

Attachment C

Clause 4.6 Variation Request - Height
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Clause 4.6 Variation Request

158 Wyndham Street, Alexandria

Submitted to City of Sydney Council
on behalf of Blueshore Development Group



Prepared by Ethos Urban, a Colliers Company.
28 May 2025 | 2220605



'Gura Bulga'

Liz Belanjee Cameron



'Dagura Buumarri'

Liz Belanjee Cameron



'Gadalung Djarri'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green 'Dagura Buumarri' – translates to Cold 'Gadalung Djarri' – translates to Hot Red Country. Representing New South Wales. Brown Country. Representing Victoria. 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.

In March 2025, Ethos Urban took a major step toward future growth by partnering with leading professional services firm, Colliers. While our name evolves, our commitment to delivering high-quality solutions remains unchanged—now strengthened by broader access to property and advisory services and expertise

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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 Blueshore Development Group (the Proponent). It is submitted to the City of Sydney (the Council) in support of a development application (DA) for the construction of a six-storey residential flat building at 158 Wyndham Street, Alexandria (the Site).

Clause 4.6 of the Sydney Local Environmental Plan 2012 (Sydney LEP 2012) enables the consent authority to grant consent for development even though the development contravenes a development standard. This Clause 4.6 Variation Request relates to the development standard for building height under clause 4.3 of the SLEP. This report should be read in conjunction with the Statement of Environmental Effects (EIS) prepared by Ethos Urban and the associated appendices.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards and 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 that 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 relevant building height development standard is unreasonable and unnecessary in this 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 the proposed development:

- Achieves the objectives of Clause 4.3 of the SLEP 2012 by:
 - Ensuring the portion of the building that exceeds the building height is isolated to the lift overrun.
 - The minor height exceedance is a direct result of flood modelling that has been undertaken by the proponent; as such, the ground floor of the building has been adjusted to ensure the Finished Floor Levels (FFL) comply with the necessary Flood Planning Levels (FPLs).
 - The portion of the building that exceeds the height control does not adversely impact views to the sky or impact on exposure to sunlight to adjoining buildings and the surrounding public domain.
 - The portion of the building that exceeds the height limit control is integrated into the building and is not distinguishable from the public domain.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The proposed height exceedance is limited to the lift core. The remainder of the building does not exceed the maximum height control and is an appropriate height for the site and the surrounding context.
 - The minor height exceedance does not result in any additional environmental impacts to the surrounding neighbouring buildings such as loss of solar or increased overshadowing.
 - The proposal remains consistent with Council's plans and policies that seek to uplift the development in the Botany Road Corridor Character area by providing housing on a currently vacant and underutilised site.

The consent authority can therefore be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the SLEP have been considered and may grant development consent notwithstanding the contravention of the height of building development standard.

Accordingly, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the SLEP.

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 1 DP827390 and has an area of 271.8 m². The site is a slim rectangular shape and has a street frontage to Wyndham Street at its western boundary. The site adjoins private properties to its northern, southern, and eastern boundaries. The site is generally flat however there is a slight decrease in levels from the front and rear boundaries to the centre of the site. The site does not contain any buildings or structures and currently contains a rocky surface with scattered shrubs and weeds.

The site is secured with a boundary fence at its frontage to Wyndham Street. The site's rear boundary bordering 158 Botany Road is also secured with a boundary wire fence. An aerial image of the site is shown below in **Figure 1**.



Figure 1 Site aerial

Source: Nearmap, Ethos Urban

2.2 Description of the Proposed Development

This Development Application seeks approval for a Residential Flat Building (RFB) at 158 Wyndham Street, Alexandria.

The DA specifically seeks consent for the following:

- Site preparation works including minor earthworks.
- Construction of a six (6) storey residential flat building comprising:
 - Five (5) x three (3) bedroom apartments.
 - A Gross Floor Area (GFA) of 611.55 m².
 - A Floor Space Ratio (FSR) 2.25:1.
- Five (5) bicycle racks, waste storage and fire pump room at ground level. Landscaping works including:
 - Ground level deep soil area.
 - Rooftop landscaping including private open space and communal open space.
- Extension and augmentation of infrastructure and services as require.

