

# **Attachment C**

## **Clause 4.6 Variation Request – Height of Building**

# Clause 4.6 Variation Request

Acacia Apartments

330-332 Botany Road, Alexandria

Submitted to City of Sydney Council  
on behalf of City West Housing



**'Gura Bulga'**

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.



**'Dagura Buumarri'**

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Brown Country. Representing Victoria.



**'Gadalung Djarri'**

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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# 1.0 Introduction

## 1.1 Overview

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of City West Housing (the Applicant). It is submitted to the City of Sydney Council (Council) in support of a development application (DA) for the detailed design and construction of a mixed-use development at 330-332 Botany Road, Alexandria (the site).

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) enables the consent authority to grant consent for the development even though the development contravenes the development standard of the Sydney LEP 2012. This clause 4.6 Variation Request relates to the development standard for height of buildings under clause 4.3 of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 9 July 2024.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development by allowing flexibility in particular circumstances. Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (clause 4.6(3)(b)).

This document demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the development standard. As such, this document satisfies the provisions of clause 35B(2) of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation).

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the building height development standard, the proposed development:

- Achieves the objectives of the building height development standard since it:
  - The proposal ensures that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of form that will not result in any unreasonable environmental impacts.
  - An appropriate height transition is maintained between the higher density character of Alexandria, Green Square and adjoining areas.
  - View sharing is promoted by not impacting key public vantage points or views from surrounding building occupants.
- Demonstrates that there are sufficient environmental planning grounds to support the variation, in that it:
  - Is a minor breach, particularly in the context of surrounding development (and planned development).
  - Maximises the provision of affordable housing and is therefore in the public interest.
  - Results in a development of a scale that is consistent with the site's location and locality.
  - Does not result in additional overshadowing onto the public domain.
  - Better achieves the locality principles established by Council for North Alexandria.
  - Will allow for the maximisation of affordable housing at the site as it provides access to the upper level of apartments.
- Is in the public interest since it:
  - Is consistent with the objectives of the building height development standard.
  - Will provide additional affordable housing dwellings amidst a housing crisis.
  - Will promote the orderly and efficient use of land, good design and the social welfare of the community in accordance with the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Sydney LEP 2012.

## 1.2 Legal Guidance

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*). While these cases referred to the former SEPP 1, the analysis remains relevant to the application of clause 4.6(3)(a). Further guidance on clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this clause 4.6 variation request:

- Identifies the site and proposed development (**Section 2.0**);
- Identifies the development standard to be varied (**Section 3.0**);
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.0**); and
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**).

## 2.0 Site and Proposed Development

### 2.1 Site Description

The site is legally described as Lot 10 in DP 1247504 and has a total site area of 6,709m<sup>2</sup>. It is irregular in shape and has frontages to Botany Street (62m) and O’Riordan Street (30m). The site adjoins private properties to the north and the future GS2AC Road to the south. The site is generally flat, with a gentle fall in level towards the north-west. The site is currently enclosed by construction fencing in preparation for works associated with the Green Square to Ashmore Connector Road. No public pedestrian or vehicular access is currently provided to the site.



**Figure 1** Site aerial

Source: Nearmap and Ethos Urban

### 2.2 Description of the Proposed Development

This application seeks approval for the following development:

- Construction of two mixed-use buildings for use as affordable rental housing with non-residential ground floor, comprising:
  - Part below, part above-ground basement for parking and servicing, with vehicle access from the GS2AC road.
  - Retail uses on ground.
  - 9 levels of affordable rental housing in Cores A, B, C, D and E, and 11 levels of affordable rental housing in Cores H, G and F.
- Landscaping and public domain works.
- Tree removal.
- Bulk earthworks including excavation.
- Remediation of the site, as needed.
- Extension and augmentation of services and infrastructure as required.

Architectural drawings prepared by AJC and Landscaping Plans prepared by Nguluway Design Inc illustrating the proposed development as part of the development application.

A photomontage of the proposed development is shown at **Figure 2**.



**Figure 2** *Photomontage of proposal as viewed from Botany Road*

Source: AJC Architects



## 3.0 Development Standard to be Varied

### 3.1 Background and Description of the Variation

The proposed development was subject to a Competitive Design Alternatives Process and reflects AJC's competition winning design. As part of the competition scheme, the lift overruns extended above the Sydney LEP 2012 building height development standard. Further, the Competition Selection Panel identified an area for further development of the scheme as "*review opportunities to rationalise the extent of rooftop communal open space*", in the context of potentially providing more affordable apartments at the upper levels. The proposed development has been designed to retain the design of the competition winning scheme where possible and has also included additional affordable housing units in place of some of the rooftop communal open space in response to the Selection Panel comments. As a result, several lift overruns protrude marginally beyond the maximum building height development standard.

The proposed development comprises two separate residential flat buildings with maximum heights of 40.6m and 33.25m respectively, which presents a 0.6m (1.5%) and 0.25m (0.8%) variation to the part 40m and 33m height of buildings control. The principal reason for this variation relates to the provision of general lift overrun and lift access for a rooftop level comprising of communal open space and affordable dwellings. The variation is noted to be localised to the central portion of the building, where it will be largely indiscernible from the public domain. This is illustrated in the 3D height plane diagram provided at **Figure 4**.



