

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
--

The logo for URBIS, featuring the word "URBIS" in a bold, white, sans-serif font. The text is positioned to the left of a white square frame that is partially open on the right side. A white vertical line extends from the top of the frame, and a white horizontal line extends from the right side of the frame, intersecting at the top-right corner of the square.

URBIS

CLAUSE 4.6 VARIATION REQUEST SYDNEY LEP 2012 – BUILDING HEIGHT

11-13 Greenknowe Avenue, Elizabeth Bay

Prepared for
TOP SPRING AUSTRALIA DEVELOPMENT NO.1 PTY LTD
27 April 2020

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Stephen White
Senior Consultant	Anna Wang
Project Code	P%18328
Report Number	Final

All information supplied to Urbis in order to conduct this research has been treated in the strictest confidence. It shall only be used in this context and shall not be made available to third parties without client authorisation. Confidential information has been stored securely and data provided by respondents, as well as their identity, has been treated in the strictest confidence and all assurance given to respondents have been and shall be fulfilled.

© Urbis Pty Ltd
50 105 256 228

All Rights Reserved. No material may be reproduced without prior permission.

You must read the important disclaimer appearing within the body of this report.

urbis.com.au

CONTENTS

1.	INTRODUCTION.....	1
2.	ASSESSMENT FRAMEWORK	2
2.1.	CLAUSe 4.6 OF SLEP 2012	2
2.2.	NSW LAND AND ENVIRONMENT COURT: CASE LAW	2
3.	SITE DESCRIPTION.....	6
3.1.	SITE LOCATION.....	6
3.2.	SITE CONTEXT	6
3.3.	PLANNING CONTEXT	7
4.	PROPOSED DEVELOPMENT	8
5.	EXTENT OF VARIATION	9
5.1.	PROPOSED NON-COMPLIANCE	9
5.2.	REASON FOR NON-COMPLIANCE	10
6.	CLAUSe 4.6 VARIATION ASSESSMENT	11
6.1.	KEY QUESTIONS.....	11
6.1.1.	Is the Planning Control a Development Standard?	11
6.1.2.	the Development Standard Excluded from the Operation of Clause 4.6?	11
6.1.3.	What is the Underlying Object or Purpose of the Standard?	11
6.2.	CONSIDERATION	11
6.2.1.	Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case	11
6.2.2.	Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?	14
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?	17
6.2.4.	Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?	18
6.2.5.	Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?	18
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?	18
7.	SUMMARY AND CONCLUSION.....	19
	Disclaimer.....	20

FIGURES

Figure 1 Aerial Photograph of Site	6
Figure 2 Height Control.....	7
Figure 3 Height Analysis Diagram	9
Figure 4 Sightline Diagram from Greenknowe Avenue	14
Figure 5 Shadow Analysis from the area of height non-compliance	16

TABLES

Table 1 Numeric Overview of Proposal 8

Table 2 Demonstrated achievement of the objectives of Clause 4.3 height of buildings standard..... 11

Table 3 Assessment of Compliance with Land Use Zone Objectives..... 17

1. INTRODUCTION

This request has been prepared in support of a development application (DA) for a residential flat building development at 11-13 Greenknowe Avenue, Elizabeth Bay (the Site).

The DA seeks development consent for the following:

- Demolition of existing building onsite.
- Construction of a part six and part seven-storey residential flat building comprising 30 units, one basement level providing 31 car parking spaces, loading and servicing bays and waste management facilities on the ground floor.
- Site landscaping throughout the Site, including the embellishment of the ground and open rooftop communal areas.

This request seeks to vary the building height development standard prescribed for the 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, Architectural Drawings prepared by PBD Architects, 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 building height development standard in Clause 4.3. The assessment of the proposed variation has been undertaken 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 correct 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 cl4.6(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 (cl4.6(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 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 11-13 Greenknowe Avenue, Elizabeth Bay and is legally described as Lot 1 DP135651. The Site is rectangular in shape and has a total site area of 1,340m² (refer to Figure 1).

The Site is defined by a 30m primary street frontage to Greenknowe Avenue to the north and the southwestern corner of the site backs onto Baroda Lane. The Site is located on a sloping block with a gentle west-east cross fall.

The Site is currently occupied by an elevated five storey building above a basement car park. The building has a zero setback to Greenknowe Avenue and is characterised by open space along its southern boundary.

