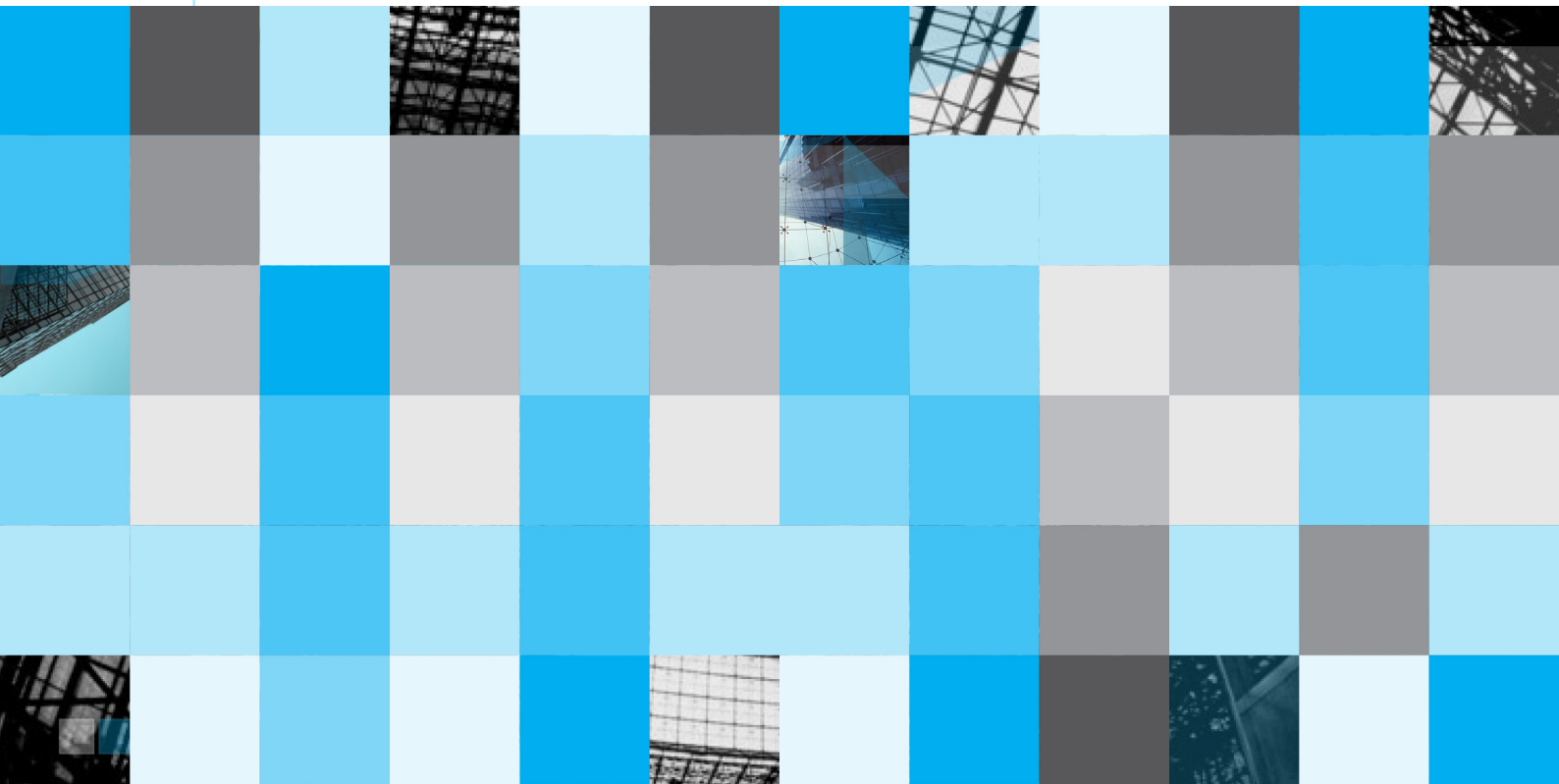


Attachment D

Clause 4.6 Variation Request – Height of Buildings



45-47 Ralph Street and 634 Botany Road, Alexandria

Clause 4.6 – Building Height Development Standard

Clause 4.6 – Building Height Development Standard

**45-47 RALPH STREET AND 634 BOTANY ROAD,
ALEXANDRIA**

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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Sydney Local Environmental Plan 2012 (SLEP). The request relates to a Development Application for a part 6 part 7 shop top housing development comprising ground floor commercial tenancies and residential apartments above at 45-47 Ralph Street and 634 Botany Road, Alexandria.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Sydney Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Sydney Local Environmental Plan 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.3 Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows:
 - (a) to ensure the height of development is appropriate to the condition of the site and its context,
 - (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
 - (c) to promote the sharing of views,
 - (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

Building height (or height of building) is defined as the vertical distance between ground level (existing) at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The maximum height shown for the land on the Map for the site to which the proposed building relates is 22 metres, as shown in Figure 1.