**Figure 3** 3D height plane diagram illustrating the proposed variation

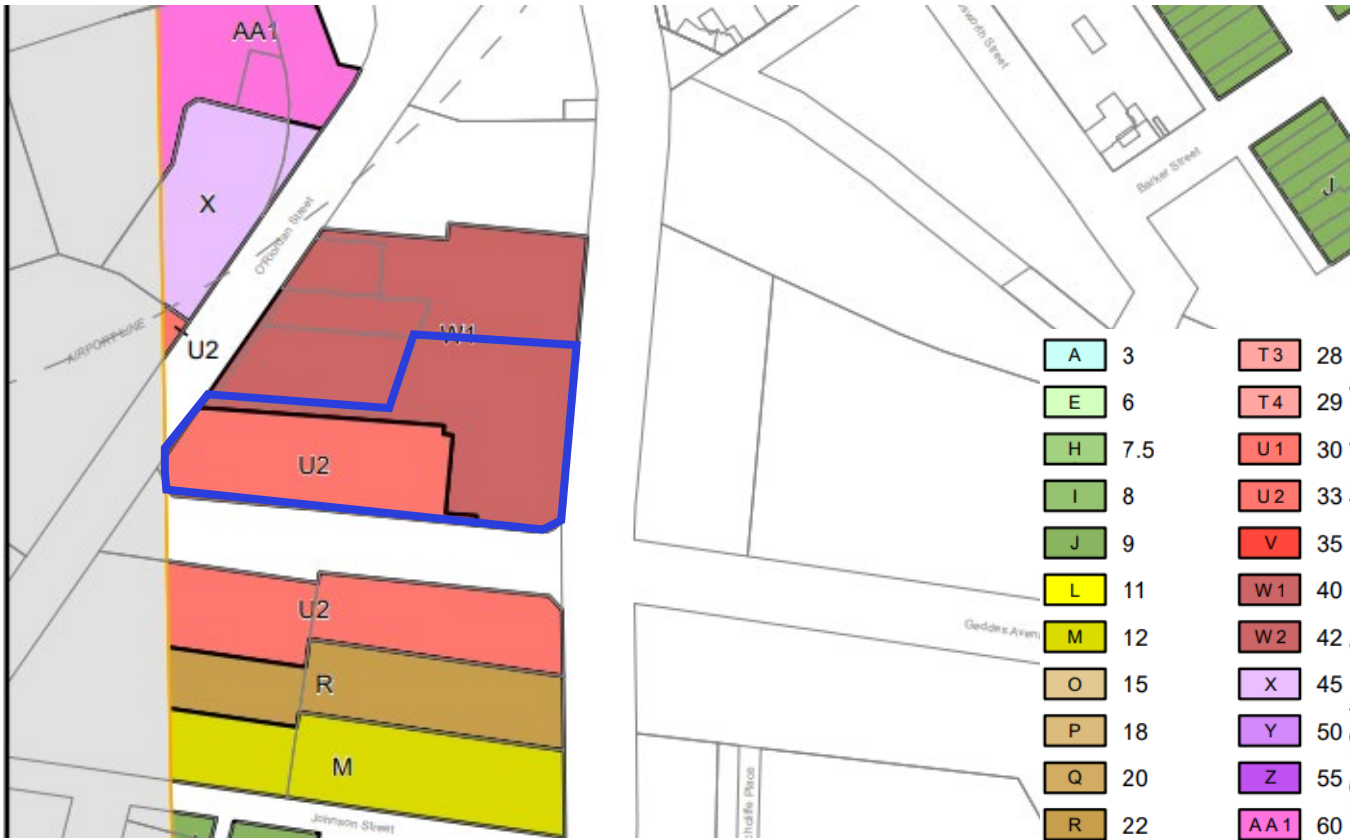
Source: AJC Architects

## 3.2 Summary of Development Standard to be Varied

A summary of the environmental planning instrument (EPI), development standard and proposed variation is summarised in Table 1.

