

# **Attachment C**

<b>Clause 4.6 Variation</b>
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# **CLAUSE 4.6 VARIATION REQUEST**

## **SYDNEY LEP 2012 - BUILDING HEIGHT**

**BLOCK D - 56A ASHMORE STREET, ERSKINEVILLE**

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# 1. INTRODUCTION

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

The DA seeks development consent for the following:

- Site preparation and demolition of existing structures onsite.
- Construction of six two storey plus attic level terrace houses, each comprising three bedrooms and a roof-top terrace.
- Deep soil and landscaped setback fronting Metters Street and around the peripheral of the site boundaries.
- Removal of 20 trees to accommodate the construction of Coppersmith Lane.
- Public domain works as required by the VPA in association with DA2015/966.
- Subdivision of the site to create six individual lots for the residential buildings and one lot for the public domain to be dedicated to Council.

This written 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 2012.

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

## 2. ASSESSMENT FRAMEWORK

### 2.1. CLAUSE 4.6 OF SLEP 2012

Clause 4.6 of SLEP 2012 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 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. The assessment of the proposed variation has been undertaken in this document in accordance with the requirements of the SLEP 2012 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]*.*



# 3. SITE DESCRIPTION

## 3.1. SITE LOCATION

The Site is located at 56A Ashmore Street, Erskineville.

It is legally described as Lot 3 DP123642 and has an area of 3,014sqm.

Block D is in the north-western corner of the whole Ashmore Precinct site and is bound by Ashmore Street, Kooka Walk (to be constructed), Metters Street (to be constructed) and Coppersmith Lane (to be constructed).

The Site location is illustrated in **Figure 1**.

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.

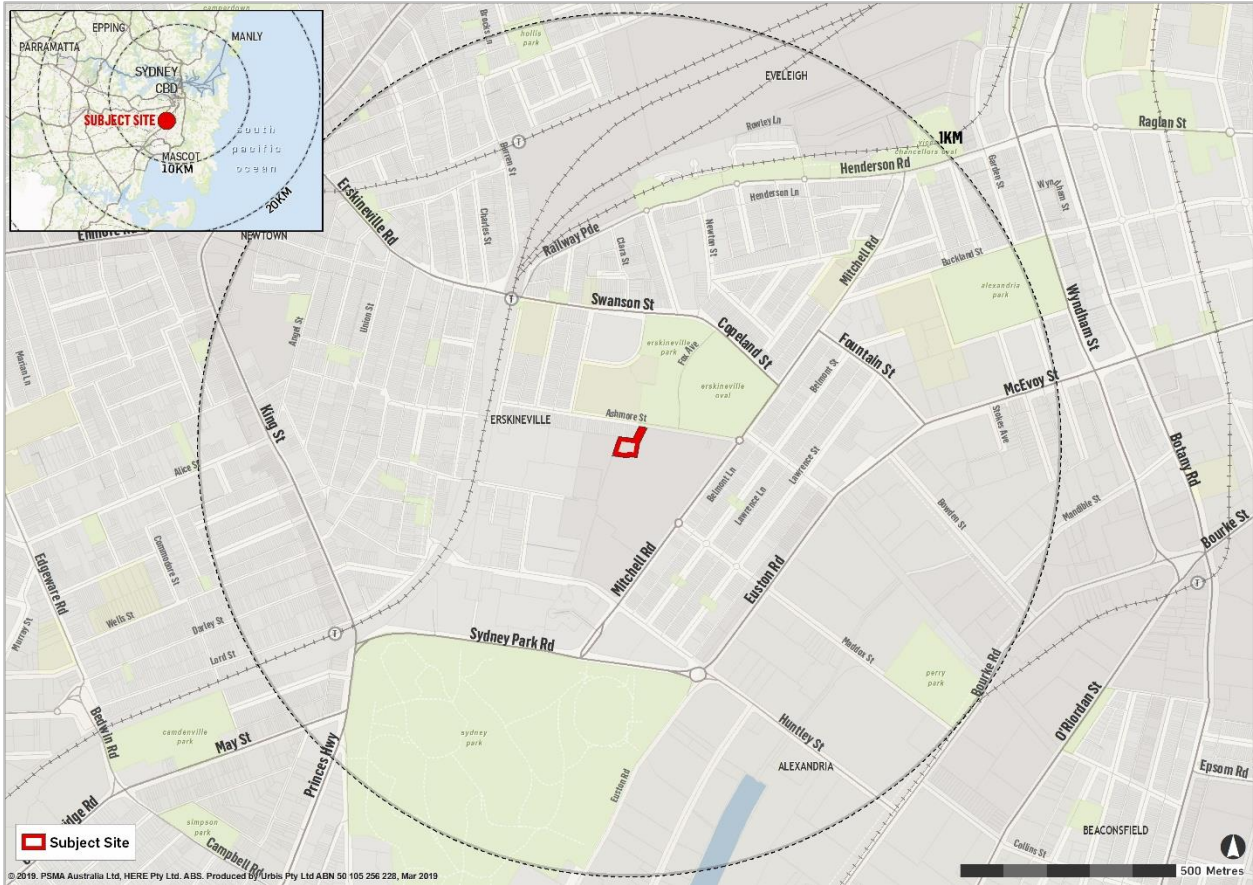
The Site is surrounded by the following:

- Directly to the north of Block D is a row of two storey terraces fronting Ashmore Street. Further to the north is the Erskineville Public Housing Estate, the Alexandria Erskineville Bowling Club and the Erskineville oval. Sydney University is approximately 1.3km to the north of the Site.
- Directly to the east of the Site is the future Kooka Walk and the future 7 to 8 storeys residential flat building at Block A.

- Directly to the south of the Site is the future 7 to 8 storey residential flat building at Block E.
- Directly to the west of the Site is a row of two storey plus attic level terraces at 1A Metter Street, which have recently constructed.

Site context is provided in **Figure 2**.

Figure 2 – Site Context



### 3.3. PLANNING CONTEXT

The Site is zoned 'B2 Local Centre'. Within the B2 zone, 'dwelling houses' is permitted with consent. The proposed dwellings in the form of terrace houses is therefore permissible with consent.

The SLEP 2012 applies a maximum 9m height control across the Site. The proposed height of the development is 11.49m measured from the top of the rooftop screen at RL20.47 to the lowest exiting ground level. Accordingly, the proposed development seeks to vary the height of buildings standard under the SLEP 2012 by 2.49m.

No other variations to development standards are being sought.

Public benefits are being provided by the proposal, including the following:

- Providing a high-quality residential development that is contributing to the mix of housing types and diversity in the locality.
- Public domain works in association with D/2015/966 Voluntary Planning Agreement and incorporates a Preliminary Public Art Plan, which will improve and enhance public domain experience for the community and contribute greatly to public interest.

### 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 to the Stage 1 building envelope has been prepared in accordance with the proposal, this has been addressed in a separate Section 4.55 Modification application.

Figure 3 – Approved building envelopes (D2015/966)



Source: Architectus

### 3.3.2. Design Competition

Greenland Golden Horse Investment Pty Limited undertook a Competitive Design Alternatives Process and invited three architectural consortiums, made up of one established architect design a scheme for Block A, in conjunction with one emerging architect designing a scheme for Block D. The three consortiums invited to participate in the Competitive Process were:

- Group GSA with Tribe
- PTW and Collins with Turner
- Turner with Andrew Burns Architects

All Competitors completed the Competitive Process and produced a final submission for consideration by the Selection Panel.

The Competitive Process was undertaken in accordance with the SLEP 2012), the *Sydney Development Control Plan 2012* (SDCP 2012), and the *City of Sydney Competitive Design Policy 2013*.

An analysis and assessment of the designs was undertaken based on compliance with the Competitive Design Alternatives Brief, satisfying the design, planning and commercial objectives of the brief, compliance with relevant planning controls and the Stage 1 DA.

The Competitive Process has resulted in a scheme that was judged to be of high design quality. The Panel resolved that the Andrew Burns scheme can achieve design excellence as per clause 6.21 of the SLEP 2012 and the Design Brief requirements and accordingly was awarded the winner of the Competitive Process.

The following provides the selection panel comments of the Andrew Burns scheme:

- *The terraces show a clear design relationship to Turner's Block A scheme, and are compact, well planned and highly considered.*
- *The urban approach is resolutely conventional and the architectural expression a subtle, modern interpretation of the classical terrace house. The Panel considers this to be an appropriate response to the urban context*
- *Substantial deep soil setbacks fronting Metters Street will allow for a strong landscape setting to be created for these buildings.*
- *The upper level balconies will provide added residential amenity and a pleasant district outlook.*
- *The bigger backyards enhance amenity for residents.*

*The Panel notes that the 9m LEP height control (2 storey plus attic) in combination with the provision of minimum flood planning levels limits the provision of generous ceiling heights to primary living areas (i.e. 2.7m finished floor to underside of ceiling). Hence, pending environmental impacts, some additional height would benefit the proposal for Block D.*

In proceeding to Stage 2 DA, the Panel recommends that the following items be addressed:

- *Effective weather protection should be provided to windows, entry points and outdoor living spaces.*
- *Improved privacy should be provided to all mid-level bedrooms.*
- ***As noted, the Panel considers pending environmental impacts that some additional height would be of benefit to any proposal for Block D, and recommend that this should be resolved with Council prior to submission of the DA.***

### **3.4. PROPOSED DEVELOPMENT**

The DA seeks development consent for the following:

- Demolition of existing structures onsite.
- Construction of six, three-bedroom terrace houses each with a roof-top terrace.
- Landscape works and the removal of 20 trees to accommodate the construction of Coppersmith Lane.
- Public domain work in association with the Voluntary Planning Agreement, including:
  - Construction of Kooka Walk North, including a new trunk drainage infrastructure below the alignment of Kooka Walk (North);
  - Construction of Metters Street from the western boundary to the western edge of Kooka Walk, including a temporary southern footway treatment adjacent to future Building E.
  - Construction of Coppersmith Lane from the western boundary of the site to the western edge of Kooka Walk and including the north south extent from Metters Street.
- Subdivision of residential buildings and public domain, including new roads.

