

Attachment C

Clause 4.6 Variation - Height of Buildings

Clause 4.6 Variation Request

Building Height

Detailed Development Application

Bangalay Apartments – Affordable Rental Housing

216-220 Wyndham Street, Alexandria

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



Prepared by Ethos Urban, a Colliers Company.

24 September 2025 | 2220442



'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

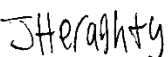
'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

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.

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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Appendices

Appendix		Author
A.	Architectural Plans	EM BE CE
B.	Architectural Design Report	EM BE CE
C.	Aboriginal Cultural Heritage Assessment Report	Curio Projects

1.0 Introduction

1.1 Overview

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of City West Housing. It is submitted to City of Sydney Council (the Council) in support of a development application (DA) for the detailed design and construction of a mixed-use development at 216-220 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 the development standard. This Clause 4.6 Variation Request relates to the development standard for height of buildings under clause 6.60B of the Sydney LEP 2012 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban and 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 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 Botany Road Precinct Opportunity Land maximum height of building development standard is unreasonable and unnecessary in the circumstances of the case. Further, that in the circumstances 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:

- The objectives of clause 6.60B of the SLEP 2012 are achieved notwithstanding the height variation, for the following reasons:
 - The proposal creates employment generating uses through a development which includes commercial uses at ground level and level 1, equating to 1,123.5m² of commercial floor space.
 - The proposal seeks to enable the timely provision of much-needed affordable housing in a highly sought-after location, strategically located in proximity to established public transport networks and amenities.
 - The proposal includes the provision of new community infrastructure in the form of a publicly accessible through-site link and laneway.
 - The proposed development seeks a high environmental performance.
- The objectives of clause 4.3 (maximum height of buildings development standard) of the SLEP 2012 are also achieved, notwithstanding the proposed variation, since:
 - The proposed development provides a building height which is contextually appropriate and provides an appropriate height transition to adjoining areas.
 - The proposed development ensures an appropriate height transition between the site and the adjoining heritage item.
 - The proposed development promotes the sharing of views by being setback from the edges of the level below.
- Compliance with the development standard would be unreasonable and unnecessary because the underlying objective and purpose of the building design and massing methodology would be thwarted if strict compliance to individual heights under the controls were to be complied with.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The extent of the variation is minor, particularly in the context of surrounding development and planned future context.
 - The variation allows for more affordable housing to be provided in the development than if strict compliance was enforced and contributes to the National Housing Accord.

- Compliance with the FSR development standard is retained despite the height variation and therefore the density of development is consistent with that envisaged at the site.
- The additional height will not result in any additional adverse overshadowing impacts.
- The additional height does not result in any view sharing impacts when viewed from the public domain and is mostly not visible from the ground level surrounding the site when viewed from Botany Road, McEvoy Street and the southern part of Wyndham Street.
- 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.
- 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 and contributes to the National Housing Accord.
 - 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 the 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.