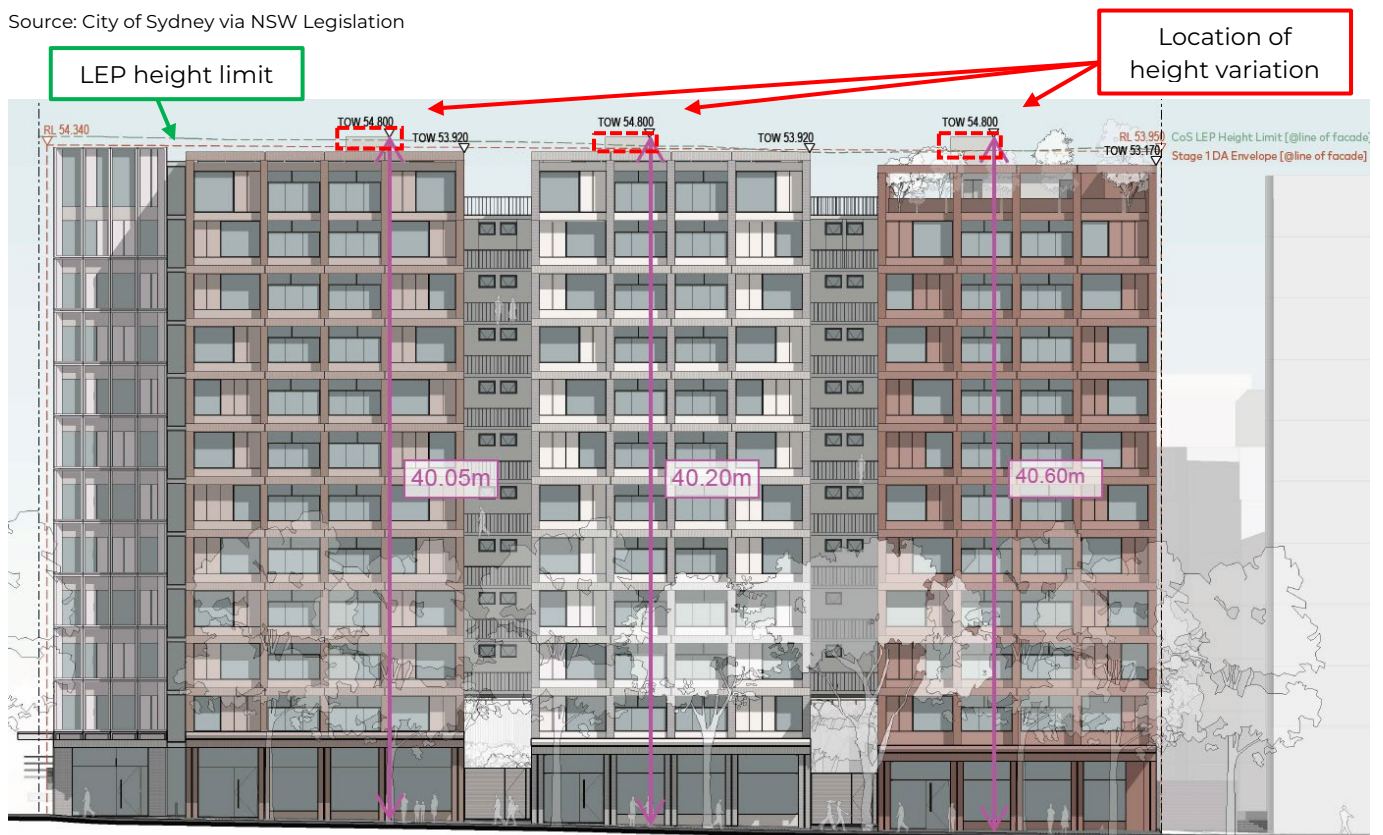
**Table 1** Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	<i>Sydney Local Environmental Plan 2012</i> (Sydney LEP 2012)
The site's land use zone	E3 Productivity Support
Development standard sought to be varied	<p>Clause 4.3 Height of buildings</p> <p>The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> <li>(a) to ensure the height of development is appropriate to the condition of the site and its context,</li> <li>(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,</li> <li>(c) to promote the sharing of views outside Central Sydney,</li> <li>(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,</li> <li>(e) in respect of Green Square— <ul style="list-style-type: none"> <li>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and</li> <li>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.</li> </ul> </li> </ul>
Type of development standard	Numerical development standard
Numeric value of the development standard in the EPI	<ul style="list-style-type: none"> <li>• Part 33m</li> <li>• Part 40m</li> </ul>
Difference between the existing and proposed numeric values. Variation percentage between the proposal and the EPI	<p>The proposed maximum height of buildings is 40.60m and 33.25m, which exceeds the maximum height of buildings control of part 33m and part 40m.</p> <p>The proposal exceeds the maximum part 33m and part 40m by:</p> <ul style="list-style-type: none"> <li>• <b>Core A:</b> 33.25m, which is a variation of 0.25m (0.8%)</li> <li>• <b>Core H:</b> 40.60m, which is a variation of 0.6m (1.5%)</li> <li>• <b>Core G:</b> 40.20m, which is a variation of 0.2m (0.2%)</li> <li>• <b>Core F:</b> 40.05m, which is a variation of 0.05m (0.05%)</li> </ul>
Visual representation of the proposed variation	Refer to <b>Figure 4</b> , <b>Figure 5</b> and <b>Figure 6</b>