Table 1 provides a numeric overview of the proposed development.

Table 1 – Numeric Overview

<b>Component</b>	<b>Proposed</b>
Maximum Height (m)	10.84m to ridge line of the built form; and 11.49m to the top of rooftop terrace privacy screens.
Maximum Height RL	RL 19.82 to the proposed ridge height of the built form; and RL20.47 to the top of rooftop terrace privacy screen  The maximum building height is measure from rooftop screen at RL 20.47 to the lowest point of the existing ground level at RL 8.98.
Height (Storeys)	Two storeys plus Attic
Gross Floor Area (GFA)	952.03sqm

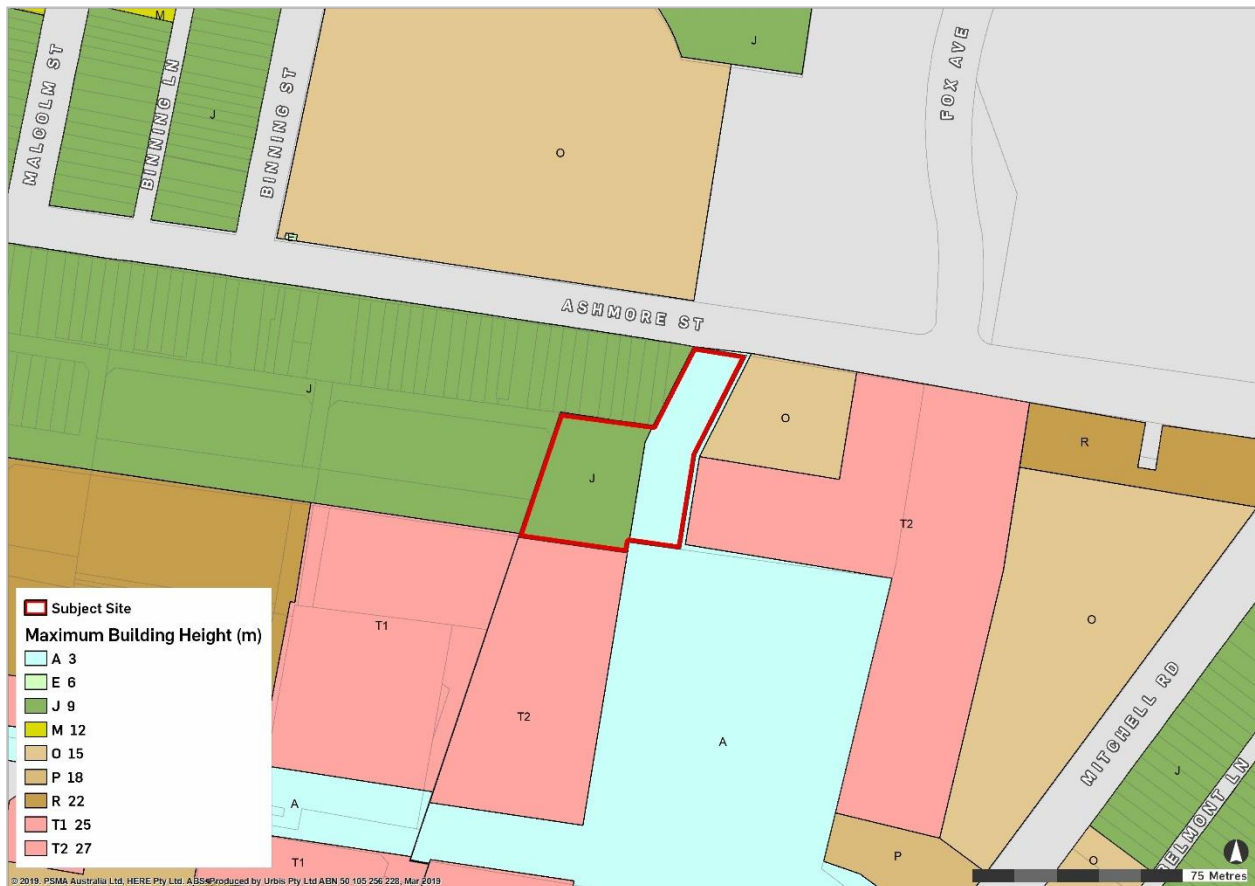
## 4. EXTENT OF VARIATION

### 4.1. DEVELOPMENT STANDARD

The relevant Height of Buildings Map within the SLEP identifies the Site as being subject to a 9m maximum height of building limits (**Figure 4**).