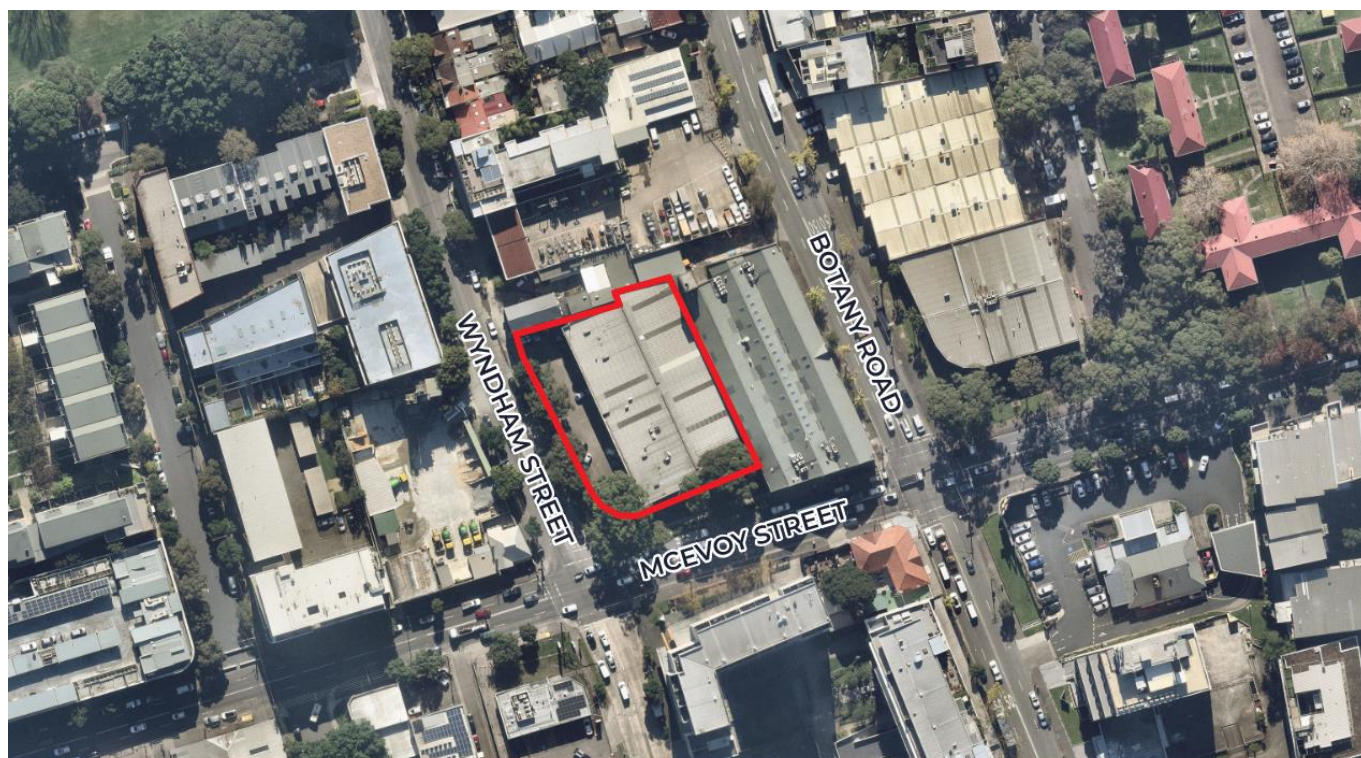
In accordance with the above requirements, this Clause 4.6 variation request:

- 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 DP126288 and has a site area of 2,735sqm. The site is an irregular shape and is bound by two street frontages including Wyndham Street along the western boundary and McEvoy Street to the southern boundary. The site adjoins private properties to its northern and eastern boundaries. The site is generally flat. The site contains two attached warehouses inclusive of office floor space and at grade car parking. The site vehicular access point is via Wyndham Street. There is a SP2 Roadway setback along McEvoy Street and a local heritage item adjoining the site at the north-western boundary.



 The Site



NOT TO SCALE

Figure 1 Site aerial

Source: Nearmap and Ethos Urban

2.2 Description of the Proposed Development

The application seeks approval for redevelopment of the site for the purposes of affordable rental housing. Specifically, approval is sought for the following:

- Site preparation works, including demolition of existing structures and tree removal.
- Construction and operation of a mixed-use building for affordable rental housing, including:
 - Commercial uses at ground level and level 1 (1,123.5m² of commercial floor space).
 - 111 affordable rental units.
- Construction of part of a new north-south through site link to be dedicated Council in the future that will connect Wyndham Street to the adjacent site at 214-218 Botany Road.
- Construction of an at-grade parking and servicing area with vehicle access from the new through site link connected at Wyndham Street, comprising:
 - 12 car parking spaces.
 - 1 service vehicle space
 - 144 bicycle parking spaces.
- Landscaping and public domain works, including:
 - Landscaped setback to McEvoy Street, public domain land dedication and enhancements.

- Communal open space at Level 2.
- Extension and augmentation of services and infrastructure as required.

Architectural drawings prepared by EM BE CE and Landscaping Plans prepared by Yerrabingin illustrating the proposed development are included at **Appendix A** and **Appendix B**, respectively.