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



Figure 2 *Wyndham Street View*

Source: Studio.SC

3.0 Development Standard to be Varied

3.1 Is the Planning Control in question a Development Standard

The height of building control in Clause 4.3 of the Sydney Local Environmental Plan (SLEP) 2012 is a development standard in accordance with the definition of that term in section 1.4(d) of the Environmental Planning and Assessment Act 1979 Act (EP&A).

3.2 Relevant Development Standards

Sydney Local Environmental Plan 2012

This Clause 4.6 variation request seeks to justify contravention of the maximum height of building development standard set out in the SLEP. Under clause 4.3 of the SLEP, the site is subject to a building height control of 24m as shown in **Figure 3**.



Figure 3 Height of building map – Sheet HOB_010

Source: Sydney LEP 2012

3.3 Extent of the Variation Proposed

The proposal seeks a variation to the 24m building height control of the SLEP. As outlined above, the height is subject to the 24m building height limit. **Figure 4** illustrates the exceedance of the proposed building height over the 24m height limit. The height exceedance is isolated to the lift core.

The building exceedance is a direct result of flood modelling undertaken to support the proposed development. To achieve the necessary Flood Planning Levels (FPLs) required, the ground floor Finished Floor Level (FFL) at 158 Wyndham Street are increased from RL 15.950 to RL 16.04. This adjustment has led to a minor increase in the overall building height, resulting in the proposed lift core of the building exceeding the maximum building height control of 24m.

The building height exceedance is approximately 225mm over the 24m building height control, representing a less than 1% breach of the control.

