliant solar access to McPherson Park.

Figure 8 - Shadow Diagrams June 21 9am - 3pm



Source: Turner

Figure 9 – Solar Access Diagram of McPherson Park



Source: Turner

Solar access

The proposal has been designed in accordance with the objectives of the ADG as detailed in the Design Report. The overall proposal complies with solar access to communal open space, living rooms and private open space areas, and the area of non-compliance does not hinder compliance with solar access requirements.

The principal usable part of the communal open space is able to achieve 90% of direct sunlight for a minimum of 2 hours between 9am and 3pm on 21 June (mid winter).

73% (127 apartments) of the apartments will receive two hours solar access to living room and balcony. 15% (26 apartments) of the apartments receive no direct sunlight between 9am and 3pm at mid-winter if skylights are relied for solar access. 16.1% (286 apartments) of the apartments receive no direct sunlight between 9am and 3pm at mid-winter if skylights are not relied for solar.

The L-Shape element is able to maintain solar access to most living rooms and all the balconies of the level 5 and 6 apartments located to the east and north. All units located on level 7 are able to receive solar access to living rooms and balconies.

Accordingly, the height non-compliance does not hinder solar access compliance to residential units within the apartments.

Figure 10 demonstrates solar access compliance to upper level apartments.

Figure 10 – Solar Access to upper level apartments



Source: Turner

View

The L-Shape element is able to maintain adequate northern views for the future residents of the north-facing apartments uppermost levels of the southern wing of Building A (refer to Figure 11). Although direct view may be obstructed, the northern view corridor remains open for apartments located to the south.

The area of non-compliance on the roof are very minor building features and are all less than 0.5m in height. These elements will not impact on potential significant view corridor through or across the site.

Accordingly, the height non-compliances proposed will not impact on view access.

Figure 11 – View corridor to the north



Source: Turner

Overall, the area of non-compliance will not result in any detrimental amenity impacts to surrounding development when compared to a complying design. The non-compliant roof elements are related to building servicing features, which provide essential amenity to the residents and are necessary within the development. Therefore, the proposed height non-compliances are considered appropriate, and are able to be supported on environmental planning grounds. The consolidated and centralised condenser on the roof can also reduce heat and noise impact and is a more efficient design outcome that is consistent with the DCP control.

The L-Shape element fronting Ashmore Street will not impact on northly view, does not result in additional overshadowing, has been placed to ensure the objective of a transitional building height presentation to Ashmore Street is achieved, has been designed to respond to the context of the Site and does not add additional bulk to the built form.

6.2.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

As detailed in Table 2, the proposed development is consistent with the objectives of the height of buildings development standard. The proposal is also consistent with the B2 Local Centre land use objectives that apply to the Site under SLEP, as outlined within

Table 3.

Table 3 – Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<p>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</p>	<p>The proposed non-compliance with the height control enables the delivery of a mix of apartments which provide good amenity to future residents of Building A.</p> <p>The L-Shaped element height non-compliance enables four apartments to be expanded in size to address market demand and provide private open space which is designed to support good amenity for future residents.</p> <p>The non-compliant rooftop structures support good amenity for future residents of the building, including the location of condenser units away from noise sensitive receivers and lift overruns to enable upper floors to have equitable access to serve the needs of people who live and visit the building.</p>
<p>To encourage employment opportunities in accessible locations.</p>	<p>The height non-compliance will not adversely impact the achievement of this objective. However, more broadly the development is located within a highly accessible area and will create numerous jobs during the construction phase.</p>
<p>To maximise public transport patronage and encourage walking and cycling.</p>	<p>The height non-compliance will not adversely impact the achievement of this objective. However, more broadly the development greatly supports the intensification of activity around existing public transport and bicycle infrastructure. Accordingly, future residents, visitors and employees contained to the proposal will increasingly choose to travel by bike or public transport instead of a car.</p>
<p>To allow appropriate residential uses so as to support the vitality of local centres.</p>	<p>The height non-compliance will support the delivery of new residential dwellings, which meet current design and amenity standards in an urban renewal precinct which includes a new local centre. The non-compliant roof elements are able to support the delivery of contemporary apartments with equitable access, good solar access, cross ventilation and acoustic amenity without creating adverse environmental impacts.</p> <p>The L-Shaped Element will support an increased number of apartments addressing Ashmore Street, which will strengthen the interstation of the Ashmore precinct with the surrounding established area, and increased passive surveillance for residents from the established areas to visit the new retail offerings within the Ashmore Precinct.</p> <p>Further, the proposed Building A proposed 173 residential dwellings. The influx of new residents as a result of this increase in dwellings will help support the viability of approved retail and childcare land uses within the Ashmore Precinct and surrounding area of Erskineville.</p>