The proposal exceeds the 9m LEP height limit by 2.49m measured to the top of the rooftop terrace privacy screen at RL 20.47m to the lowest existing ground level at RL 8.98m. It is noted that the proposed ridge line is RL 19.82m, which will result in a 1.84m exceedance of the 9m LEP height control for the bulk of the built form.

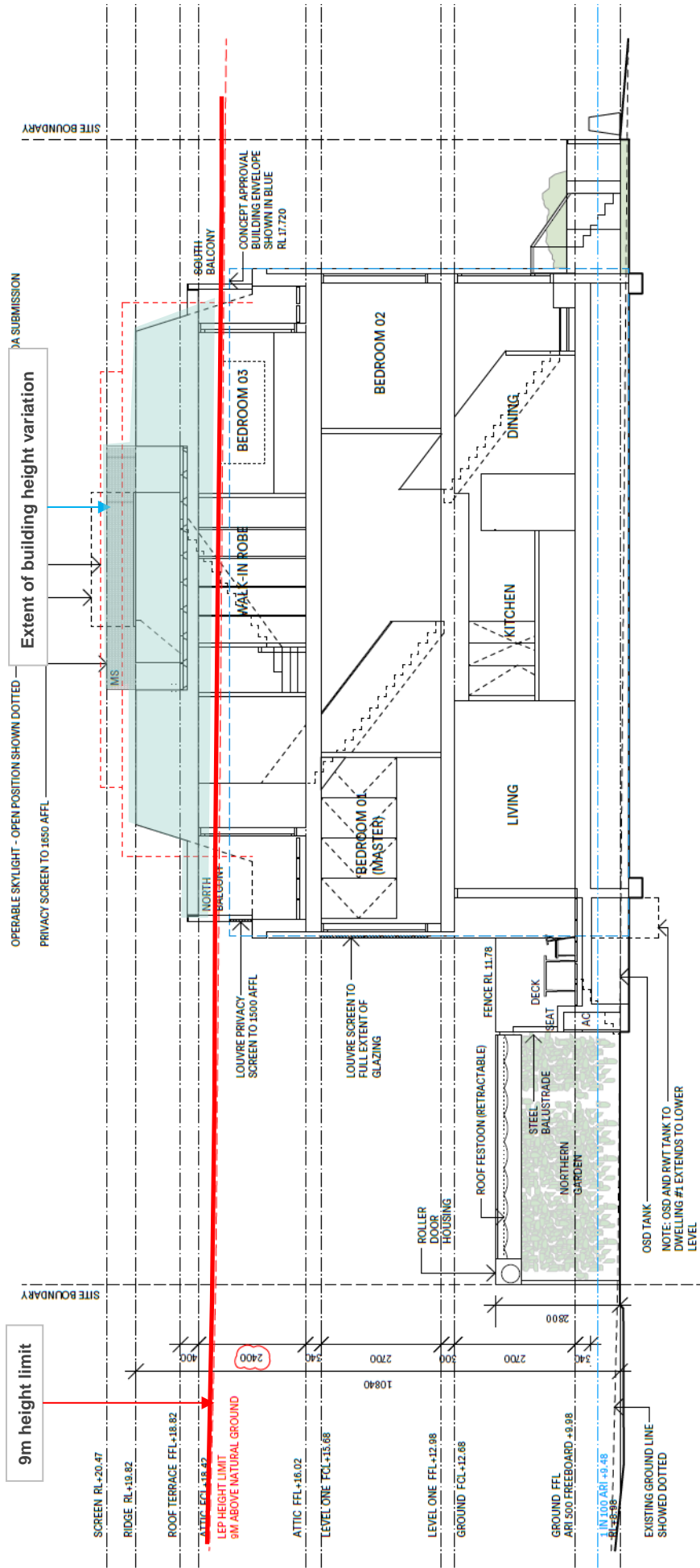
Figure 4 - Maximum building height map extract



### 4.2. AREA OF NON-COMPLIANCE

The area of non-compliance relates to the upper portion of the attic level and the rooftop terrace privacy screen, as shown in **Figure 5**.

Figure 5 – Section showing extent of variation



Source: Andrew Burns

## 5. CLAUSE 4.6 VARIATION ASSESSMENT

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 2012.

### 5.1. KEY QUESTIONS

#### 5.1.1. Is the Planning Control a Development Standard?

The height of buildings prescribed under clause 4.3 of the SLEP 2012 is a development standard capable of being varied under clause 4.6 of SLEP 2012.