A photomontage of the scheme is provided at **Figure 2**.



Figure 2 *Photomontage of the proposed development viewed from McEvoy and Wyndham Street Intersection*

Source: EM BE CE

3.0 Development Standard to be Varied

3.1 Background and Description of the Variation

In accordance with Section 4.3 of the City of Sydney Competitive Design Policy 2020, a Competitive Design Alternatives Process was held in 2024, commencing on 5 August 2024.

The Competition Selection Panel chose EMBECE Studio as the winning architect, observing that the proposal presented an innovative, distinct and robust design. The winning scheme was then progressed towards a DA lodgement scheme.

In addressing the Selection Panel's commentary, which included conversion of Level 1 from residential to commercial uses to comply with the SLEP 2012 and to better align the unit mix with City West Housing needs, an opportunity to provide additional affordable housing yield in an 11th storey was identified.

A Pre-DA pack was prepared by EMBECE and subsequently reviewed by Council officers and the Design Advisory Panel, which included the proposed 11th storey. Written pre-lodgement advice was received from Council on 10 June 2025, which noted that there appears to be minimal impacts to views and overshadowing, and if required, the additional storey was supported by the Design Advisory Panel. Further, the pre-lodgement advice outlines that Council Officers could support an additional setback story, subject to the following:

- A clause 4.6 variation request is being submitted that demonstrates that compliance with the height control is unreasonable or unnecessary, and that there are sufficient environmental planning grounds to exceed the control.
- A detailed solar analysis to demonstrate that apartments in the building south of the site receives adequate solar access as required by Part 4A of the ADG and Part 4.2.3.1 of the SDCP 2012.
- An analysis of visual impacts from the public domain.
- The use of appropriate materials and finishes to mitigate any potential visual impacts.
- Consideration of any impacts to the adjoining heritage item to the north.

This Clause 4.6 Variation Request has been prepared to justify the additional storey and associated contravention of the building height development standard. The Request also takes into consideration the matters raised by Council in their pre-DA feedback.

3.2 Botany Road Precinct Opportunity Land Alternative Height Development Standard Granted by Clause 6.60B

This Clause 4.6 Variation Request seeks to justify contravention of the Botany Road Precinct Opportunity Land Alternative Height development standard set out in clause 6.60B of the Sydney LEP 2012.

The base mapped height of building standard for the site under clause 4.3 of the Sydney LEP 2012 is 15m.

Notwithstanding, the site is located within the Botany Road Precinct Opportunity Land and is therefore subject to clause 6.60B(3) which states:

(3) A building on land to which this clause applies may exceed the maximum height shown for the land on the Height of Buildings Map if—

(a) the building is used only for—

(i) non-residential purposes, or

(ii) non-residential purposes and to provide affordable housing, and

(b) the height of the building does not exceed the height shown for the land on the Alternative Height of Buildings Map.

Since the proposed building is for non-residential purposes and affordable housing only, it is subject to the height of building control established by clause 6.60B(3) and the Alternative Height of Buildings Map as shown in **Figure 3**.

The site is therefore subject to a height control of 35m.