This building was previously owned and operated by the Country Women's Association as club and accommodation facilities.

An aerial photograph of the Site is included in Figure 1 below.

Figure 1 Aerial Photograph of Site



Source: [Urbis 2020]

3.2. SITE CONTEXT

The Site is located within the City of Sydney Local Government Area (LGA) and is approximately 500m walking distance from Kings Cross town centre, located to the southwest of the Site. Elizabeth Bay is an important location within the City of Sydney LGA, providing a variety of housing types, retail tenancies and public open spaces.

The Site is located in a predominantly medium to high density residential area. The site and its adjacent lots are zoned R1 General Residential zoning, which allows for a range of residential heights and densities. Building heights in the locality ranges between 15m to 35m.

The surrounding developments are described below:

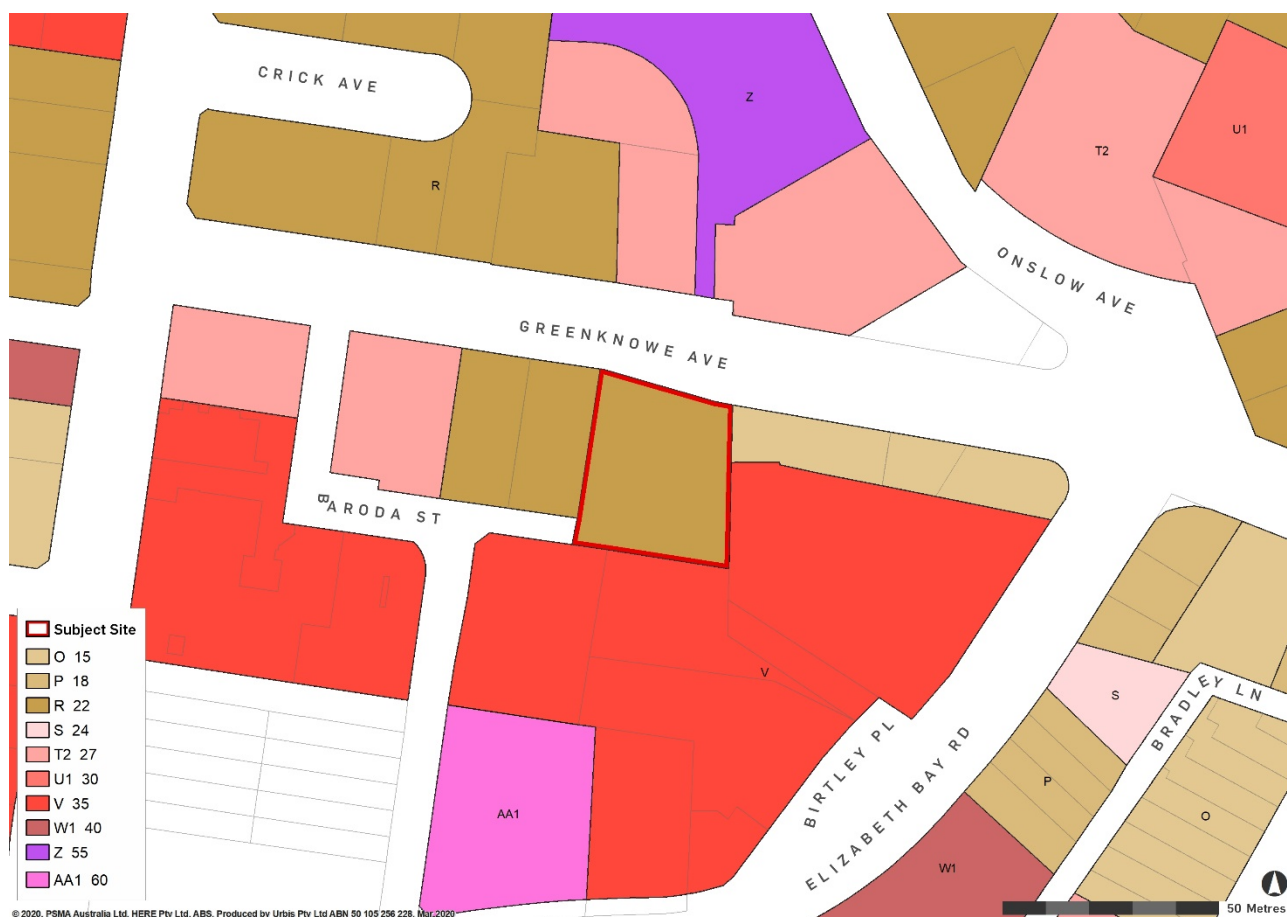
- To the north – directly on the opposite side of Greenknowe Avenue, is a row of residential flat buildings ranging from six to eight storeys.
- To the south – to the south of the site is a six storey residential flat building located at 6A Birtley Place. Mature trees and dense vegetation are located between the site and 6A Birtley Place. To the southeast is a nine storey residential flat building.
- To the east – adjoining the site to the east is a five storey residential flat building. Further to the east are three storey attached terrace style dwellings.
- To the west – adjoining the site to the west is a part two and part-three storey residential flat building that is elevated above the footpath. Further to the west is a part four and part nine storey residential flat building.