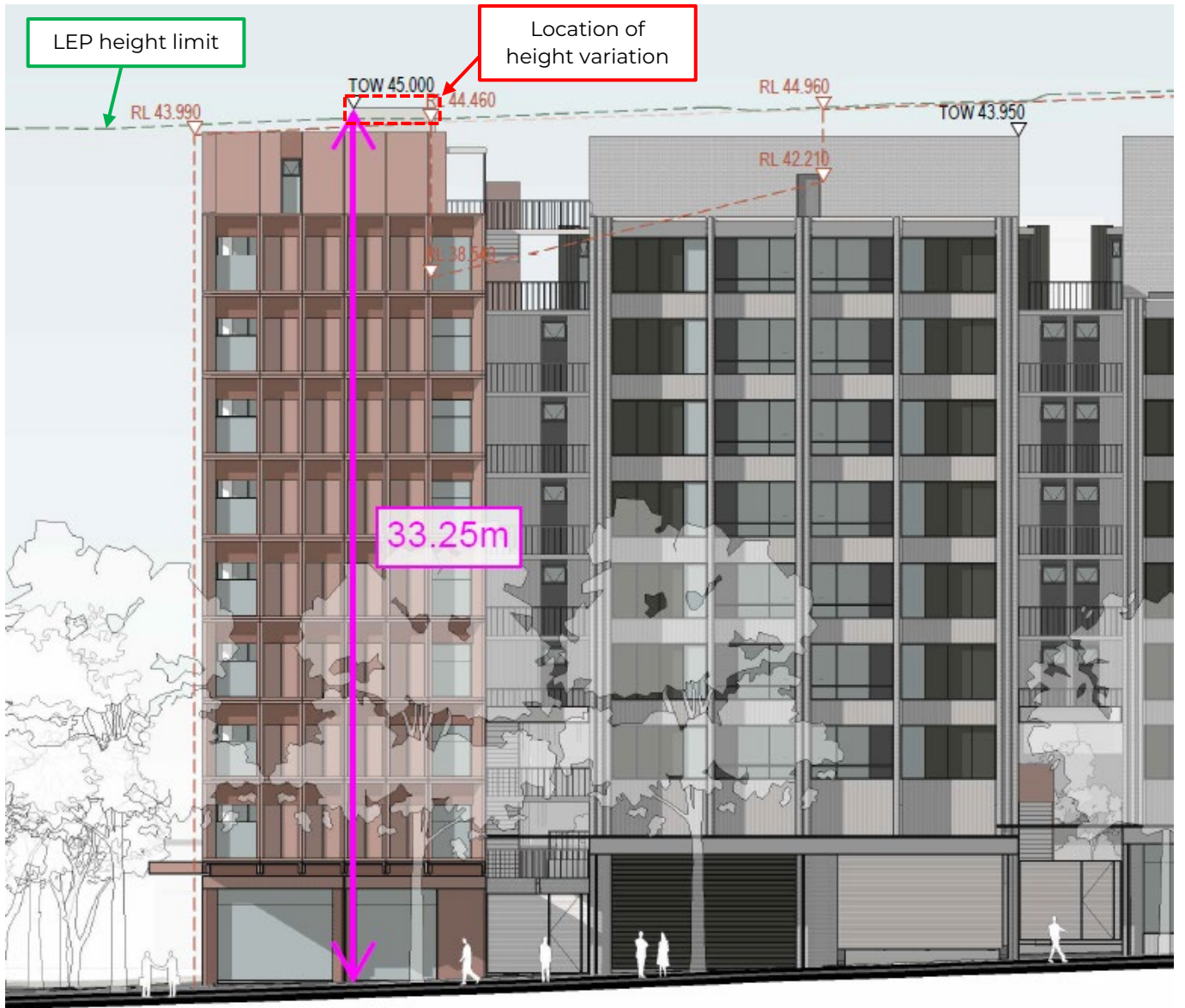
**Figure 4 Sydney LEP 2012 Height of Buildings map (site outlined in blue)**

Source: City of Sydney via NSW Legislation



**Figure 5 Section drawing of proposed variations to Cores H, G and F along Botany Road**

Source: AJC Architects



**Figure 6** Section drawing of proposed variation to Core A along GS2AC Road

Source: AJC Architects

## 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP provides that:

### 4.6 Exceptions to development standards

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:
- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*);
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*); and
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).
5. *Randiwck City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 (*Micaul*).
6. *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46 (*Winten*).
7. *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065 (*WZSydney*).

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the maximum height of buildings development standard, are each addressed below, including with regard to these decisions.

### Role of the Consent Authority

The role of the consent authority in considering this request for a clause 4.6 variation has been explained by the NSW Court of Appeal in *Initial Action*. This requires the consent authority to be satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by clauses 4.6(3)(a) and (b).

This document provides the basis for the consent authority to reach this level of satisfaction. The relevant matters required to be demonstrated in accordance with clause 4.6 of the Sydney LEP 2012 with respect to the height of buildings development standard are each addressed below, including with regard to the above decisions.

### 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

The five alternative methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).

- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

This clause 4.6 request will be relying on the First Method under *Wehbe* by establishing that the objectives of the standard are achieved notwithstanding non-compliance with the standard.

#### 4.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.3 of the Sydney LEP 2012 are:

(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 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.*

#### 4.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

##### **Objective (a): to ensure the height of development is appropriate to the condition of the site and its context**

The proposed development (inclusive of the variation) results in an appropriate height for the site and its context, as described below.

The proposed development is located on a prominent corner site, having three boundary frontages which do not adjoin any other building. Accordingly, the site has a unique opportunity to present a built form that responds to its context and constraints. The site is located in a highly urbanised context which is characterised by an array of multi-storey commercial and residential buildings fronting Botany Road and Geddes Avenue, as well as other developments on surrounding roads, varying in building heights from 3 to 20 storeys. A summary of the site's surrounding built form context is provided below, as well as the future context shown in **Figure 7**:

- **North:** to the north fronting O'Riordan Street is a 6 storey hotel. Directly to the north on the Botany Road frontage are two sites with approval for redevelopment as large commercial buildings, of 10-storeys high at 326-328 Botany Road (D/2021/700, item 1 in **Figure 7**) and 16-storeys high at 324-326 Botany Road (D/2021/894, item 8 in **Figure 7**). Further north includes the 20 storey mixed-use building identified as Infinity, comprising of retail and residential uses. Northeast of the site is a 28 storey residential development identified as OVO.
- **South:** to the south of the subject site is 511-515 Botany Road, comprising two 11 and 8 storey residential flat buildings which are both currently under construction. To the northeast of this site is 23 Geddes Avenue, identified as Uno, which is also currently under construction for a 14 storey residential flat building. Across the GS2AC Road at 338 Botany Road is the development site for a future 10-storey affordable housing development by St George Community Housing, for which a Detailed DA is currently under assessment (D/2024/273 shown at No 3 in **Figure 7**).
- **East:** Directly east of the site is Mirvac's Green square sites 8D, 8C, 19A and 19B. These sites are expected to be developed in the coming years into residential flat buildings. The site has been granted a building envelope which exceeds a maximum height of RL 101.59 (24 storeys).
- **West:** To the west of the subject site is characterised by largely industrial development with lower building height (between 1-3 storeys).