#### 5.1.2. 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.

#### 5.1.3. 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.*

### 5.2. CONSIDERATION

#### 5.2.1. 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 notwithstanding the non-compliance with the numeric height control as detailed in Table 2 below.

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

Objectives	Achievement
<i>(a) to ensure the height of development is appropriate to the condition of the site and its context.</i>	The additional building height has been specifically located within the site to ensure the precinct specific height objectives will continue to be met through the response to the site and surrounds.



Objectives	Achievement
	<p>The proposed building height is a result of the building form responding to the particular environmental conditions of the Site, specifically:</p> <ul style="list-style-type: none"> <li>- Ensuring minimum flood planning levels are achieved, which has resulted in the ground floor level being raised approximate 1 metre above existing ground level;</li> <li>- Providing a built form which has generous ceiling heights to correspond to other development immediately surrounding the Site, resulting in a ground and first level floor to ceiling height of 2.7 metres.</li> <li>- The floor to ceiling height clearances have been proposed to respond to the recommendations of the Design Panel.</li> </ul> <p>In addition, consistent with Council's recommendation, the attic level floor to ceiling height has been reduced from 2.7m to 2.4m. This is to comply with BCA attic habitable room floor to ceiling height control and to further reduce the extent to height non-compliance.</p> <p>The height non-compliance also relates to the proposed rooftop terrace privacy screen. This has been designed as, a light-weight structure to minimise additional bulk, and respond to the surrounding built form context. The rooftop terrace utilises roof space to provide additional private open space and further improves amenity for future residents. The rooftop terrace has been designed to have minimal amenity impacts on nearby dwellings while responding to the surrounding built form context.</p> <p>The building elements that are above the height standard, including the privacy screens are light structures and are located towards the centre of the built form that are well separated from the street frontage. These elements have minimal visibility from surrounding public spaces, do not create additional bulk to the terraces and cannot be easily perceived from the public domain.</p> <p>Accordingly, the numerical non-compliance associated with the roof terrace elements do not contribute to bulk or the perceivable height of the built form.</p> <p>It is noted that no shade structure is proposed as part of the proposal.</p> <p>Overall, the proposal retains the streetscape presentation of the building height in storey control (2 storey plus attic level) and building street wall height (2 storey) approved by the</p>

Objectives	Achievement
	<p>Concept DA, to ensure that the proposal remain consistent with the desired streetscape and context character.</p> <p>The height of the building proposed continues to provide a sympathetic transition from the future residential flat building at Block A to the two storey and an attic level terrace development at 1A Metter Street.</p> <p>Importantly, the attic roof form has been through significant design development from a rectilinear roof form to a mansard style roof form to respond to Council’s concerns with the built form presentation of the upper-elements of the building. The design now incorporates cladding with roof sheeting and large room-scaled projecting hoods to ensure the building form positively contributes to the built form character along Metter Street and correlates with the bulk and scale of nearby terrace developments.</p> <p>The proposed built form and additional height have been designed to positively contribute to achieving the desired future character for the Ashmore Estate and will deliver the key elements through the proposed built form massing and internal and external amenity provision.</p>
<p><i>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas</i></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 comprising:</p> <ul style="list-style-type: none"> <li>• C22 – Erskineville Estate Heritage Conservation Area (directly to the north).</li> <li>• C24 – Malcolm Estate Heritage Conservation Area (to the northwest of site).</li> </ul> <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 will include six two-storey modern terraces, attached in a single row, with a stepped back third level for an attic. This residential apartment will be separated by new roads and pedestrian pathways, and feature front and rear landscaped settings.</i></p> <p><i>The existing industrial site does not contribute or relate to the significance of the surrounding HCA’s. Demolition of the existing structures is understood to be acceptable from a heritage perspective, considering the age, use and aesthetic value of the existing structures.</i></p>

Objectives	Achievement
	<p><i>The new development illustrates a substantial effort to minimise visual impacts on the surrounding HCA's through sympathetic design with regards to bulk, scale, height, use of materials and provision of deep soil plantings. The design will have no heritage impact overall.</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> <p>Accordingly, the proposed height variation will result in a built form that provides an appropriate transition will not adversely impact on, the heritage values of the conservation areas.</p>
<i>(c) to promote the sharing of views.</i>	The proposed built form, including the building elements have a similar or smaller building envelope as adjacent and nearby developments, therefore, the proposed height non-compliance will not impact on views.
<i>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas.</i>	The Site is not within close proximity to Central Sydney nor Green Square Town Centre. Accordingly, this objective is not applicable to the proposed variation.

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

## 5.2.2. 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 is specific to the areas of non-compliance.

### Massing & Built Form

The area of height non-compliance relates to a portion of the attic level and the rooftop terrace privacy screen. Nonetheless, the overall built form has been sympathetically designed to minimise visual impact and massing of this part of the building.