3.3. PLANNING CONTEXT

The Site is zoned 'R1 – General Residential'. Within the R1 zone, 'residential flat buildings' are permitted within consent. The proposal is defined as a 'residential flat building' and is permissible with consent.

The SLEP 2012 applies a maximum building height of 22m across the Site (as shown in Figure 2 below). Area surrounding the site has height control ranging between 15m to 35m.

Figure 2 Height Control – reference "R"



Source: Sydney LEP

4. PROPOSED DEVELOPMENT

This development application seeks approval for the following:

- Demolition of existing building onsite.
- Construction of a part six and part seven-storey residential flat building comprising 30 units, one basement level providing 31 car parking spaces, loading and servicing bay, bicycle storage and waste management facilities on the ground floor.
- Site landscaping, including the embellishment of the ground and open rooftop communal areas.

Table 1 provides a numeric overview of the proposed development.

Table 1 Numeric Overview of Proposal

Parameter	Proposed
Site Area	1,340sqm
Gross Floor Area	3,419sqm
FSR	2.55:1
Building Height / Storeys	21.6m to the top of the parapet at RL 57.95, 22.33m to the top of the lift overrun at RL 59.1 Part six and part seven storeys
Number of Apartments	30
– 1 bedroom units	5
– 2 bedroom units	11
– 3 bedroom units	14
Car parking	31 total car parking spaces including 3 accessible spaces.
– Resident	26
– Visitor	5
– Motorcycle	3
Deep Soil Area	134sqm
Communal Open Space	391sqm