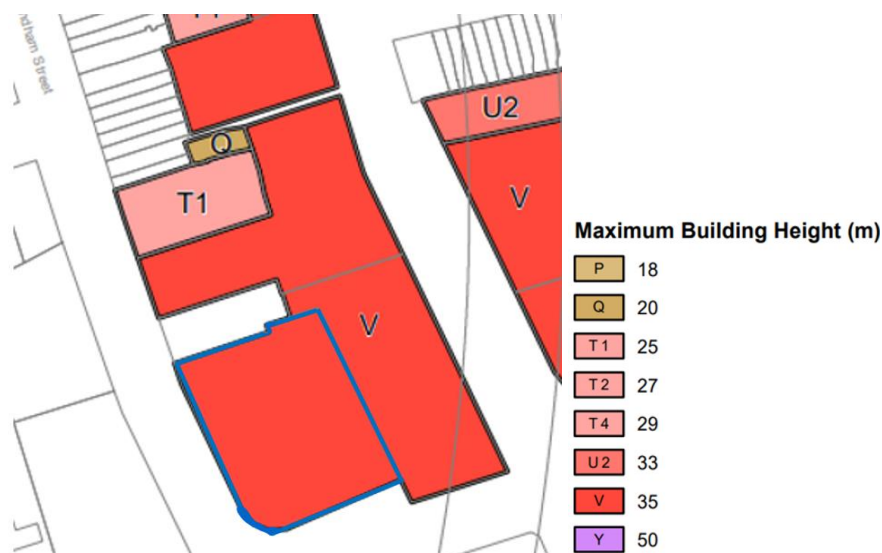


Figure 3 Alternative height of buildings map – Sheet AHOB_010 (site in blue)

Source: Sydney Local Environmental Plan 2012

3.3 Variation Sought

As illustrated in **Figure 3**, the site is afforded a maximum height control of 35m. The proposed development comprises a building of up to 39.08m in height, which represents a 4.08m (11.6%) variation from the height of buildings control. The exceedance is due to the 11th storey of the building, which will provide additional affordable housing within the approved FSR at the site and is setback on all sides from the edges of the 10th storey below. The variation is shown diagrammatically in **Figure 4** and **Figure 5**.

Table 1 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	Sydney Local Environmental Plan 2012 (Sydney LEP 2012)
The site's land use zone	MU1 Mixed Zone
Development standard sought to be varied	Clause 4.3 Height of buildings <i>The objectives of this clause are as follows:</i> (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. Notwithstanding the above, the site is located within the Botany Road Precinct Opportunity Land and is therefore subject to clause 6.60B(3). This provision states: (3) A building on land to which this clause applies may exceed the maximum height shown for the land on the Height of Buildings Map if— (a) the building is used only for— (i) non-residential purposes, or

Matter	Comment
	(ii) non-residential purposes and to provide affordable housing, and (b) the height of the building does not exceed the height shown for the land on the Alternative Height of Buildings Map.
Type of development standard	Numerical development standard
Numeric value of the development standard in the EPI	35m (map extract provided in Figure 3).
Difference between the existing and proposed numeric values. Variation percentage between the proposal and the EPI	39.08m, which is a variation of 4.08m (11.6%)
Visual representation of the proposed variation	Refer to Figure 5 and Figure 4 .

