

Attachment C

<p>Clause 4.6 Variation Request Height of Buildings</p>
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15 March 2023



Request to Vary the Building Height
Standard under Clause 4.6 of S.L.E.P.
2012:

8 Coneill Place, Forest Lodge
(New Dwelling)



Introduction

This written contravention request supports a development application (DA), as amended, for a new (replacement) single dwelling at No. 8 Coneill Place, Forest Lodge. It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd, plans by Molnar Architects (including revisions to Issue D and E) and the information submitted with the DA.

The proposal exceeds the maximum 6m Building Height control in Clause 4.3 of Sydney Local Environmental Plan 2012 (SLEP 2012). This control is a “development standard” in accordance with the definition in Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act 1979).

Clause 4.6 of SLEP 2012 relevantly states:

4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.
- (6) –(8)... [not relevant]

1. Identifying and quantifying the non-compliance

Clause 4.3 of Sydney Local Environmental Plan 2012 ("SLEP 2012") specifies a maximum Building Height of 6m, by reference to the relevant LEP Map (extract below).

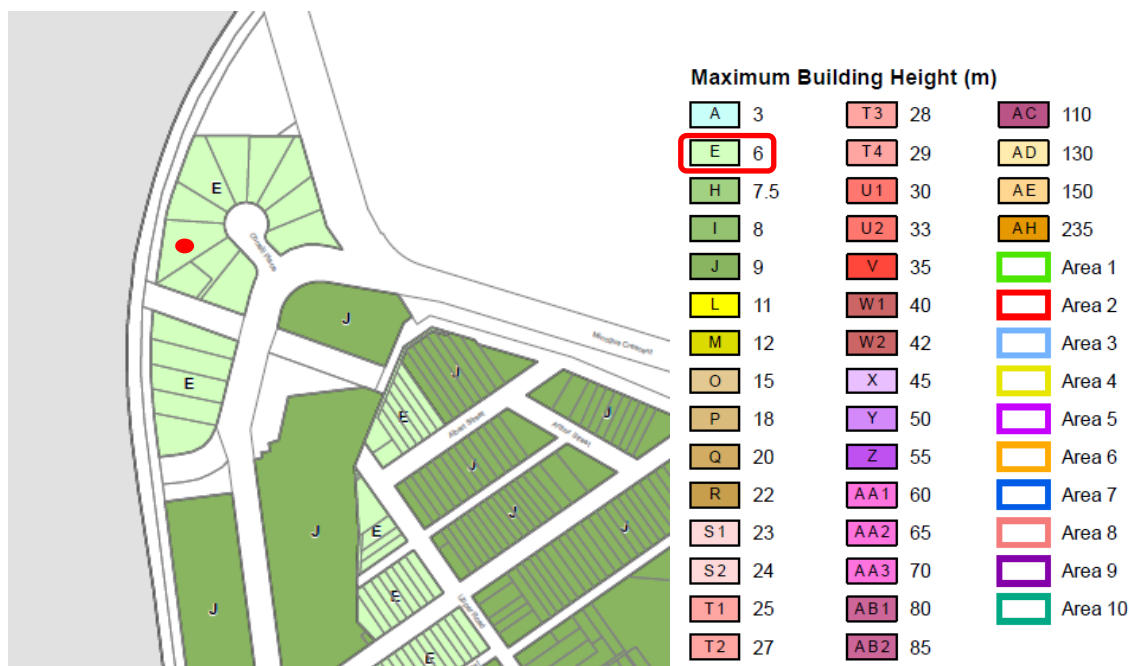


Figure 1 - Building Height Map Extract – SLEP 2012

There are certain parts of a building able to be excluded from building height calculations due to the definition of building height, namely:

...but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Accordingly, the flues to gas heaters are excluded.

The proposal exceeds the maximum building height of 6m, with the proposed dwelling having a maximum height of 8.5m.

To the rear/west, the RL to the roof parapet (excluding the flues which are able to be excluded) is RL 10.5. The lowest existing ground level from the survey is RL 2.15, equating to a rear height of approximately 8.35m.

To the front/east (at the southern portion where the roof steps up), the RL to the roof parapet is RL 10.17. The lowest existing ground level below this roof line appears to be RL 2.67, equating to a front height of approximately 7.5m.