5. EXTENT OF VARIATION

5.1. PROPOSED NON-COMPLIANCE

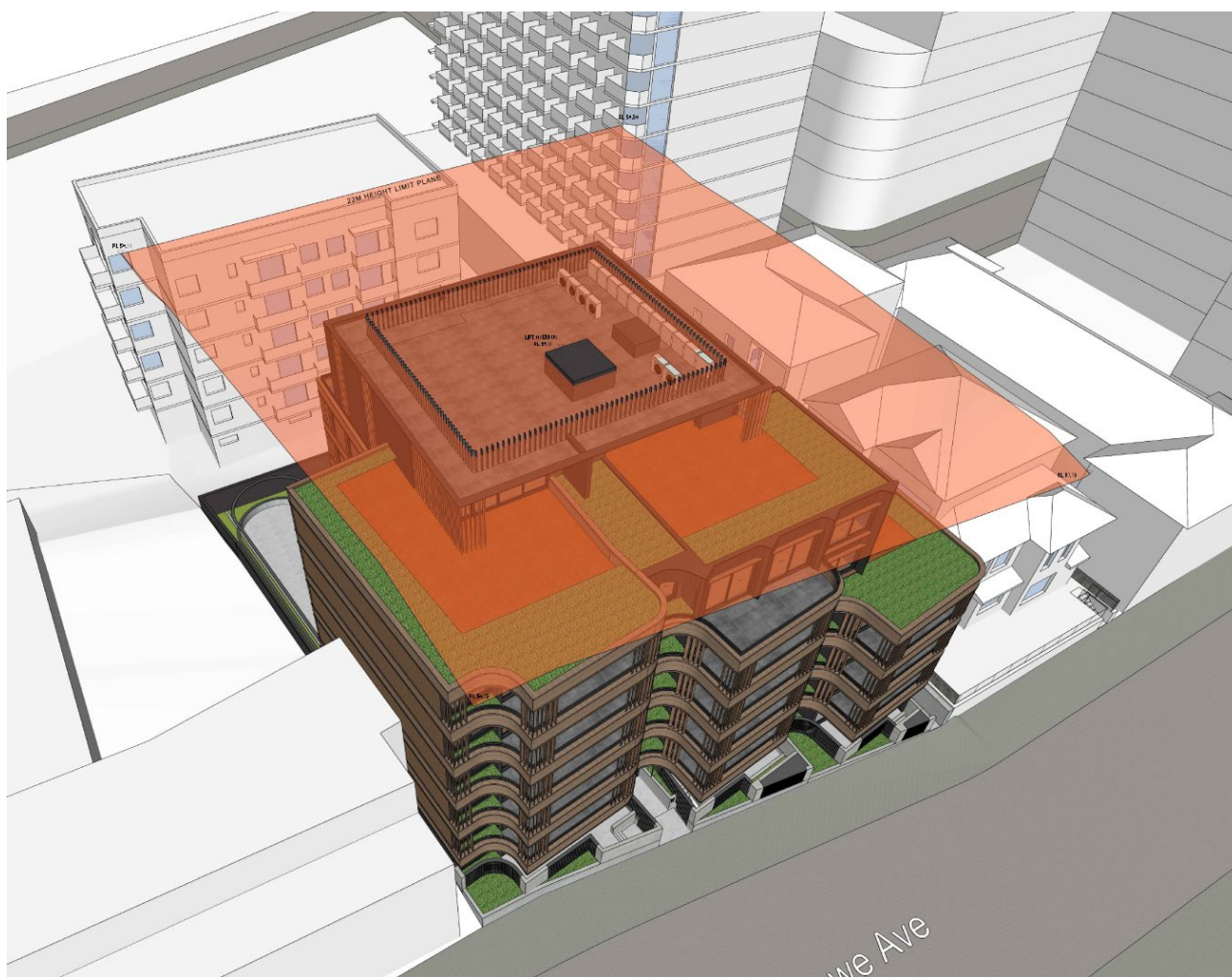
The proposed building has a maximum height that varies between 21.6m measured from the existing ground level to the top of the parapet at RL 57.95, and 22.3m measured to the top of the lift overrun at RL 59.1. The height non-compliance is 0.3m and represents minor variation of 1.36% above the 22m height standard.

The area of height non-compliance relates to the centrally located lift overrun and the top portion of the acoustic batten screen around the boundaries of the roof. The area of non-compliance are minor building service and screen structures located towards the rear of the site and does not comprise any floor space.

A Height Plane Diagram has been prepared by PBD Architects, which clearly articulates the specific parts of the building that vary from the development standard (refer to Figure 3).

As evident below, the entire built form is below the 22m height standard, with the exception of the lift overrun and the screen.

Figure 3 Height Analysis Diagram



Source: PBD Architects

5.2. REASON FOR NON-COMPLIANCE

The variation to the maximum height of building development standard is directly attributable to the following reasons:

- The lift overrun provides accessible lift access to the rooftop communal open space and is a necessary building service structure that can improve the amenity of the development.
- The acoustic batten screen is an effective acoustic measure to reduce noise impact from the condenser units located on the roof and is recommended by the Acoustic Consultant.
- The height non-compliance is also the result of providing compliant floor to floor height (3.15m) and ceiling height across all floor levels.

6. 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.

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. 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. Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

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
<i>(a) to ensure that the size and scale of development is compatible with the desired future character of the locality,</i>	The structures exceeding the height control are minor in nature (only 0.3m above the height control) and are located towards the rear of the site setback from the edge of the building. The structures will largely be screened from view by