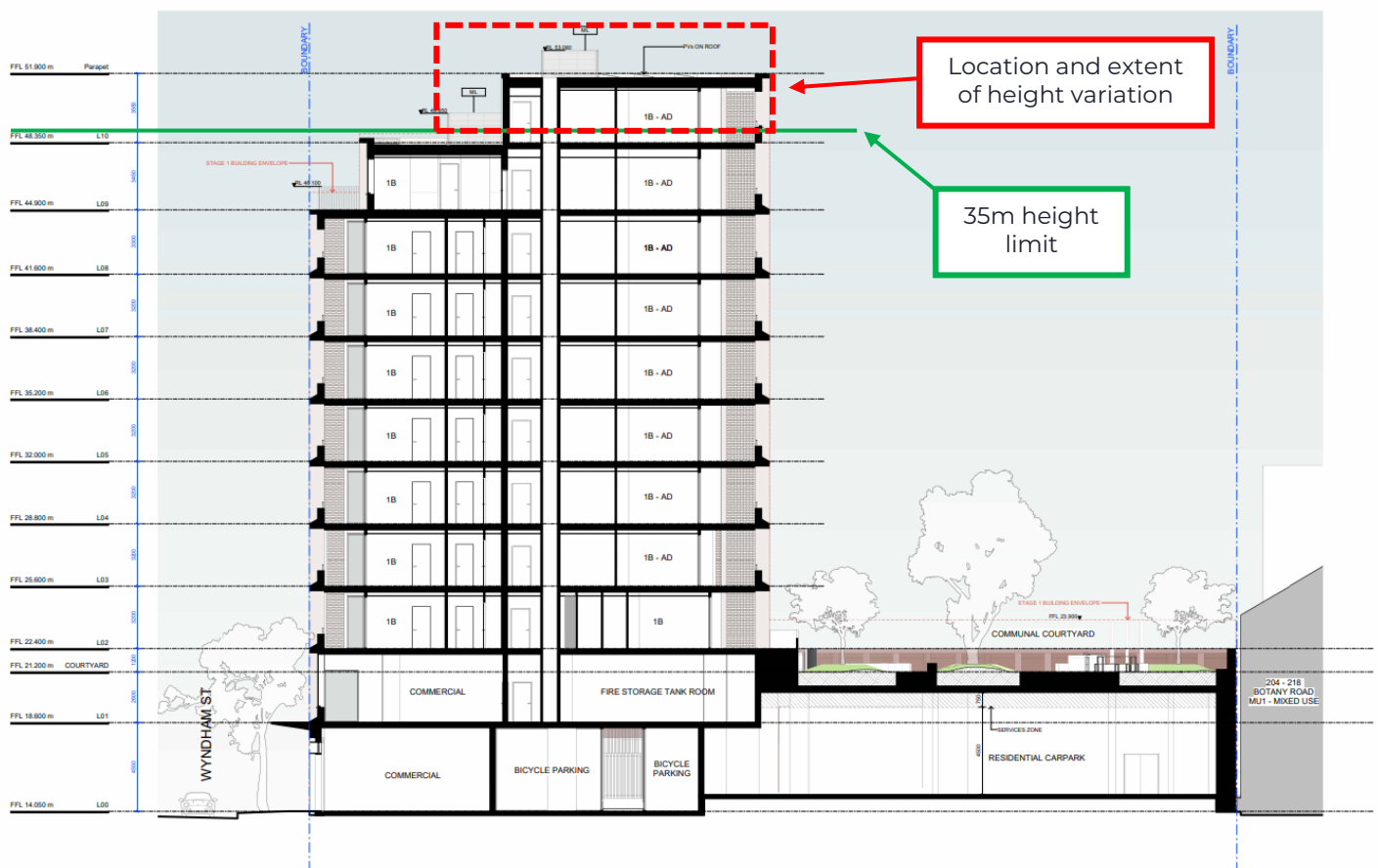


Figure 4 Section Drawing of Building, showing variation

Source: EMBECE

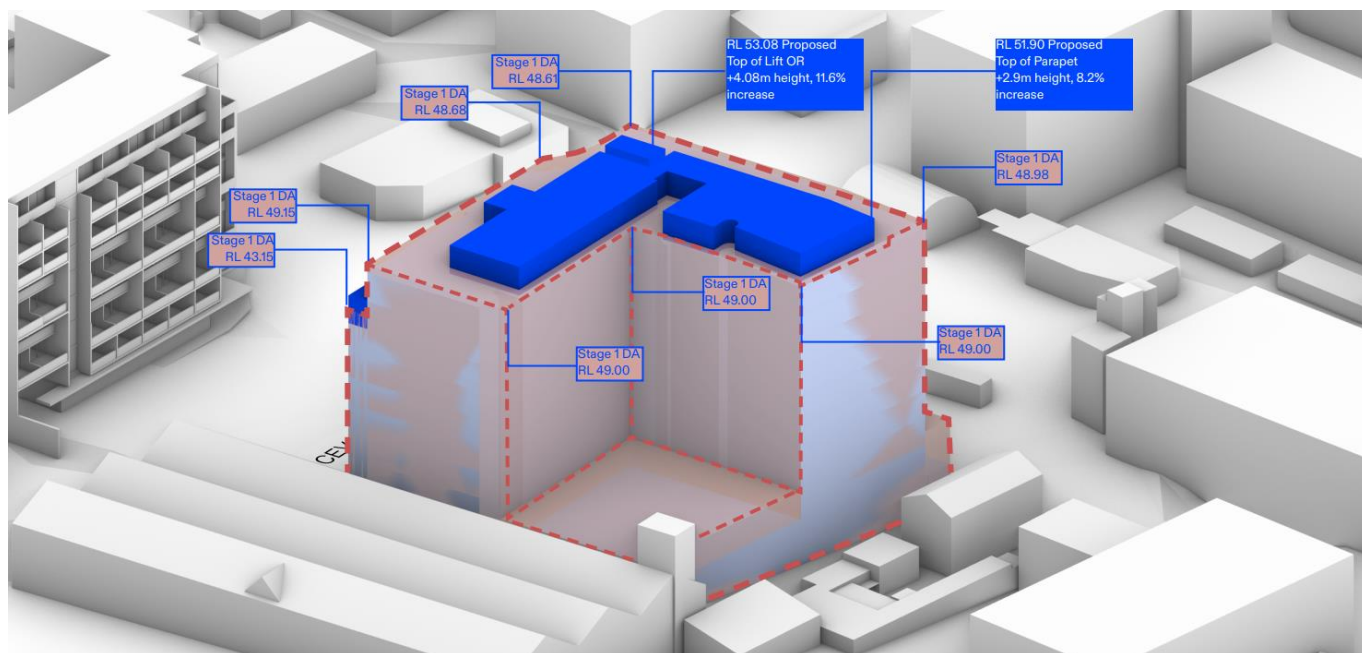


Figure 5 Proposed massing with additional storey shown in blue above the 35m height limit

Source: EMBECE

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 2012 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.

It is noted that variation to clause 6.60B is not otherwise excluded subject to the provisions of clause 4.6(8). 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*)

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 being satisfied that the applicant's written request has adequately addressed the matters in clause 4.6(4)(a)(i).

The consent authority is required to form this opinion first before it considers the merits of the SSDA and it can only consider the merits of the SSDA if it forms the required satisfaction in relation to the matter. In particular, the consent authority needs to be satisfied that there are sufficient environmental planning grounds to grant consent and that the contravention of the standard is justified.

This document provides the basis for the consent authority to reach this level of satisfaction. The relevant matters contained in clause 4.6 of the Sydney LEP 2012, with respect to the FSR 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]).

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 maximum height of buildings development standard pursuant to the **First Method**.

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

Clause 4.3 Objectives

The relevant objectives under clause 6.60B should not be considered in isolation and need to be considered in light of the objectives of the maximum height of building standard in clause 4.3, which are addressed as follows.

(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 site is located within the Botany Road Precinct which was recently rezoned following the announcement of the Waterloo Metro Station. Area specific controls were also provided within the Sydney Development Control Plan 2012 (SDCP 2012) to complement and guide the transformation of the area. The Botany Road Precinct Urban Strategy, showing the intended outcome of the Botany Road Precinct is shown in **Figure 6**.