This height non-compliance at its maximum is 2.35m above the control, equating to just over 39%.

The building height contravention is illustrated in the plans/elevations submitted by Molnar Architects:

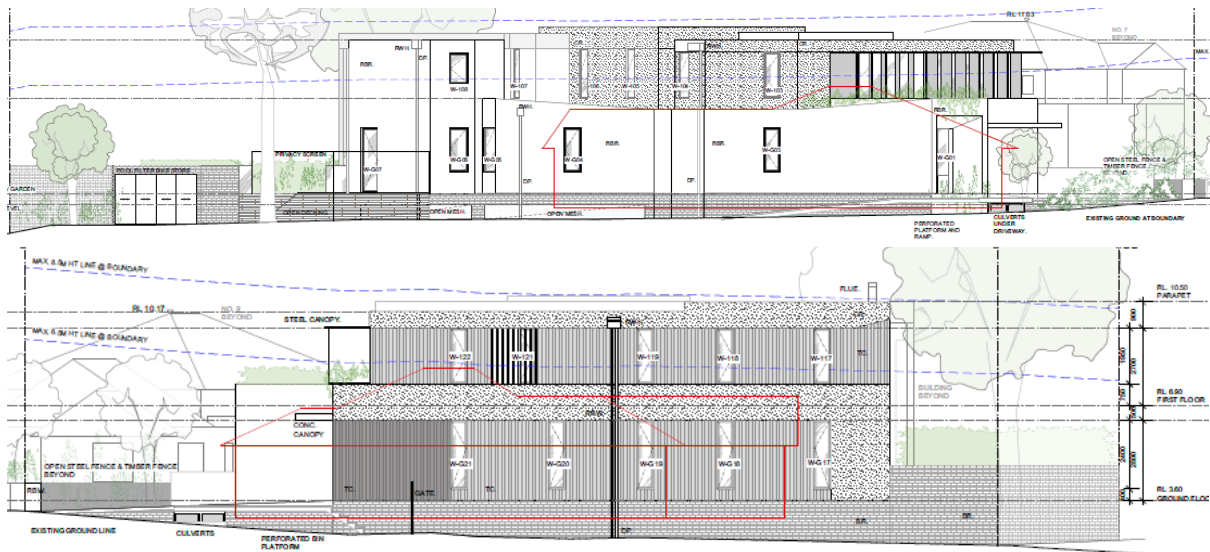


Figure 2 - Height Non-Compliance (southern and northern elevation) – Molnar Architects

It is noted this shows two lines: 6m as applies by the LEP and 8.5m (being a reference point and maximum height for a Complying Development Certificate under the provisions of *SEPP (Exempt and Complying Development Codes) 2008*).

2. Objectives of Clause 4.6 of SLEP 2012

The objectives of Clause 4.6 of SLEP 2012 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.

There has been some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was considered and determined in a judgement by the chief justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. That judgement held that the objectives of Clause 4.6 do not need to be specifically considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 (of appropriate flexibility and better outcomes) can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

Despite this, in very broad terms, better planning outcomes are facilitated by designing a new dwelling to meet flood planning levels, and a dwelling with very high amenity and design quality, with very limited and acceptable impacts upon others. The two-storey form is compatible with the evolving and changing nature of the street and area (including other approvals contravening the height control to a similar degree).

3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

Clause 4.6(3) of SLEP 2012 states:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard*

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

The submission and consideration of Objections under State Environmental Planning Policy No. 1 (“SEPP 1 Objection”) and the issue of compliance being “unreasonable or unnecessary” was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council [2007] NSWLEC 827* (“the Wehbe case”). While that judgement applied to SEPP 1 Objections and not Clause 4.6 Variation requests, the approach in that case has been accepted in subsequent court cases related to Clause 4.6 Variation Requests.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or

- iii. Requiring compliance with the development standard would “thwart” the achievement of the objectives of that standard; or
- iv. The development standard in question has been “virtually abandoned” by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

In this particular case it can be reasonably argued that the development standard, at least within Coneill Place where the height limit is less than surrounding land, has been “virtually abandoned”. This is due to other relatively-recent approvals (including under the current LEP), allowing variations to the 6m height limit, and to a similar degree to that sought.

This is highlighted in the table below (which is adapted from a table in the S.E.E. outlining the number of properties having two storey approvals to include the height approved) and updated for recent proposals.