Objective	Assessment
	<p>the building parapet, which will have limited visibility from surrounding development and public domain, including Greenknowe Avenue. Accordingly, the minor numerical non-compliance do not contribute to bulk or the perceivable height of the built form.</p> <p>The area of height non-compliance does not comprise additional gross floor area for the Site, therefore it does not represent an over development of the Site and does not contribute to additional bulk of the building.</p> <p>The parapet of the building is below the 22m height control, the majority of the built form is also well below the 22m height control. Accordingly, the proposed built form achieves a building size and scale is compatible with surrounding context.</p> <p>The bulk and scale associated with the minor height exceedance is considered negligible, and only visible from a distance, hence the built form achieves a compatible relationship with the desired future character of the locality.</p>
<p><i>(b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,</i></p>	<p>The Site is not classified as a heritage item but is located in the Elizabeth Bay and Rushcutters Bay Heritage Conservation Area.</p> <p>The proposed building design, including the roof structure, respect the heritage conservation area and is supported by the Heritage Impact Statement prepared by Weir Phillips Heritage and Planning for the following reasons:</p> <p><i>The proposed works will have the opportunity to construct of the sympathetically designed modern infill building that supports the ongoing significance of the area as a mixed use precinct, will have an acceptable impact on the Conservation Area.</i></p> <p><i>The building is varied in height (6 storeys to 4 storeys) when viewed from Greenknowe Avenue to provide visual interest and transition in scale. The top level is small in area and well set back, given the setback of level 6 and the topography of the site, it is not easily perceived from Greenknowe Ave. It will not have undue prominence in the streetscape as the site is approached in either direction along Greenknowe Avenue. It is simple in form and clad in a dark material to make it as recessive as possible. It will sit comfortably within the varied roof heights in Greenknowe Avenue, particularly on approach from the east where the contemporary terraces at No. 15 Greenknowe Avenue are limited to three stories.</i></p>

Objective	Assessment
	<p><i>The proposed new building has been designed with regard to the setback, massing and scale of the adjacent buildings, enabling the proposed building to sit comfortably within the its setting, which is compiled of varied built forms.</i></p> <p><i>The bulk and scale of the proposed new building is such that it will have no undue prominence in the wider setting of the Conservation Area and other heritage items.</i></p> <p><i>The proposed works will have no impact on the ability to understand the significance of the nearby heritage listed items and the adjoining Conservation Area. No significant view corridors will be blocked. The building will read in the setting of nearby items as one of several buildings of a similar massing and scale.</i></p> <p>The non-compliant building structure is minor in nature and scale. It is setback from Greenknowe Avenue and cannot be easily perceived from the public domain. Therefore, it will not detract the heritage significance of the Conservation Area and can be supported from a heritage perspective.</p>
<p><i>(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</i></p>	<p>The minor numerical height exceedance 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 and amenity impact on the locality.</p> <p>Detailed amenity and visual impact assessment is provided in Section 6.2.2 of this report.</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

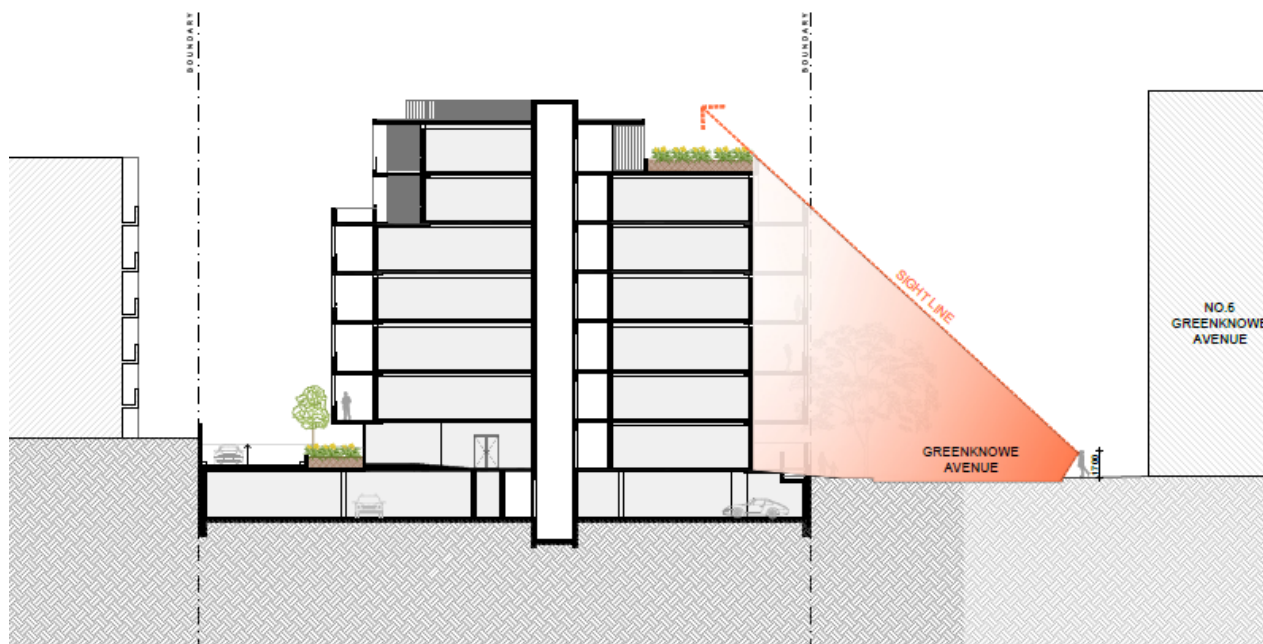
The proposed building largely complies with the LEP height standard. The only exception being the lift overrun and acoustic screen located on the rooftop, which breach the height development standard by 0.3m.