The proposal is considered to be in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

6.2.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the height of buildings development standard will not raise any matter of significance for State or Regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

6.2.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the height of buildings development standard and the land use zoning objectives despite the building height development standard non-compliance. The strict application of the height control would prevent effective redevelopment of the Site to provide improved and superior amenity, which has been achieved through the current proposal.

The proposed variations to the maximum building height result from a revised building envelope as part of a refined design that is generally consistent with the approved concept master plan, apart from the additional levels fronting Foundry Street and Stovemaker Lane and Ashmore Street. The additional street wall levels will not dominate the streetscape, and it will improve the transitional built form relationship of all buildings.

The lift overrun, exhaust, solar panels and the condensers are building servicing structures that provide accessibility to all levels, cooling/heating system and energy saving measures, which are all necessary to deliver contemporary amenity to the future residents of the development. These structures satisfy the objectives of the *Environmental Planning and Assessment Act 1979*, specially objectives (b) and (g) which relate to promoting ecologically sustainable development and good amenity in the built environment.

The height non-compliance is not a result of providing additional gross floor area beyond the permissible gross floor area (with design excellence) for the site, therefore it does not represent an over development of the Site.

Given the nature of the proposed variation and the justification of the impacts provided within this statement and accompanying SEE, the proposal is consistent with the public interest as it promotes the orderly and efficient use of land.

6.2.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the Clause 4.6 request prior to granting concurrence, should it be required.

7. SUMMARY

As described in the preceding sections, taking into account the significance of the Site, its context, and the vision for the locality, strict compliance with the numerical building height development standard in this instance is both unreasonable and unnecessary for the following reasons:

- As demonstrated in the proposal, the built form has been developed in response to site constraints, surrounding context and the design development for the built form and massing across the site
- The development complies with the floor space ratio development standard (with design excellence), and the height non-compliance is not a result of providing additional gross floor area beyond the permissible gross floor area. Accordingly, the development is not considered as an overdevelopment for the site.
- The non-compliant roof elements are related to building servicing features, which provide essential amenity for the residents. This includes accessible lift access, cooling /heating system, exhaust, which are necessary within the development and the minor height breach is considered appropriate. The consolidated and centralised condenser on the roof can also reduce heat and noise impact and is a more efficient design outcome that is consistent with the DCP control.
- The additional height along Ashmore Street is the result of relocating the additional design excellence floor space entitled through a Design Competition Process. The extent of the L Shape element has been reduced compared to the original DA scheme, including reducing the length of the fourth storey element, the width of the upper levels and reduction of the balcony footprint.
- The L shaped element is able to contribute a transitional built form from three storeys at the corner of Kooka Walk and Ashmore Street, to four storeys at the centre of the Ashmore Street frontage and eight storeys further to the corner of Foundry Street and Ashmore Street. This architectural expression creates visual interest and a better urban design outcome, which is sympathetic to the street context and does not contribute to additional built form bulk.
- The additional height will not result in any detrimental amenity impacts to surrounding development when compared to a complaint design. Nor will the extent of the non-compliance result in any adverse visual impact on the locality.
- The non-compliance will not hinder the development's ability to satisfy the objectives of the B2 Local Centre zone and the objects of the Act.

Based on the reasons outlined, it is concluded the request is well founded and the particular circumstances of the case warrant flexibility in the application of the maximum height of building development standard.

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BRISBANE

Level 7, 123 Albert Street
Brisbane QLD 4000
Australia
T +61 7 3007 3800

MELBOURNE

Level 12, 120 Collins Street
Melbourne VIC 3000
Australia
T +61 3 8663 4888

PERTH

Level 14, The Quadrant
1 William Street
Perth WA 6000
Australia
T +61 8 9346 0500

SYDNEY

Level 23, Darling Park Tower 2
201 Sussex Street
Sydney NSW 2000
Australia
T +61 2 8233 9900