No.	DA	Approved	Description	Approved Height (Reference)
1	D/2022/610	Being Assessed	2 x 2-storey dwellings + Subdivision	8.75m (from SEE/cl 4.6).
2	D/2015/982	26/10/2015	2 x 2-storey dwellings	8.637m (from SEE/cl 4.6).
2A	D/2015/982	26/10/2015	As above	8.637m (from SEE/cl 4.6).
3	D/2022/1224	Being Assessed	2 x 2-storey dwellings (Dual Occupancy)	6.97m (from SEE/cl 4.6).
4	D/2019/554	Not on website	2 x 2-storey dwellings + Subdivision	6.8m (from assessment report).
6	D/2012/1249	28/11/2012	Subdivision into 3 lots	A Council report states “Three Complying Development Certificates were issued in April 2014 - P/2014/647, 648 and 649 [for] three large modern two-storey dwelling houses at No. 6, 6A and 7 Coneill Place.” It appears these dwellings exceed 6m in height, although the elevations are not available. It is noted the maximum height for CDCs in the Housing Code is 8.5m.
6A	As above	As above	As above	As above.
7	As above	As above	As above	As above.
8	Current DA	Under assessment	2 storey dwelling	Subject DA.

9	D/2009/2125	26/3/2010	New second storey	8.49m (from elevations and PL 2.61 on survey) – note prior Leichardt LEP
9B	D/2015/501/B	13/4/2016	New second storey to dwelling	6.015m (from assessment report).
10	D/2004/1663	16/5/2005	Subdivision and two storey dwelling	Not available on website but likely above 6m

Table 2 – Other recent DA approvals exceeding the height limit (current LEP)

From the above, other DAs (and CDCs) have been approved in close proximity to the site for a similar height to that proposed. From these approvals and the existing development in the street, it can reasonably concluded the standard has been “virtually abandoned” either directly by approvals, or indirectly due to the effect of an Environmental Planning Instrument (“EPI”) allowing CDCs.

It is noted that 3 Complying Development Certificates have been issued for 3 x two-storey dwellings at 6, 6A and 7 Coneill Place, to the immediate north of the site.

Under Part 3, Subdivision 2 of the *Housing Code* (related to dwelling houses and attached development), the maximum height limit is 8.5m. As a SEPP, this over-rides the LEP height standard. The relevant part is quoted below:

Subdivision 2 Built form development standards for dwelling houses and attached development

3.8 Maximum building height

The maximum height for a dwelling house and any attached development is 8.5m above ground level (existing).

While Council may be of the opinion this SEPP is not relevant for this DA and a Clause 4.6 contravention request, it is clear that this SEPP has had an effect on the existing built form and character of the street, and has contributed to the built form context of this site. So, it is considered relevant, if only for history, context and comparison.

Apart from the above reasonable arguments about “virtual abandonment” and the potential for CDCs, the following also responds to the other common pathway related to compliance with underlying objectives of the standard in question (pathway 1 in the “Wehbe” case).

In terms of the objectives of the standard, Clause 4.3(1) of SLEP 2012 contains the following objectives:

- (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 outside Central Sydney,*

- (d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,*
- (e) in respect of Green Square—*
 - (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and*
 - (ii) to ensure the built form contributes to the physical definition of the street network and public spaces.*

The following responds to these objectives:

- a) The height of the development is consistent with the condition of the site and its context. The site itself is in a flood planning area, and the floor level of the ground floor must be raised to RL3.6, in order to meet flood planning levels (verified by an expert flooding report). This has the effect of raising the building by up to 1.5m above the existing ground level.

In terms of context, as noted in the SEE, the visual catchment of Coneill Place is also visually separated from the wider suburb of Forest Lodge, due to the nature of surrounding new development, the wide and busy road known as The Crescent, the landform, the larger sites and subdivision pattern, tree planting, the large PCYC building to the south-east, the adjoining surrounding park and the aqueduct to the west. These factors combine to visually and spatially separate the cul-de-sac from the character and setting of surrounding Forest Lodge.