The lift overrun and the acoustic screen are limited in size and only exceed the height standard by a minor amount. The area of non-compliance are located on the roof and towards the rear of the building, which is setback from the building parapet and will not be visible from Greenknowe Avenue (refer to Figure 4).

In addition, the proposed built form is within the height limit and the area of height exceedance does not comprise any floorspace. Therefore, the height non-compliance still maintains the streetscape character and does not add to the perceived height of bulk of the development from beyond the Site.

Accordingly, the minor area of height non-compliance does not contribute to additional bulk of the building and will not create adverse visual impact from the public domain.

Figure 4 Sightline Diagram from Greenknowe Avenue



Source: PBD Architect

Amenity

The lift overrun is a building servicing structure that provide equitable access to the rooftop communal open space area and is a necessary service structure to deliver good amenity for the future residents. The structure satisfies 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 condensers provide heat/cooling system that enhances internal amenity for future residents. The location and layout of the condenser is consistent with control 4.2.7 of the Sydney 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. As a result of this, acoustic screen is proposed to minimise noise impact to surrounding developments, which is a noise mitigation measure recommended by the Acoustic consultant. Therefore, the acoustic screen is necessary to protect the amenity of the surrounding development.

Accordingly, the non-compliant elements are necessary service structure and acoustic measure to improve the amenity of future residents and surrounding developments.