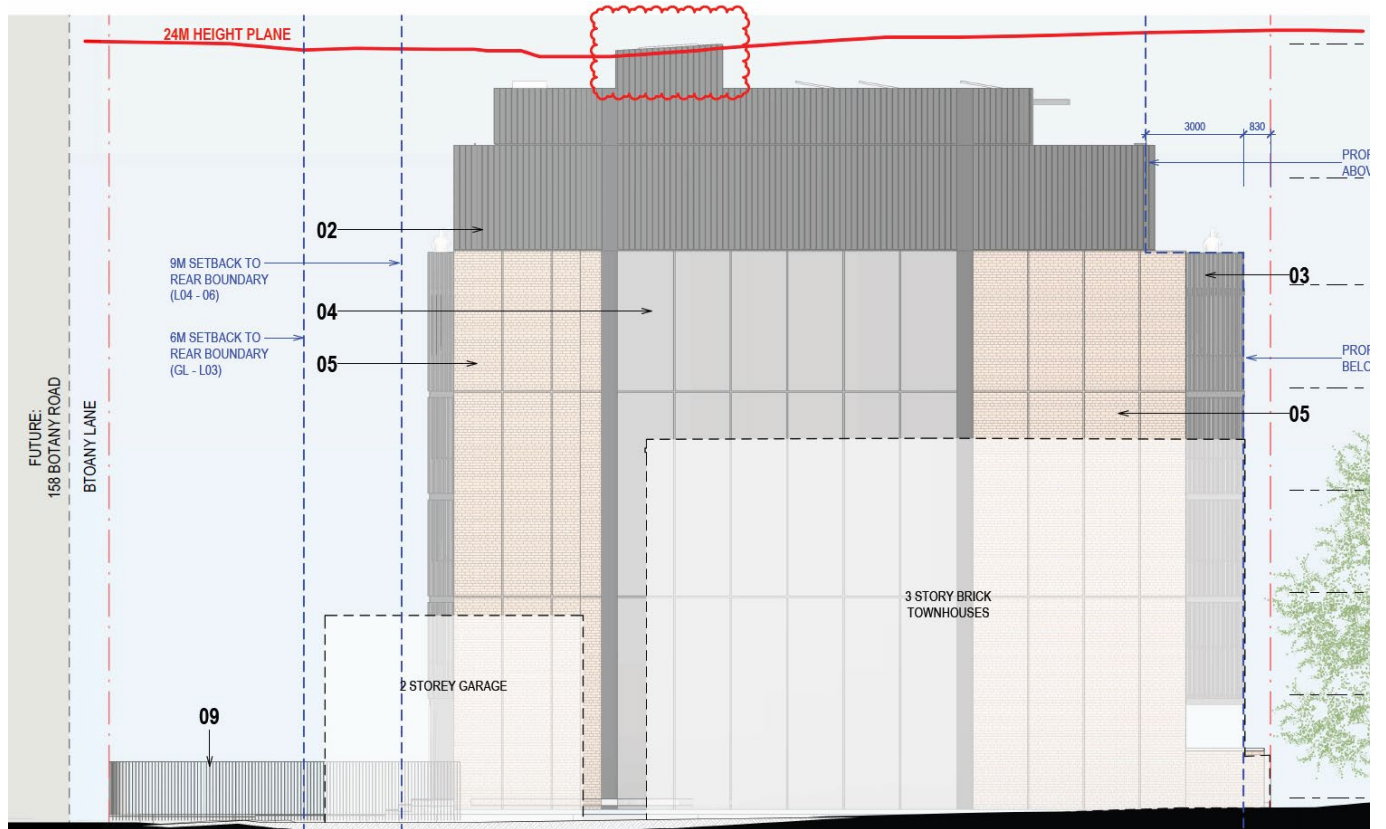


Figure 4 Building Height Diagram

Source: Scott Craver

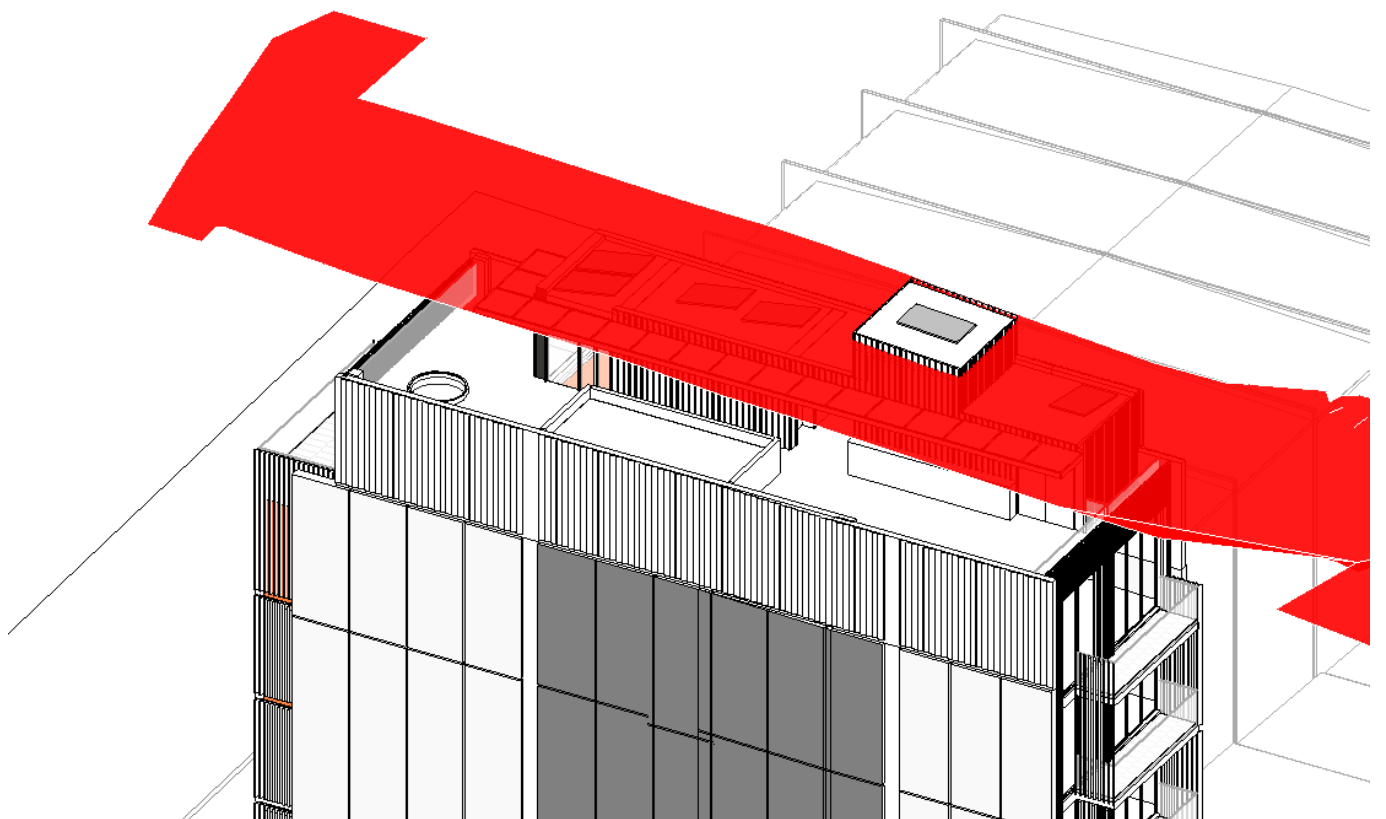


Figure 5 Visual representation of 24m building height exceedance

Source: Studio.SC

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*)

The relevant matters contained in clause 4.6 of the SLEP, with respect to the height of building development standard, are each addressed below, including with regard to these 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, it was not suggested that the types of ways were a closed class.

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 similar language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the SLEP is essentially the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five 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 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of building development standard pursuant to the **First Method**.

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

The following section identifies how the objectives of Clause 4.3 of the SLEP are achieved notwithstanding the non-compliance with the development standard.

Sydney Local Environmental Plan 2012

The objectives of the development standard contained in clause 4.3 of the SLEP 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,*

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

The design of the proposed Residential Flat Building (RFB) responds to both the existing and future local context through integrated built-form elements that are highly articulated and reflective of the current and emerging future character of Alexandria and the Botany Road Corridor.

The proposed height exceedance is localised to the lift core of the building, which is located within the central portion of the built form. The remainder of the building adheres to the 24m maximum height limit. The overall massing of the development has been carefully considered, informed by input from the Council Design Review Panel and is an appropriate built form addition to the site.

The proposed height variation of 225mm is extremely minor and does not preclude the remainder of the development from complying with the maximum height control.