**Figure 7 Surrounding future context**

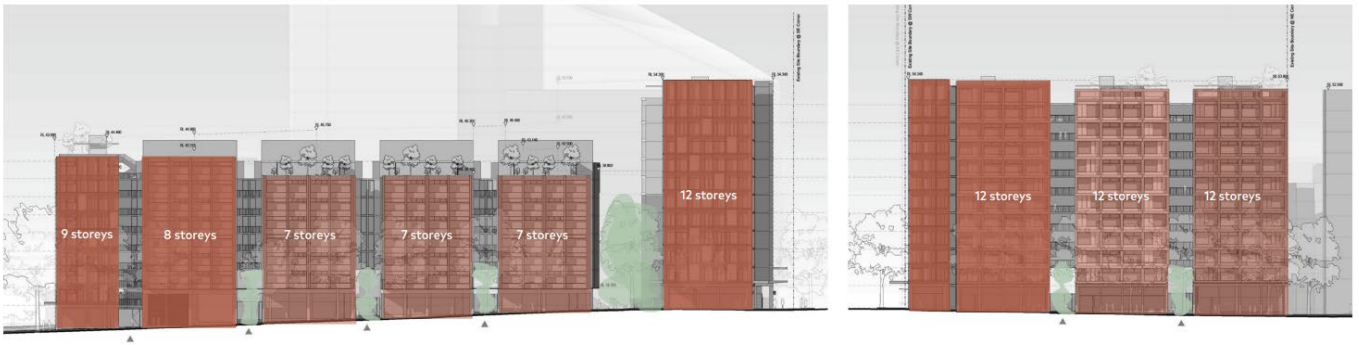
Source: Nearmap, Ethos Urban & City of Sydney DA Tracker

It is also noted that the block bounded by Botany Road, O’Riordan Street and GS2AC Road of which the site forms part of, has an irregular building pattern of maximum building height controls (refer to **Figure 4** above), with the maximum height of buildings being part 33m and 40m. Further afield, the immediate context is characterised by a range of building heights and typologies, with many buildings ranging from 1 - 20 storeys. This is evidence of a varied urban character, which is not characterised by any uniformity of height controls and is indeed characterised by variation of densities, including much higher densities.

As such, it is clear that there is no homogenous character in the locality, nor homogenous LEP height limits, whereby a variation to the maximum building height control would prevent the achievement of the subject objective. Instead, the test is whether the height of the proposed building is appropriate to (i.e. compatible with) the site surrounds.

In light of this, it is noted that the design of the proposed development and height of the building has drawn on contextual cues from adjacent residential flat buildings as well as the maximum building height controls in the locality in order to deliver a development outcome that intrinsically fits into the neighbourhood context. In this sense, the proposed variation is appropriate to the site and its surrounding built form. Additionally, it is reiterated that the proposed variation pertains to the lift overrun and in this sense, the variation does not compromise the proposal’s integration with the character of this immediate portion of Alexandria.

In light of the above, it is considered that the proposed variation to the height control and the overall development support the achievement of this objective and would ensure that the building presents as an appropriate response to the condition of the site within its local and site context.



**Figure 8** Proposed buildings in surrounding built form context

Source: AJC Architects

**Objective (b): To ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas.**

The site is not a heritage item, nor is it located within a heritage conservation or a special character area. The site and its surrounds are characterised by new development with similar architectural and built form features to that of this proposal. The slight increase in height to allow for lift overrun will have no adverse impact on local character.

**Objective (c): to promote the sharing of views outside Central Sydney**

As aforementioned, the site is located in an area outside of Central Sydney as defined in the Sydney LEP 2012. As described above under objective (a), as the site is of a scale commensurate with surrounding buildings, there will not be any significant loss of views, particularly as the proposed variation relates to minor lift overrun exceedances. Further, as the proposed variation relates to lift overrun exceedances, the additional height will not have any adverse visual impacts when viewed from public domain areas surrounding the site. Principally, this is a result of the overrun's setback from the parapet, which, as can be seen below in **Figure 9** and at **Figure 2**. As shown, the portion of the development exceeding the height limit is indiscernible from the public domain.