Figure 1:

Extract from the SLEP
Height of Buildings
Map

1.4 Extent of Variation to the Development Standard

The majority of the proposal is below the height control with the exception of:

- a firestair at the north-eastern corner of the development
- lift overrun at north-eastern corner of the development
- a corner roof feature at the north-eastern corner of the development
- fence to the private open space areas on the roof of the Botany Road building
- pergolas to the private open space areas on the roof of the Botany Road building
- car park exhaust adjacent to the lift overrun
- vent adjacent to the lift overrun
- the PV system on the roof top

These elements are illustrated in the 3D height plane diagram in Figure 2 below. A comparison of the proposed heights against the development standard applicable to the site is illustrated below:

Element	Proposed Height	Variation to 22m control
firestair at the north-eastern corner of the development	23.47 metres	+1.47m (6.6% over)
lift overrun at north-eastern corner of the development	25.17 metres	+3.17m (14.4% over)
corner roof feature at the north-eastern corner of the development	24.85 metres	+2.85m (12.9% over)
fence to the private open space areas on the roof of the Botany Road building	22.07 metres	+0.07m (0.3% over)
pergolas on roof of Botany Road building	23.37 metres	+1.37m (6.2% over)
car park exhaust	23.47 metres	+1.47m (6.68% over)
vent adjacent to the lift overrun	25.17 metres	+3.17m (14.4% over)
PV system on the roof top	22.18 metres	+0.18m (0.8% over)

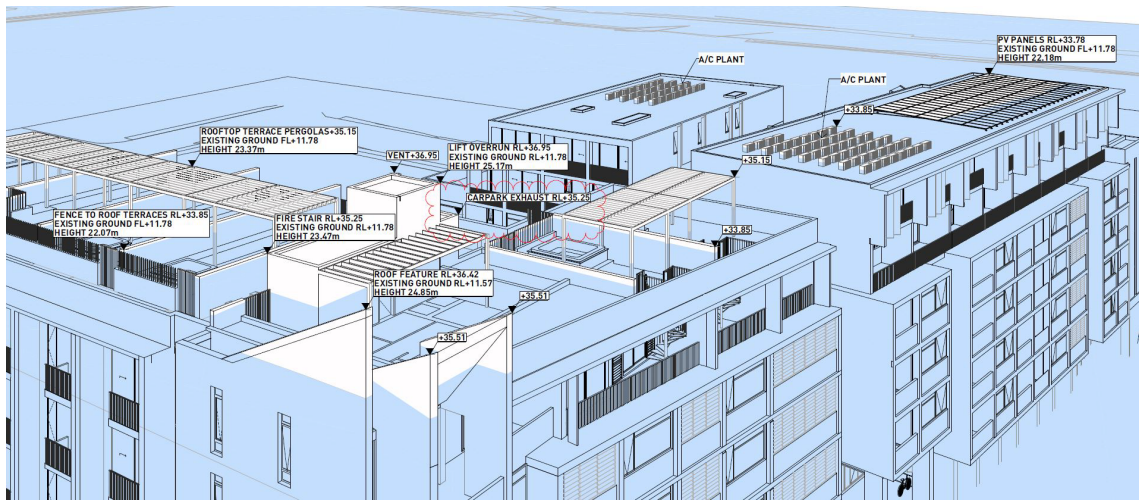


Figure 2:

Height plane drawing which illustrates the components which are above the height control

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Mical Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

The specific objectives of the building height development standard, as specified in clause 4.3 of the Sydney Local Environmental Plan 2012 are identified below. A comment on the proposal’s consistency with each objective is also provided.