Figure 6 Site location within the Botany Road Precinct Urban Strategy (site outlined in blue)

Source: EMBECE

As demonstrated above, the site was intended for “medium rise buildings” along Wyndham Street. The variation to the height control is located within the portion of the site identified as “medium rise buildings”. Indeed, the development, including the height contravention, remains to be a “medium rise building”.

The design of the building is compatible with the future residential and non-residential land uses intended to be developed throughout the Botany Road Corridor. As shown below in **Figure 7**, the additional level is not visible from McEvoy Street and the proposed development remains consistent with adjacent development if it were developed as either residential or commercial in accordance with the LEP and DCP.

Overall, the proposed development, including any contravention to the mapped height control, remains appropriate within the context of the Botany Road Precinct. The development achieves the above standard.



Figure 7 *Proposed development massing with neighbouring site redeveloped as a compliant scheme*

Source: EMBECE Studio

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. The adjoining 212-214 Wyndham Street, Alexandria (Lot 1, DP 585736) is identified as a local heritage item (I2240) and identified as “Former Electric Light Substation No 89 including interiors”.

The development as a whole, has been designed to implement height that appropriately responds to surrounding existing and new development, as well as heritage items. The proposal incorporates a two-storey brick datum that references the height of the adjacent substation building, with the tower set-back above this height. The height variation does not impact this heritage response and the facade has been carefully designed to integrate the additional height. Architectural detailing, including variation in brickwork, modulation of bays, and recessive treatments, resolves the built form to ensure an appropriate articulation and massing strategy. This approach allows the additional level to sit comfortably within the overall composition while respecting the adjacent heritage context. Refer to **Figure 8** for a visual representation of the approach.