The building height non-compliant element of the upper attic level and the rooftop terrace privacy screen is recessed from Coppersmith Lane and Metters Street to reduce the perceived bulk from the street. The rooftop terrace is setback approximately 6.77m from the Metters Street and 13.31m from Coopersmith lane, and is centrally located to minimise visual impact and perceived bulk.

The sightline diagram in **Figure 6** demonstrates that the rooftop terrace and privacy screens will not be easily perceived from Metters Street or Coppersmith Lane, therefore maintaining the streetscape character and does not add to the perceived height of bulk of the development from beyond the Site.

The proposal presents as two-storey plus attic level terraces form to Metter Street and Coppersmith Lane, with the attic level setback from the boundaries. The attic level floor to ceiling height has been reduced from 2.7m to 2.4m. This is to comply with BCA attic habitable room floor to ceiling height control, which is consistent with Council's recommendation and is to reduce additional height and bulk.

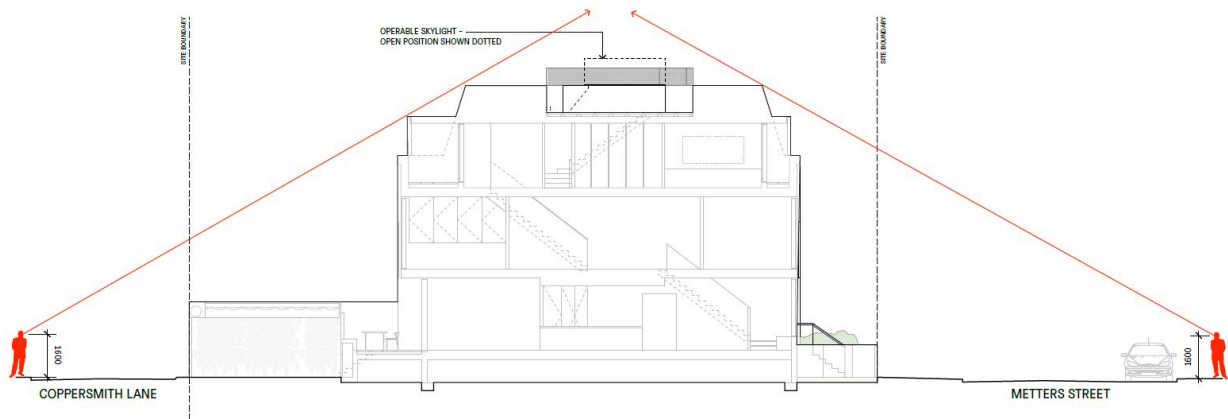
The attic roof form has been through significant design development from a rectilinear roof form to a mansard style roof form roof and incorporating large room-scaled projecting hoods to reduce the bulk and dominance of this element of the built form on the streetscape and when viewed from surrounding properties. This is to respond to Council's concerns with the built form presentation of the upper-elements of the building.

The attic roof form and materials are proposed to correlate with the bulk and scale of nearby terrace developments, including the ones located within the Malcolm Estate Heritage Conservation Area. This form is also proposed as it represents a more traditional attic roof form and is consistent with surrounding terrace developments (refer to **Figure 7**).

The proposal retains the building height in storey (two storey and attic level), street setback and building street wall height (2 storey) set by the Concept DA, to ensure that the proposal remain consistent with the desired streetscape character (refer to **Figure 7**).

An additional contributor to the height non-compliance is the ground level to be raised approximately 1 metre above existing ground level to comply with the flood planning level. While this may result in additional height and a technical non-compliance with the height of building control, it will be consistent with surrounding building forms which are also required to comply with the same flood planning levels.