Two storey forms are common in the existing and evolving form of dwellings in Coneill Place. This is illustrated in the previous table

From the history of approvals it can be seen and adduced:

- Of the 13 properties on Coneill Place (excluding the extra dwelling entitlement for No. 10), only three (3) do not have approved or proposed two storey dwellings (Nos 1, 3 and 5);
- Of the 3 properties not having two storeys existing or approved, two of those have current DAs being assessed, both exceeding the height standard;
- The predominant type of new DAs is for subdivision and two new two storey dwellings (usually attached);
- 2 storey dwelling forms have been consistently and recently approved, under the current LEP/DCP statutory regime;
- Separately, Complying Development Certificates (CDCs) are not be limited to a one storey form or a 6m height limit.

The following photos show the context of other dwellings in Coneill Street, which is a relatively short cul-de-sac:



Clause 4.6 Request – Building Height – 8 Coneill Place, Forest Lodge





It is reasonable to conclude the proposal is appropriate to the context.

- b) There are no adjoining Conservation Areas or Special areas. There are heritage items to the rear. These are not buildings, but a canal and an aqueduct, the latter well-separated from the site and the equivalent of around 3 storeys in height. The proposal is well setback from the rear boundary and the proposal will be visually separated from the heritage items and will not adversely affect their setting or significance.
- c) The height non-compliance will not affect any views (public or private).

In terms of private views, the views from within surrounding dwellings have not been seen by the author of this report, so according qualification to the comments and conclusions given is needed. However, from a site inspection, interpolation of the site conditions, review of proposed plans, expected views, slope/topography, landscaping and surrounding buildings, it is clear the main potential outlook impacts (as opposed to significant views) would be to outlook over the rear of the site from the northern side first floor window in 9B Coneill Place. The proposed upper-level setback and splay, and appropriate siting, responds appropriately to this aspect. In any event, the proposed height non-compliance is not anticipated to adversely affect views from surrounding development, noting the land is relatively flat.

- d) Objectives (d) and (e) are not relevant to this site and proposal.

In summary, the proposal is wholly consistent with the objectives of the development standard and using the accepted approach(s) in *Wehbe v Pittwater Council* [2007] NSWLEC 827,

compliance with the development standard can be considered unnecessary or unreasonable (even if it is not held or agreed the development standard has been virtually abandoned).

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

The case *Four2Five v Ashfield Council [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248* raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* highlighted that:

1. The term “*environmental planning grounds*” is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant's written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

Also, given the term “*environmental planning grounds*” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the Building Height development standard, on this particular site and for this particular development:

- a) The site is subject to flooding. This requires raising of the ground floor, in turn pushing up the height of the proposal in the order of 1.5m.
- b) The context of the site and surrounds is in transition, to a predominantly 2-storey form. The breach of the height limit with a two-storey form, while responding to flooding constraints, is inevitable.
- c) The FSR for the site is 0.7:1. If dwellings were all one-storey, they would or will inevitably take a greater footprint than a two-storey dwelling, thereby reducing landscaped area, important in an area subject to flooding and also adjoining a public reserve;
- d) The proposal is not an over-development of the site, with the (revised) proposal being approximately 9% below the FSR standard, which is relatively unusual for new development;
- e) The streetscape presentation has been modulated and revised since DA lodgement, including presenting a stepped 1-2 storey form to the street;

- f) Apart from the context, there are a number of sound environmental planning reasons to support a two-storey form for the site and area (consistent with other approvals and existing development), namely:
- The second level helps provide passive surveillance to the adjoining public domain and public reserve(s);
 - The provision of a second level provides improved flood planning and life safety (as a safe haven in the PMF);
 - The scale of this specific part of the wider locality has been in significant transition and is surrounded by large buildings within the Harold Park Development to the east (post-dating the DCP controls); the large PCYC building to the south, and the containment provided by the large Sydney Water Aqueduct to the west (which is a heritage item);
- g) The floor-ceiling heights are not excessive and provide high levels of amenity for the proposal, while having limited and acceptable external impacts to neighbours and the environment.
- h) The height non-compliance results in an appropriate height transition between neighbouring buildings. The proposed height is in-between the height of the adjoining No. 7 to the north and Nos. 9-9B to the south.
- i) The height and form have been modulated for visual interest and articulation, combined with high-quality materials. The height steps down with the landform, towards the west.
- j) There are very limited and acceptable amenity impacts on adjoining land. The proposal incorporates modulation of footprint and form (possible by a non-complying second storey height) to provide generous side setbacks to the south (with a stepped form and weighted average of 2.25m), to achieve complaint overshadowing. The visual impacts of the additional height are minimised by appropriate modulation and stepping of the form. Privacy impacts are well-considered and not impacted by the proposed height, while the additional height does not cause any known adverse view impacts.
- k) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant height of the building, is consistent with the following Objects of the Act:
- i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations* – noting the height and design facilitates high amenity on the site yet with acceptable impacts upon others;
 - ii. *to promote the orderly and economic use and development of land* – noting the height and height transition in the surrounding context is orderly, also allowing an appropriate compliant FSR, which represents economic use of land on a well-connected site, with an appropriate use specifically permitted in the zone;