**Figure 9** View of the proposed development from O'Riordan Street

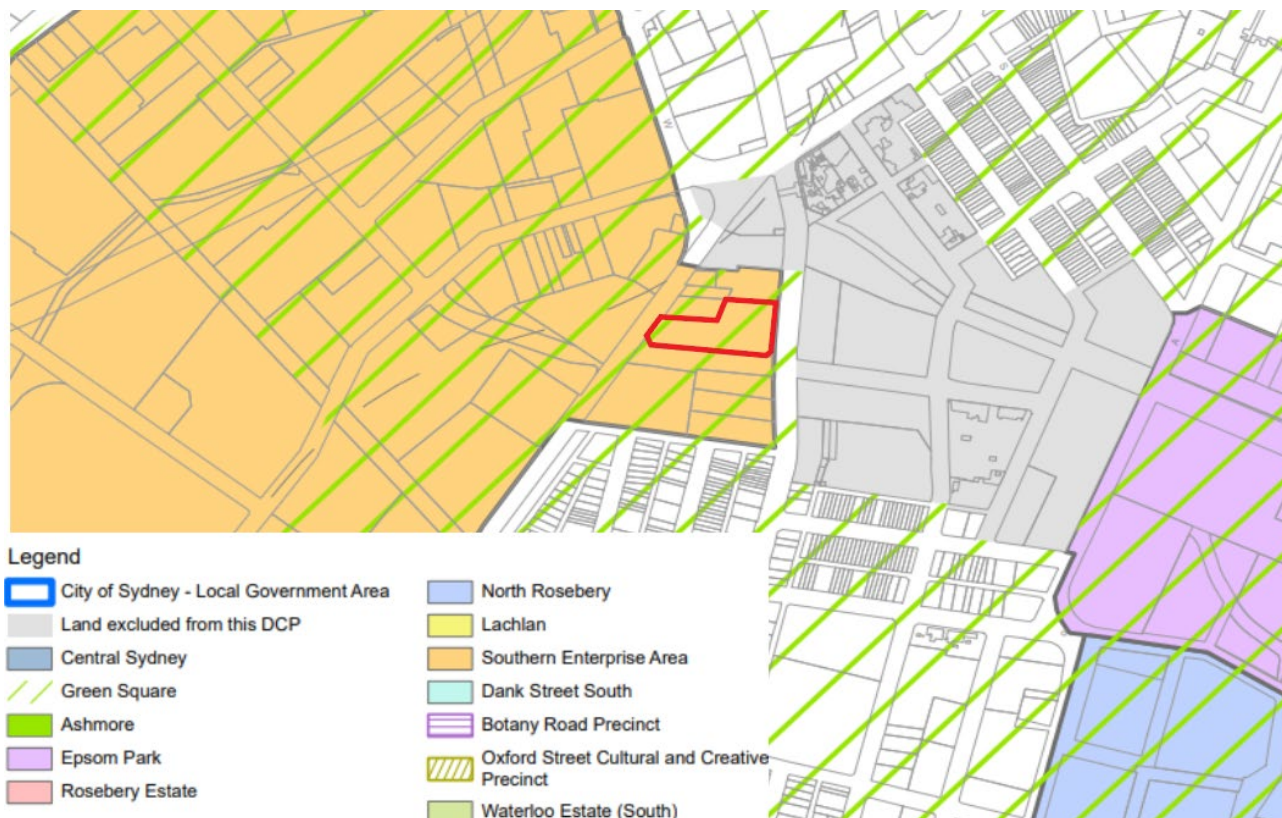
Source: AJC Architects



**Objective (d): to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas.**

The subject site is located within the Southern Enterprise Area in Green Square as per the Sydney Development Control Plan 2012 (Sydney DCP 2012) (refer to **Figure 10**). The proposal has sought to provide a building height which is relatively consistent with that of the surrounding developments (refer to discussion under objective (a) at **Section 4.1.2**), ensuring that the development does not contribute to an inappropriate height transition between Green Square and adjoining areas.

The proposed development is of a height that is comparable to the surrounding existing and future development identified in **Figure 7**. Buildings to the north and east within the Green Square Town Centre are generally a similar height or taller. The proposal therefore reinforces the height of Green Square Town Centre and will contribute to a tapering down in heights moving away from the centre.



**Figure 10** Specific areas map (site outlined in red)

Source: Sydney Development Control Plan 2012

**Objective (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**

The site's design is informed by the surrounding context, ensuring the amenity of the public domain is protected. The subject site's proposed envelope has been distributed across the site to create two separate buildings, with 8 cores which further break up the massing. These 8 separate cores are of similar height and scale, to ensure that the public domain is not adversely affected by the buildings. The general siting and arrangement of buildings, being a stepped 11 storey development on the eastern portion to a 9-storey development on the western portion, remains consistent with that approved in the Concept DA and allows activation of all three street frontages, contributing to the amenity and vibrancy of the public domain.

The proposed variation to the height of buildings will not affect the public domain. The lift runoff will be unnoticeable on the ground level of the site and therefore will have no impact on the amenity.

**(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.**

The proposed development relates to the street network of the Green Square Town Centre and surrounds, bounded by O'Riordan Street, GS2AC Road and Botany Road. In particular, the arrangement of the buildings addresses all three street frontages positively, allowing for activation and amenity in the public domain surrounding the site. As the proposal's area of non-compliance is limited to the lift overrun, the proposed

variation will not impact the street network or public spaces. The proposal also addresses the new GS2AC Road by setting back at the corner with the GS2AC Road and O’Riordan Street in order to provide additional relief and an enhanced public domain. Further, the height of the building fronting the GS2AC Road steps down to a lower form so that it creates a more human scale while contributing to the physical definition of the street network and public spaces, and the proposed variation which is limited to the lift overrun will not have an impact.