Figure 6 - Sightline Diagram from Metter street to the roof terrace



Source: Andrew Burns

Figure 7 - Metter Street Montage



Source: Andrew Burns Architect

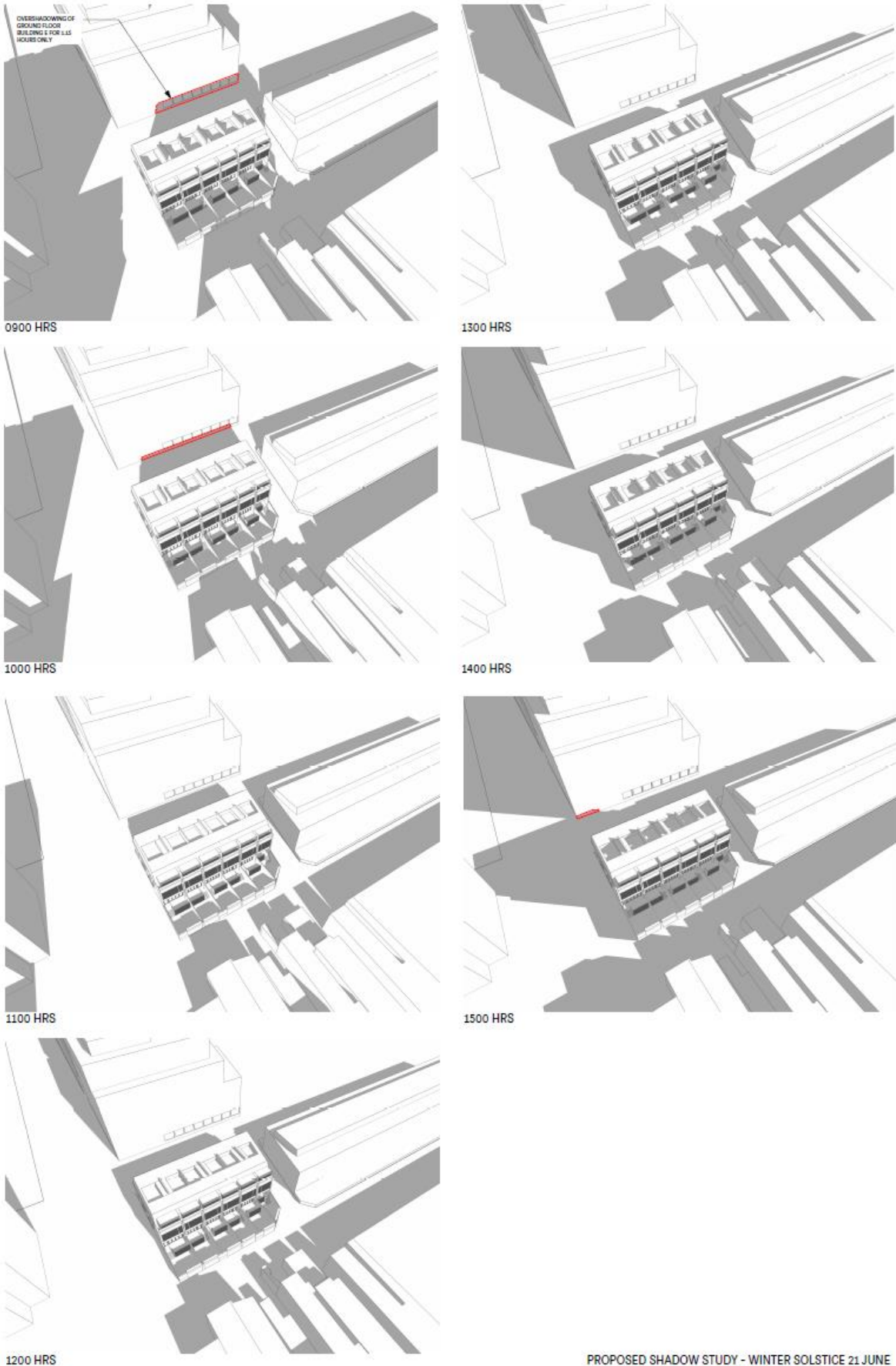
## Amenity

### Over Shadowing

Solar access to surrounding development and public open space will be maintained by the proposal and will not be adversely affected by the proportion of the built form which exceeds the height control. The proposal will result in some additional overshadowing to the ground windows of future Block E building between 9.00am – 10.00am on June 21.

As demonstrated by the Shadow Diagrams (refer to **Figure 8**), throughout the day, most of the shadow is cast within the Site and onto the streets. Good levels of solar access are maintained to open space and adjacent developments. The proposal will maintain appropriate levels of solar access to adjoining developments, and the height non-compliance will not impact on solar access to adjoining developments.

Figure 8 – Shadow Study - Winter Solstice 21 June



Source: Andrew Burns

PROPOSED SHADOW STUDY - WINTER SOLSTICE 21 JUNE

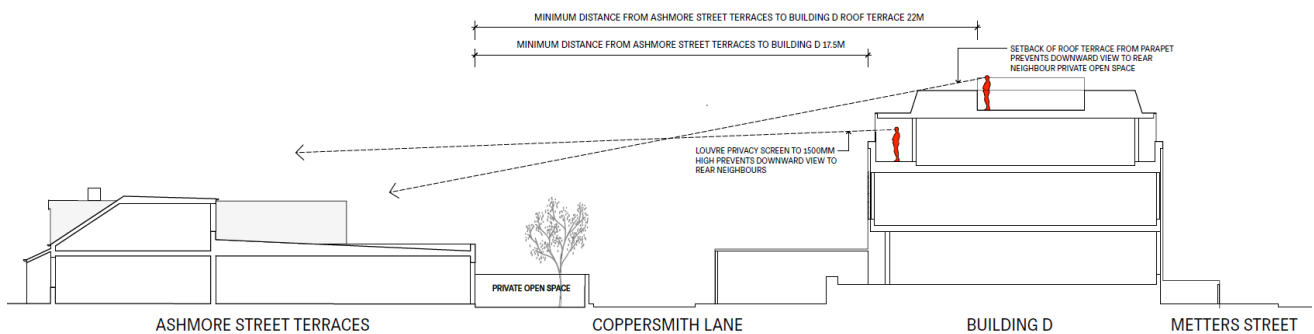
## Privacy

The area of attic level and roof top terrace non-compliance will not create any unacceptable visual privacy impacts. Part of the proposed height non-compliance is a result of the inclusion of privacy screens to minimise overlooking between the proposed rooftop terraces.