- (a) to ensure the height of development is appropriate to the condition of the site and its context,

The vast majority of the development sits below the maximum 22 metre building height control, noting that there are elements such as the retained interwar functionalist building and the lower 5 storey element to Ralph Street which are well below the height control. The majority of the elements proposed above

the 22 metre height control only exceed the height control by a very small margin. The elements with the greatest extent of height variation are a lift overrun which provides access to the common open space area, and also the corner architectural feature which is deliberately accentuated in order to properly celebrate this important corner of the development which heralds the entrance to the through site link. This element is consistent with the criteria for an architectural roof feature.

The development still presents as 6 storeys in scale to Botany Road and is therefore appropriate to the condition of the site and its context which is characterised by an emerging 6 storey scale along Botany Road.

(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,

The site does not contain a heritage item nor is it located within a heritage conservation area or special character area, or adjacent to any heritage items.

(c) to promote the sharing of views,

The proposed development will not impact on any scenic or iconic views.

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

Not applicable.

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

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

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

The underlying objective of the height control is to achieve an appropriate height on the site which is compatible with the emerging context of the site. Due to the design, location and configuration of the proposed development, it successfully achieves these objectives. Strict compliance with the height control would lead to a less satisfactory outcome as it would negatively impact on the quality of the design and architectural expression of the development, it would reduce residential amenity as it would require removal of all private and common open space from the roof, and also require removal of the PV panels on the roof. Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the height control because it would encourage a less desirable outcome for the subject site and surrounding area.

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;**

Council has historically adopted a relatively flexible approach to the implementation of the height control in circumstances where the objectives of the control are achieved, particularly where the variation is associated with the delivery of common open space on the rooftop where it will enjoy generous solar access. A recent example is Development Application D/2016/865 on the immediately adjacent development site to the north at 620-632 Botany Road, Alexandria which was approved on 8 December 2016 for a 6 storey shop top housing development containing 191 apartments. That site was also located within a 22 metre height zone and a variation to building height was supported specifically to provide for roof top communal open space in exactly the same manner as that which is proposed in this application.

5. **the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

The proposed zoning of the land is considered to be reasonable and appropriate.

Strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case in that:

- The vast majority of the development sits below the maximum 22 metre building height control, noting that there are elements such as the retained interwar functionalist building and the lower 5 storey element to Ralph Street which are well below the height control.
- The proposal has retained the interwar functionalist building on the site at Council's request which is only a single level and this has resulted in the need to relocate built form and mass to other parts of the site to accommodate the floor space, which has placed pressure on building height compliance.
- The majority of the elements proposed above the 22 metre height control only exceed the height control by a very small margin. The elements with the greatest extent of height variation are a lift overrun to provide access to common open space on the roof, and also the corner architectural feature which is deliberately accentuated in order to properly celebrate this important corner of the development which heralds the entrance to the through site link. This element is consistent with the criteria for an architectural roof feature in that:
 - It comprises a decorative element on the uppermost portion of a building which is integral to the architecture of the development
 - It is not an advertising structure
 - It does not include any floor space
 - Its location does not result in any significant overshadowing impact.
- The proposed areas of variation do not result in any additional overshadowing to neighbouring properties beyond that which results from the approved building envelope.
- The minimal nature of the variation for the PV system, combined with the setback of the other elements such as the lift overrun and roof top pergolas, is such that there is no adverse visual impact associated with the proposed variation when compared to a strictly compliant height.
- The ground floor level is established by the Peak Flood Level given the flooding affectation applicable to the site and therefore the development cannot be lowered to reduce the extent of variation.
- The scale of the development in terms of its three dimensional size will not be perceived as jarring or antipathetic in a streetscape and urban design context.
- The proposed development involves a compliant floor space ratio and the proposed variation to the height control does not facilitate a density beyond that which is anticipated for the site under the applicable planning controls.

- The locality is undergoing a transition in its character and other developments are likely to occur along Botany Road in the vicinity of the site. The proposed variation to the height control is minor and will not result in a building which is inconsistent with the desired future character of development in the zone and locality generally.
- Whilst the building height development standard has not been “virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard”, the Council has nonetheless consistently supported a Clause 4.6 variation to the building height standard for the purpose of roof top structures a great number of times. Of particular relevance is Development Application D/2016/865 for the immediately adjacent development to the north at 39 Ralph Street which was approved on 8 December 2016 for a 6 storey shop top housing development containing 191 apartments. The variations for that project were to provide access to roof top amenities, and similarly in this instance the proposed variations allow for access to both private and common open space, which provide increased residential amenity.
- Requiring strict compliance would negatively impact on the quality of the design and architectural expression of the development and strict compliance would merely serve to diminish the design outcome envisaged as a result of the design competition but without any commensurate benefit to the streetscape or the amenity of the adjoining properties. Strict compliance would also and also require removal of the PV panels on the roof and all open space from the rooftop. Accordingly, strict compliance is unreasonable and unnecessary in the circumstance.