### 4.1.3 Conclusion on clause 4.6(3)(a)

In summary, compliance with the building height development standard is considered unreasonable and unnecessary since it achieves the objectives of the building height development standard in clause 4.3(1) of the Sydney LEP 2012. In particular:

- The proposal, notwithstanding the variation, is of a height and scale that is appropriate for its context and surrounds.
- The variation does not impact the surrounding character area, nor does it impact any heritage or heritage conservation.
- Views from key public vantage points and surrounding buildings will not be negatively impacted by the proposed variation.
- The proposal is of a scale commensurate with surrounding buildings, and therefore does not impact height transitions between Green Square and adjoining lower density areas.

## 4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60]. There are sufficient environmental planning grounds to justify contravention of the height of buildings development standard in this specific instance, as described under the relevant headings below.

### 4.2.1 The extent of the variation is minor:

The maximum extent of variation sought is 0.6m (1.5%) and 0.25m (0.8%) to the part 40m and 33m height of buildings control, although the breach only applies to the central portion of the rooftop caused by the lift overrun. The extent of the variation is considered to be relatively minor, particularly in the context of surrounding development (and planned development). Of relevance, Walsh C in *Eather v Randwick City Council* [2021] NSWLEC 1075 states at [38]:

*“The fact of the particularly small departure from the actual numerical standard and lack of any material impacts consequential of the departure are sufficient environmental planning grounds to justify contravening the development standard.”*

In *Choker v Georges River Council* [2022] NSWLEC 1415, a proposed contravention of 7.1% was regarded as being as generally akin to the circumstances in *Eather*. In the context of the current site, the proposed maximum contravention of 1.5% is akin to that in *Eather* and similar to that in *Choker*. The logic of those cases should apply to the proposed variation request.

Further, even when the numerical contravention is not small, a lack of amenity impacts (refer to the below sections) can be a reason (along with other reasons) advanced in support of environmental planning grounds: *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [49]). In *Big Property* the contravention was permitted — in part due to lack of adverse impacts — even though the numerical extent of the contravention was 43%.

## 4.2.2 The variation optimises provision of affordable housing and apartment amenity

The additional built form provided above the prescribed height of buildings is attributed to the lift overrun. As mentioned in **Section 4.1.2**, the proposed variation is justified because if strict compliance with the control was required, a suboptimal outcome would result with a lower number of affordable housing dwellings provided at the site.

As described in **Section 3.1**, the proposed development seeks to respond to comments made by the Competition Selection Panel, in particular by reviewing opportunities to rationalise the extent of rooftop communal open space and provided more affordable apartments at the upper levels. The proposed development has been designed to retain the design of the competition winning scheme where possible and has also included additional affordable housing units in place of some of the rooftop communal open space in response to the Selection Panel comments. As a result, several lift overruns (which are required to provide access to the upper-level apartments and communal open space) protrude marginally beyond the maximum building height development standard. If strict compliance was enforced with the development standard, less affordable housing would be provided.

As previously discussed, the site is located in the highly urbanised suburb of Alexandria, which is located within the Green Square Town Centre and in close proximity to the Sydney CBD. The additional proposed height will utilise this urban context to support additional provision of affordable housing dwellings, as well as the use of the roof as a high amenity open space.

Strict compliance with the development standard would result in an inflexible application of the control that would minimise the overall social and public benefits. Instead, strict compliance would limit the provision of affordable housing dwellings on site. Avoiding this suboptimal outcome and achieving the proposed superior outcome of more affordable housing in the current housing crisis climate, without material adverse impacts on others. This is considered an environmental planning ground to warrant the proposed variation to the current building height control.

## 4.2.3 Substantive compliance with other built form controls

The desired future character expressed for the site in the Sydney LEP 2012 planning controls is a maximum height limit of part 33m and 40m, as well as a maximum 3.85 FSR (under clause 4.4, clause 6.14 and clause 6.21 of the Sydney LEP 2012). As aforementioned, the LEP controls for the locality provide for no consistency in building heights and are varied in immediate proximity to the site (see **Figure 4**).

It is noted that the proposal maintains compliance with the maximum 3.85:1 FSR control (an FSR of 3:1 is proposed). As such, notwithstanding the height of buildings variation, the proposed development remains consistent with the bulk and scale of the site envisaged through the principal development standards under the Sydney LEP 2012. The proposed variation to the maximum height of buildings standard therefore does not contribute to a development outcome that is inconsistent with the built form capacity afforded to the site under the planning controls.

The variation of the development standard in this instance:

- Is not significant or material.
- Continues to ensure that the overall height of the development is appropriate for the site and its context.
- Does not generate any direct adverse visual or heritage related impacts.

## 4.2.4 No Additional Overshadowing Impacts

In particular, the variation will not result in additional adverse overshadowing impacts to the surrounding public realm or existing residential receivers surrounding the site. The shadow diagrams provided as part of the Architectural Plans (**Appendix A to the SEE**) provides a demonstration of the shadows cast by the development at the proposed 40.6m and 33.25m heights. This provides that on 21 June (being the worst-case scenario), the additional height does not cast any additional shadows.

## 4.2.5 No Adverse Visual Impacts from the Public Domain

As outlined in **Section 4.1.2**, the proposed variation will not have any adverse visual impacts when viewed from public domain areas surrounding the site. Principally, this is a result of the overrun's setback from the parapet, which means that the portion of the development exceeding the height limit is indiscernible from the public domain. Refer to **Figure 2** and **Figure 9** for visualisations of the proposed development from the street, in which the lift overruns and height exceedance are not visible.