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 heritage-listed and is not within a heritage conservation area. However, there are a number of heritage items of local significance in close proximity to the site including:

- Cauliflower Hotel (I1071), row of terraces (I2296).
- The Waterloo Congregational Church (I2070) is located within the Waterloo Railway Station site to the north of the site.
- West of the site is the Alexandria Park Conservation Area which is of local significance. Alexandria Park itself is also a heritage item of local significance (I11).

The extremely minor exceedance in height of 225mm does not result in any additional impacts to the surrounding heritage items.

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

The site is located outside Central Sydney, as defined in the Sydney LEP 2012. The isolated height exceedance from the lift overrun will not obstruct any views from outside Central Sydney. The height exceedance is not discernible or noticeable when viewed from the public domain on Wyndham Street or Alexandria Park.

Additionally, the site is not positioned in a location that would obscure any views.

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

The site is located within the Botany Road Corridor, which is undergoing major redevelopment. The proposal remains consistent with Council's plans that seek to uplift the development in the Botany Road Corridor Character area by providing housing on a currently vacant and underutilised site.

The proposed development provides a suitable transition in height to the surrounding context and this park of the Botany Road Corridor. Except for the 225mm maximum building height exceedance of the lift overrun, the proposed building sits below the 24m maximum building height control that applies to the site. The proposed

building height exceedance does not result in the ability of the site to provide an appropriate transition in height to the adjoining areas.

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 height exceedance is isolated to the lift core at roof level, centralised within the floorplate of the building. The building height exceedance will not be perceptible from the surrounding street network or public domain. As such, the height exceedance will not impact the amenity of the public domain.