- iii. *to promote the sustainable management of built and cultural heritage – noting an appropriate heritage outcome for the site;*
 - iv. *to promote good design and amenity of the built environment – due to the high-quality design and for the same reasons above; and*
 - v. *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants – as the height exceedance allows equitable access and safety in flooding, without significant impacts to others.*
- l) As noted previously, the Objects of the EPA Act provide a framework for the Act itself, and its operative provisions, which include giving effect to other Environmental Planning Instruments. The proposal and specifically the height non-compliance also facilitates the following aims and objectives within Sydney LEP 2012 (Clause 1.2(2)), as outlined below in relation to the height non-compliance:
- *to promote ecologically sustainable development, for reasons outlined previously;*
 - *to encourage the growth and diversity of the residential population of the City of Sydney by providing for a range of appropriately located housing, as the design and height facilitates a unique and well-considered proposal;*
 - *to ensure that the pattern of land use and density in the City of Sydney reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport, as the benefits of the non-compliant height provide benefits that are not outweighed by disbenefits;*
 - *to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular localities, for reasons outlined previously and within the S.E.E. responding to design excellence.*

4. Clause 4.6(4) of SLEP 2012

Clause 4.6(4) of SLEP 2012 states:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained*

These are matters for the consent authority to be satisfied (as opposed to the applicant justifying as in Clause 4.6(3)). Despite this, further commentary is given to assist the consent authority in its deliberations. They also relate to the whole development, not just the non-compliance subject to the Clause 4.6 Contravention request.

Clause 4.6(4)(a)(i) has been addressed in the previous Section of this written request. The objectives of the standard have also been addressed in the previous Section of this written request.

The site is zoned **R1 – General Residential** in SLEP 2012, which also applies to the surrounding blocks in Coneill Place. The proposal is specifically permissible with consent in the zone (as a dwelling house).

The objectives of the zone are:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maintain the existing land use pattern of predominantly residential uses.

The proposal is consistent with these zone objectives, noting: the proposal is specifically designed to meet the housing needs of the owner of the site; the proposal is diverse due to its unique design responding to the site characteristics, opportunities and constraints (including a lift to allow excellent access and ageing in place); a use which is permissible and does not compromise facilities or services being provided elsewhere; and maintaining the existing land use pattern comprising single dwellings.



Figure 3 – Zoning Map Extract – SLEP 2012

The proposal is entirely consistent with the zone objectives applying to the site.

Clause 4.6(4)(b) – Concurrence of the Secretary

Concurrence of the Secretary is not required.

4. Clause 4.6(5) of SLEP 2012

Clause 4.6(5) of SLEP 2012 states:

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

In this regard, the City of Sydney is understood to have delegation from the Secretary for the Department of Planning and Environment to consider and decide upon Clause 4.6 Variation Requests.

In terms of Clause 4.6(5) (a)-(c), the following response is given;

- (a) No matter of significance for State or Regional environmental planning arises or is compromised by the non-compliance;
- (b) The integrity of the development standard will not be compromised by granting approval, noting the site-specific and proposal-specific considerations in this instance, which should not give rise to universal precedence elsewhere. In the circumstances of this application, there is no public benefit of maintaining the development standard. To the contrary: for the environmental planning reasons outlined in this written request; and given the consistency with the objectives of the development standard and R1 zone, allowing the proposal, including its height non-compliance, will provide a public benefit in this instance;
- (c) There are no other known required or nominated matters by the Secretary to be taken into account.

For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the Building Height development standard in Clause 4.3 of *Sydney Local Environmental Plan 2012*.



Jason Perica
Director