#### 4.2.6 Achieves the locality principles outlined in the Sydney DCP 2012

The site is located within the North Alexandria Locality as defined in the Sydney DCP, and the proposal remains consistent with the principles of this locality despite the proposed variation as it will:

- Maximise the amount of high quality affordable rental housing provided within walking distance of facilities and public transport options in the Green Square Town Centre.
- Contribute to the revitalisation of the region from traditional industrial uses to higher density residential and commercial uses.
- Achieve a sensitivity to scale, fine grain character and materiality which is in keeping with the surrounding context.

#### 4.2.7 Better achieving the objects of the EP&A Act

In Initial Action, the Court stated that the phrase “environmental planning grounds” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, as set out in **Table 2** we consider the proposal better achieves certain objects (when compared with a height-compliant development).

**Table 2** *Assessment of the consistency of the proposed development with the objects of the EP&A Act*

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources	The proposed height variation will promote the social welfare of future residents by delivering usable and equitably accessible rooftop space that contributes to a significantly improved level of residential amenity on the site
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposed variation allows for building services and ancillary site facilities (communal open space and structures) to be located above the mapped maximum height limit. It will facilitate the equitable usability of the rooftop terrace by future residents, providing a highly sustainable development outcome. Further, the building height variation will have no negative impact on environmental and social considerations and will support the economic health of Sydney.
(c) to promote the orderly and economic use and development of land	The site is strategically located, in close proximity to existing heavy rail (Green Square Station) and bus routes to service future residents. Strict compliance with the maximum building height control would be a lost opportunity to enable communal open space and broader utility of the rooftop which will contribute to the exceptional residential amenity provided by the proposed development. A reduction of levels would result in a loss of affordable housing dwellings, representing a lost opportunity for additional dwellings in the Sydney housing market. The proposed variation to the maximum building height control is a balanced and orderly design outcome that responds to the unique characteristics of the site, does not represent the over intensification of land and provides additional affordable housing dwellings.
(d) to promote the delivery and maintenance of affordable housing	The proposal delivers 255 affordable housing dwellings. The height variation allows for a higher number of apartments to be provided than if the proposal were fully compliant.
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats	The proposal will not have any impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)	The proposal will not impact built or cultural heritage.

Object	Comment
(g) to promote good design and amenity of the built environment	The proposal will promote good design and amenity of the built environment by exhibiting a high quality and sculptured design which adds to the architectural diversity of Green Square. The proposed height variation has drawn on contextual cues from adjacent residential flat buildings and commercial buildings, as well as the maximum height of building controls in the locality in order to deliver a development outcome that intrinsically fits in to the neighbourhood context.
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposed height variation will permit a communal open space that will comply with the relevant provisions of the <i>Disability (Access to Premises — Buildings) Standards 2010</i> (by allowing equitable rooftop access and will promote the health and safety of occupants).
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State	This object is not relevant to this proposal; however, the proposal has adhered to the required planning processes for the site and scale of development and implements the strategic planning priorities for employment growth in Alexandria, Green Square and more broadly City of Sydney.
(j) to provide increased opportunity for community participation in environmental planning and assessment	The proposed development will be publicly exhibited in accordance with the requirements of Council's Community Participation Plan.

#### 4.2.8 Conclusion on clause 4.6(3)(b)

In conclusion, there are sufficient environmental planning grounds to justify contravening the development standard as:

- The extent of the variation is considered to be minor, particularly in the context of surrounding development (and planned development).
- The variation allows for more affordable housing to be provided in the development that if strict compliance was enforced.
- The additional height will not result in adverse environmental impacts including overshadowing, privacy, and views.
- The proposal demonstrates substantive compliance with other built form controls, which ensures that the proposed variation does not result in the proposal being out of character with the built form capacity afforded the site under the Sydney LEP 2012 development standards.
- The proposed development, inclusive of the variation, achieves key aims of the Sydney LEP 2012, as well as key objects of the EP&A Act.

## 5.0 Conclusion

The assessment above demonstrates that compliance with the height development standard contained in clause 4.3 of the Sydney LEP 2012 is unreasonable and unnecessary in the circumstances of this case and that the justification for varying this development standard is well founded. The variation allows for the orderly and economic use of the land in an appropriate manner, and an improved outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the variation from the height development standard, the proposed development:

- Achieves the objectives of the building height development standard since:
  - The proposal ensures that the height of the development is in-keeping with the scale and character of neighbouring buildings and is of form that will not result in any unreasonable environmental impacts.
  - An appropriate height transition is maintained between the higher density character of Alexandria, Green Square and adjoining areas.
  - View sharing is promoted by not impacting key public vantage points or views from surrounding building occupants.
- Demonstrates that there are sufficient environmental planning grounds to support the variation, in that it:
  - Is a minor breach, particularly in the context of surrounding development (and planned development).
  - Maximises the provision of affordable housing and is therefore in the public interest.
  - Results in a development of a scale that is consistent with the site's location and locality.
  - Does not result in additional overshadowing onto the public domain.
  - Better achieves the locality principles established by Council for North Alexandria.
  - Will allow for the maximisation of affordable housing at the site as it provides access to the upper level of apartments.
- Is in the public interest since it:
  - Is consistent with the objectives of the building height development standard.
  - Will provide additional affordable housing dwellings amidst a housing crisis.
  - Will promote the orderly and efficient use of land, good design and the social welfare of the community in accordance with the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act).