Overshadowing

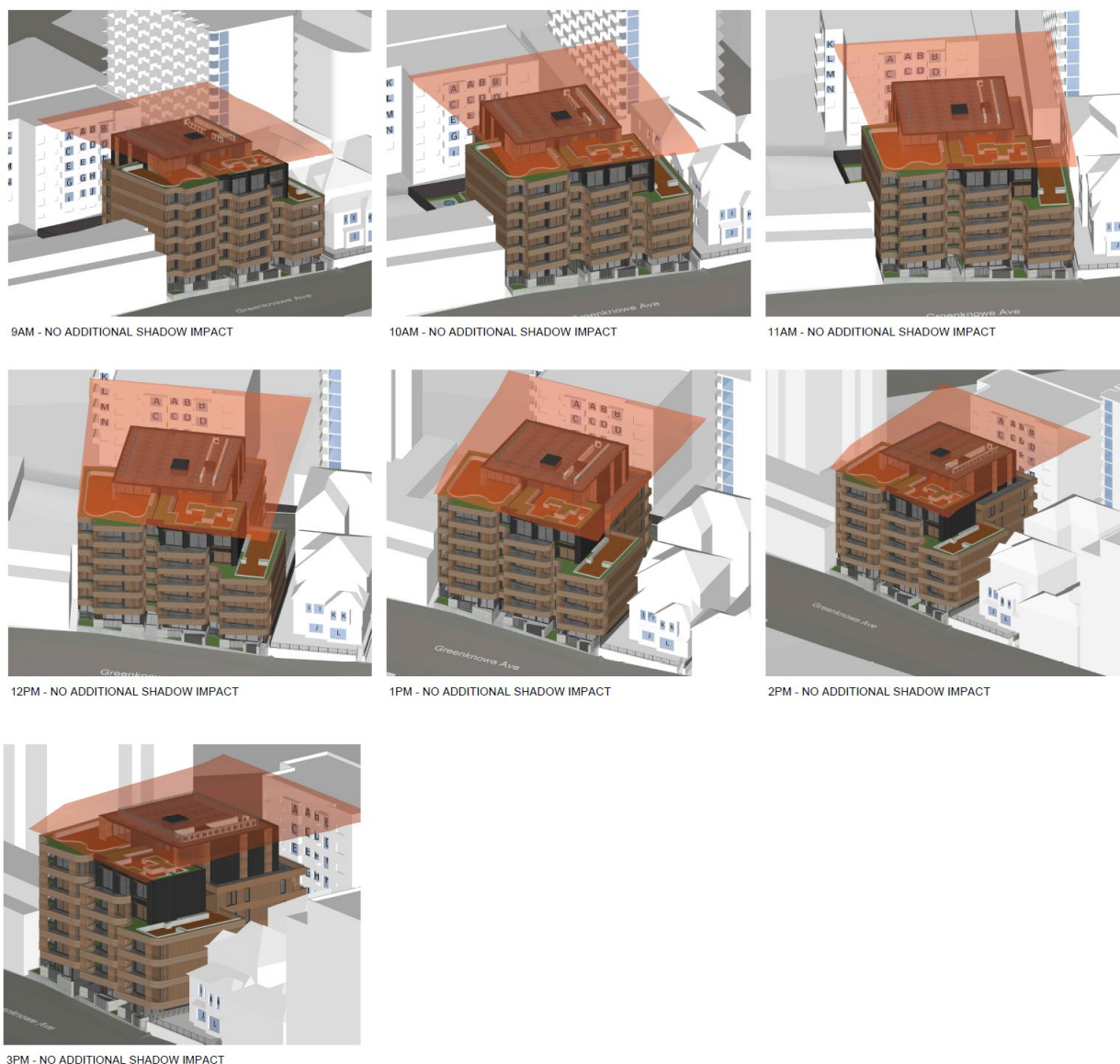
Solar access to surrounding development and communal open space will not be adversely affected by the portion of the built form that exceeds the height control.

As demonstrated by the Shadow Diagrams (refer to Figure 5) and given the minor numerical non-compliance (0.3m), throughout the day, no shadow is cast by the roof top structures. Additional shadow impact is from the portion of the building that is within the height limit, which is considered acceptable and compliant with ADG requirement. The following measures have been incorporated to minimise overshadowing:

- The building has been setback 8.5m to 11.5m from 6a Britley Place, which is more than ADG building separation requirement and is a positive measure to maximise daylight and privacy.
- It is unreasonable to expect the lower levels of the neighbouring apartments to receive direct solar access in a high-density residential area. To date, the neighbouring dwelling can enjoy 'borrowed solar access' because the existing building onsite is below the allowable height limit and the subject site is underdeveloped.
- More importantly, the 0.3m height non-compliance does not have the effect of creating any additional solar access to the neighbouring apartments.

Accordingly, height non-compliance will not impact on solar access to adjoining developments.

Figure 5 Shadow Analysis from the area of height non-compliance



Source: PBD Architects

Solar access within the site

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.

In mid-winter, more than 50% of the principal usable part of the communal open space receives direct sun between 10am to 3pm.

70% of the apartments will receive two hours solar access to living room, and 73% of the balcony will receive two hours solar access during mid-winter. 13% (4 apartments) of the apartments receive no direct sunlight between 9am and 3pm at mid-winter.

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

View

View impact has been assessed and is based on a desk top review of aerial imagery, architectural plans, preliminary 3D modelling. At the time of writing this report, Urbis have not had the opportunity to inspect

views from neighbouring residences. Our assessment of likely view access is based on our observations of relative heights, orientation, spatial separation between buildings.

The locality comprises a number of neighbouring residential flat buildings of similar and greater height to the existing building on site. Given the topography of the site and the surrounding development context, the private domain visual catchment of the site is small and constrained to the closest neighbouring developments that currently has northly outlook due the underdevelopment to the existing site.

The lower portion of the proposed development is likely to affect north-easterly views from the following neighbouring sites:

- 6A Birtley Place
- Mid-level units at 2A Elizabeth Bay Road
- Mid-level units at 2 Elizabeth Bay Road

Any potential view loss will be a result of a compliant scheme and the site been currently underdeveloped. The minor amount of acoustic screen and lift overrun above the LEP height control is unlikely to create any significant view loss. There are no iconic currently views available from the immediately impacted apartments.