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

The proposed development will positively contribute to the physical definition of Wyndham Street. Currently, the site is vacant and underutilised. The proposed building height, including the minor lift overrun, is consistent with the future vision and anticipated character for the Botany Precinct. The uplift in building height sought on the site, including the massing and proposed number of storeys will assist in delineating and defining this part of Wyndham Street. The proposed height exceedance does not impact the ability of the building to achieve this and will not result in any adverse impact on the surrounding streetscape or Alexandria Park, located directly opposite the site.

4.1.2 Conclusion on clause 4.6(3)(a)

The above section demonstrates that compliance with the height of building development standard under Clause 4.3 of the SLEP is unreasonable and unnecessary in the circumstances of the case. The objectives of the development standard, notwithstanding the variation to the height of building control in favour of a reasonable development which is consistent with the height of building objectives.

Further, the above section demonstrates that strict adherence with the 24m height of building control would impede the ability of the site to achieve the necessary ground floor FFL to comply with the required FPLs.

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

Clause 4.6(3)(b) of the SLEP 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 building development standard in this specific instance, as described below.

- **Enables appropriate flood levels**

- The exceedance in building height, specifically 225mm of the building lift overrun, is required in order to achieve the necessary FPLs required at ground floor level, informed by the flood modelling conducted to support the proposed development. The FFL at 158 Wyndham Street will be increased from RL 15.950 to RL 16.04.

- **No adverse visual or overshadowing impacts**

- The increase in building height is extremely minor and will be indiscernible from the street level. Updated solar and overshadowing diagrams have been prepared by SC Studio which demonstrate that there will not be any discernible overshadowing or solar impacts to surrounding development from the height exceedance.
- The increase in building height is extremely minimal and will be virtually indistinguishable from the street. As such, it will not cause any additional visual impacts from the public domain.

- **Compliance with bulk and massing**

- The minor increase in building height will not result in any increase to the bulk or scale of the overall development. The remainder of the proposed development remains well below the 24m maximum building height control and the proposed bulk and scale of the development remains unchanged.

- **Local amenity**

- As outlined above, the proposed development does not result in an unacceptable impact on solar access to adjoining buildings and the public domain.
- The portion of the building that exceeds the height control does not result in any visual privacy impacts to the surrounding development to the north, south and east of the site.

4.2.1 Conclusion on clause 4.6(3)(b)

For the reasons mentioned above, there are sufficient environmental planning grounds to justify the contravention of the maximum building height development standard as it is a direct change to the design that is necessary to achieve the required ground floor FPLs. This proposed scheme now ensures all habitable floorspace within the development is above expected flood levels, reducing flood risk at the site.

5.0 Conclusion

The assessment above demonstrates that compliance with the maximum height of building development standard contained in clause 4.3 of the SLEP is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

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

- Achieve the objectives of Clause 4.3 of SLEP by:
 - Ensuring the portion of the building that exceeds the building height is isolated to the lift overrun.
 - The minor height exceedance is a direct result of flood modelling that has been undertaken by the proponent; as such, the ground floor of the building has been adjusted to ensure the Finished Floor Levels (FFL) comply with the necessary Flood Planning Levels (FPLs).
 - The portion of the building that exceeds the height control does not adversely impact views to the sky or impact on exposure to sunlight to adjoining buildings and the surrounding public domain.
 - The portion of the building that exceeds the height limit control is integrated into the building and is not distinguishable from the public domain.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The proposed height exceedance is limited to the lift core. The remainder of the building does not exceed the maximum height control and is an appropriate height for the site and the surrounding context.
 - The minor height exceedance does not result in any additional environmental impacts to the surrounding neighbouring buildings such as loss of solar or increased overshadowing.
 - The proposal remains consistent with Council's plans and policies that seek to uplift the development in the Botany Road Corridor Character area by providing housing on a currently vacant and underutilised site.

Therefore, the consent authority can be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the SLEP and may grant development consent notwithstanding the contravention of the height of building development standard.