As the proposal is consistent with the objectives of the height of buildings control, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

1.6 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

The primary basis for the proposed variations to the building height control is to provide an architectural roof feature at the north-eastern corner of the development, as well as to provide other improved outcomes including PV panels on the rooftop, pergola structures to improve the amenity of the private roof terraces, and lift overruns to access common open space on the roof.

Due to the particular site circumstances and the design of the subject proposal, the majority of the components which breach the height control will not be readily visible from the public domain or the ground floor plane of the site, or the extent of breach for parapet components is so minor as to not be perceptible to the casual observer. Furthermore, the overshadowing assessment has demonstrated that the proposed areas of height variation does not generate any additional shadow impact to adjacent sites beyond the previously approved building

envelope. Accordingly, the proposed areas of variation to the height control do not result in any adverse impact to adjacent properties.

In addition to the above it is noted that the building is required to be raised above the ground level in order to address the flooding affectation on the site. If the site was not constrained by this affection, there would be no height breaches for most components and the extent of variation for the fire stair and architectural roof feature would be greatly diminished. The Land & Environment Court matter of Adam Hughes Pty Ltd v Penrith City Council [2018] NSWLEC 1369 recognises that a height non-compliance as a result of a need to respond to a flood constraint is an environmental benefit.

The proposed variation to the height control allows for the most efficient and effective use of the land to maximise residential amenity and architectural merit. Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public in the particular circumstance of this site and this proposal, but would reduce the amenity provided for the future occupants of the development and also diminish the architectural merit and design excellence of the proposal.

In this particular circumstance there are sufficient environmental planning grounds to warrant the proposed variation to the current height control as the proposal will achieve a superior outcome with a higher level of residential amenity within the site and without any adverse impact to adjacent sites.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

'to encourage:

- i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- ii) the promotion and co-ordination of the orderly and economic use and development of land..'

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance would prevent the achievement of the vision expresses for the site in the competition winning entry by Smith & Tzannes.
- The proposed variation allows for the most efficient and economic use of the land, enabling utilisation of the roof top of the building to maximise energy efficiency and amenity for the future development within without adversely impacting on amenity of adjacent sites.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is 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 in which the development is proposed to be carried out.

Objective of the Development Standard

The proposal’s consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B7 Business Park zone pursuant to the SLEP 2012

The objectives of the B7 Business Park zone are:

- To provide a range of office and light industrial uses.
- To encourage employment opportunities.
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.
- To ensure uses support the viability of nearby centres.

The proposed application provides commercial premises on the ground floor with frontage to Botany Road, Ralph Street and the through site link thereby retaining employment generating uses on the site. The retail premises will contribute to the range of facilities and services available in the locality to meet the day to day needs of both workers and residents in the area. The size of the retail premises will allow for only small businesses to be established that will not impact on the economic strength of nearby centres. The proposed development will also result in an increased residential population which will contribute to the economic success of surrounding business activities.

For the reasons given the proposal is considered to be consistent with the objectives of the B7 zone.

The above discussion demonstrates that the proposal development will be in the public interest notwithstanding the proposed variation to the building height development standard because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. Furthermore, the area in which the site is located contains many other approvals which provide for similar variations and there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accord with the vision for the area and maximise residential amenity within the site. Accordingly, there is no material impact or public benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(b) the public benefit of maintaining the development standard,

This Clause 4.6 request has demonstrated there are significant environmental planning benefits associated with the contravention of the standard. The locality in which the site is located contains many other approvals which provide for similar variations. Accordingly, in an area undergoing transition there is no material public benefit in maintaining the standard generally or in relation to the site specifically as the built form outcomes and development proposed accords with the vision for the area. There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would diminish residential amenity and energy efficiency of the development.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the positive result for the amenity of the development.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the minimum height of buildings development standard and will achieve a better design outcome in this instance in accordance with objective 1(b).

1.11 Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the proposed variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.