In summary, the scale and massing proposed is not dissimilar in height to other surrounding developments. The potential north-east view impact is from the lower parts of the proposed built form, which is within the complaint LEP height. Accordingly, the area of height exceedance in our opinion does not create an unreasonable impact on view sharing.

Privacy

The area of height non-compliance relates to building service and screen structure, which does not comprise any habitable floor space and will no create any privacy impact.

Overall, the area of non-compliance is minor will not result in any detrimental amenity impacts to surrounding development when compared to a complying design.

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 R1 General Residential 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

Clause	Provision
<i>To provide for the housing needs of the community.</i>	<p>The proposed height variation ensures that the housing needs of the community can be provided within a high amenity residential environment.</p> <p>The variation ensures that ADG and high amenity level can be achieved within the building including minimum floor to floor heights, accessible communal open space and reduced acoustic impact.</p>
<i>To provide for a variety of housing types and densities.</i>	The proposed variation meets this objective by providing a range of 1, 2 and 3 bedroom apartments in an established residential environment.

Clause	Provision
	The area of height non-compliance does not hinder the provision of dwelling mix, instead, it provides equitable lift access to the rooftop communal open space area and minimise acoustic impact from the condensers.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	Not applicable.
<i>To maintain the existing land use pattern of predominantly residential uses.</i>	The proposal is for a residential flat building within an established residential zone. The roof structures service the residential building and protects the amenity of surrounding residential dwelling, therefore maintaining the existing residential land use pattern.

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 height variation 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 variation. 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.

There is no public benefit that will be served by maintaining the height control, instead, an opportunity will be lost to deliver an accessible development while protecting the acoustic amenity of the surrounding developments.

The lift overrun and the acoustic screen are building service structure that provide a good level of accessibility, and reduces noise impact to surrounding developments, which are necessary to deliver a well-designed development for future residents and is considered appropriate.

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. Accordingly, maintaining the development standard would not result in a public benefit.

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 AND CONCLUSION

As described in the preceding sections, taking into account the context and the character 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 by the proposal, the built form has been developed in response to site topography and the character of surrounding context.
- The height non-compliance is very minor (0.3 metres) and represents 1.36% above the 22m height standard. The entire built form is below the 22m height standard, with the exception of the lift overrun and the rooftop screen.
- The area of height non-compliance relates to the lift overrun and the top portion of the acoustic batten screen. The area of non-compliance relate to building service and screen structures and does not comprise any habitable floor space. Accordingly, the development is not considered as an overdevelopment for the Site and the area of non-compliance does not contribute to the visual bulk of the building.
- The non-compliant roof service structure will provide essential amenity for the residents. This includes accessible lift access to the rooftop communal open space area and acoustic batten screen to minimise noise impact.
- The provision of the acoustic screen is a result of having consolidated and centralised condenser on the roof, which can also reduce heat and noise impact and is a more efficient design outcome that is consistent with the DCP control.
- The area of height non-compliance is centrally located and towards the rear of the Site. Accordingly, the area non-compliance cannot be easily perceived from Greenknowe Avenue and will not detract the character of the area. Careful regard to amenity of apartments to the rear has been made, through the building setback being greater than the ADG minimum.
- The minor numerical height exceedance 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 R1General Residential zone and the objectives 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.

DISCLAIMER

This report is dated 27 April 2020 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of TOP SPRING AUSTRALIA (**Instructing Party**) for the purpose of CLAUSE 4.6 VARIATION REQUEST (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

In preparing this report, Urbis may rely on or refer to documents in a language other than English, which Urbis may arrange to be translated. Urbis is not responsible for the accuracy or completeness of such translations and disclaims any liability for any statement or opinion made in this report being inaccurate or incomplete arising from such translations.

Whilst Urbis has made all reasonable inquiries it believes necessary in preparing this report, it is not responsible for determining the completeness or accuracy of information provided to it. Urbis (including its officers and personnel) is not liable for any errors or omissions, including in information provided by the Instructing Party or another person or upon which Urbis relies, provided that such errors or omissions are not made by Urbis recklessly or in bad faith.

This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