The height non-compliance will maintain or enhance privacy in the following ways:

- Privacy screen of 1.5m are provided for the attic level balconies to prevent downward view to the rear neighbouring dwellings (refer to **Figure 9**).
- Privacy screen of 0.65m height are provided along the edge of the rooftop terrace, and dividing screens with planter boxes are provided between the terraces on the southern elevation, to minimise overlooking between the terraces and protect privacy within the development. Although the privacy screen contribute to height non compliance, but it is a necessary element to ensure privacy.
- The trafficable area of the roof terrace has been reduced in size and is setback approximately 6.77m from the Metters Street boundary and 13.31m from Coopersmith lane. Accordingly, there is sufficient separation distance and the centrally located terraces limit downward and overlooking to the rear private open space area of adjacent developments (refer to **Figure 9**).

Figure 9 - Sightline Diagram from balcony and roof top terrace – Coppersmith Lane



Source: Andrew Burns Architect

Overshadowing and privacy impacts in relation to the non-compliant portion of the attic level and the rooftop terrace elements is justified above. No other amenity impacts arise as a result of the non-compliance. Accordingly, the extent of non-compliance will not create additional amenity impact to surrounding residential developments and can be justified on the environmental planning grounds.

### 5.2.3. 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?

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 2012, as outlined within Table 3.

Table 3 – Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
<i>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.</i>	The proposed development relates to residential development.
<i>To encourage employment opportunities in accessible locations.</i>	The proposal is located within a highly accessible area. The proposed built form above the specified

Objective	Assessment
<i>To maximise public transport patronage and encourage walking and cycling.</i>	<p>maximum building height will not affect the proposal's consistency with this objective.</p> <p>The proposed development supports the intensification of activity around existing public transport and bicycle infrastructure. Accordingly, future residents will increasingly choose to travel by bike or public transport instead of a car.</p> <p>The proposed built form above the specified maximum building height will not affect the proposal's consistency with this objective.</p>
<i>To allow appropriate residential uses so as to support the vitality of local centres.</i>	<p>The proposal seeks to construct six residential dwellings as part the Ashmore Estate. The increase in dwellings will to help support the viability of proposed new retail and commercial land uses within the Ashmore Precinct and surrounding area of Erskineville.</p> <p>The height non-compliance will not adversely affect the achievement of this objective.</p>

The proposal, including the height non-compliance is in the public interest as the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

#### **5.2.4. 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.

#### **5.2.5. 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 non-compliance. The strict application of the height control would prevent effective redevelopment of the Site to provide improved and superior internal and external 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 but includes minor additional building elements outside the approved envelope. These building elements located towards the centre of the built form and are well set back from the site boundaries.

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. Maintaining the development standard would not result in a public benefit.

#### **5.2.6. 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 variation request prior to granting concurrence, should it be required.



## 6. 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 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, 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 height breach ensures the ground and the first level have a floor to ceiling height of 2.7m. This is consistent with Design Panel's recommendation and is a result of minimum flood planning levels. The attic level floor to ceiling height has been reduced from 2.7m to 2.4m. This is to comply with BCA attic habitable room floor to ceiling height control and is consistent with Council's recommendation.
- The height control non-compliance is contributed to by the need for the existing ground level to comply with the flood planning levels. While this may result in additional height and a technical non-compliance with the height of building control, it will be consistent with surrounding building forms which are also required to comply with the same flood planning levels.
- The height of the proposed building provide a transition from the future residential flat building at Block A to the two storey and an attic level terrace development at 1A Metter Street. The attic roof form has been modified from a rectilinear roof form to a mansard style roof form, clad with roof sheeting and incorporating large room-scaled projecting hoods. This correlates with the bulk and scale of nearby terrace developments and reduces the perceivable scale and mass of the elements of the building form which exceed the height control.
- The additional height will not result in any detrimental amenity impacts to surrounding development when compared to a complying design. Nor will the extent of the non-compliance result in any adverse visual or privacy impact on the locality.
- The proposed rooftop terrace utilises rooftop space and provides additional private open space that receives year round solar access, which will improve the amenity enjoyed by future residents of the development.
- 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.