Therefore, the proposal results in appropriate height transitions to heritage notwithstanding the proposed variation.

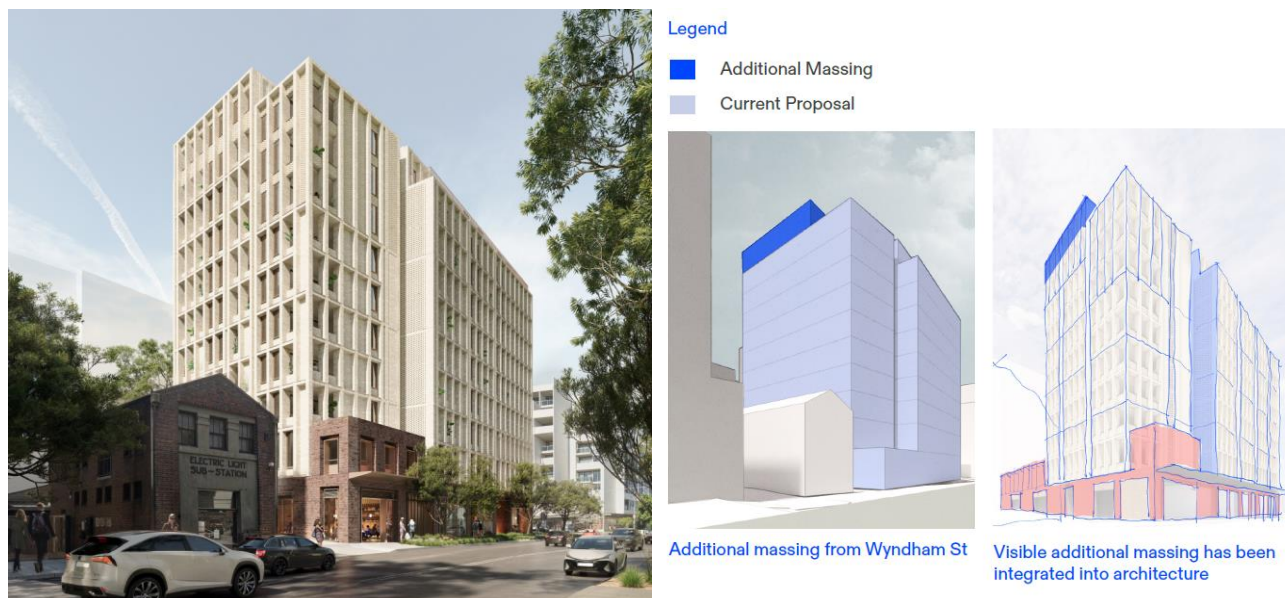


Figure 8 *Proposed development response to heritage substation adjoining to the north*

Source: EMBECE Studio

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

The proposed development, inclusive of the variation, achieves the above objective as it will not impact any significant views. The additional massing related to the variation is setback from the edges of levels below and will not impact views north and south along Botany Road.

The additional level is not visible from the ground level immediately surrounding the site when viewed from Botany Road, McEvoy Street and the southern part of Wyndham Street (as evidenced in **Figure 8**). Where it is visible from the northern part of Wyndham Street, it does not impact any view sharing.

Accordingly, the development is consistent with the above objective.

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

The site is not located in proximity to Central Sydney or Green Square Town Centre. Notwithstanding the height variation, the building is lower than existing building heights in Green Square Town Centre and Central Sydney and is of a commensurate height to the future vision for Botany Road Corridor. Further, the nearby Waterloo Metro Quarter and Waterloo Estate redevelopments will be taller than the proposed building.

As outlined in Objective (a) above, the development is contextually fit within the Botany Road Precinct.

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

The site is not located within Green Square and Objective (e) is not relevant for consideration.

Clause 6.60B

As previously noted, the building height development standard applicable for the site is stipulated under clause 6.60B of the Sydney LEP 2012. As such, this section provides justification as to how the proposed variation aligns with the objective of clause 6.60B. The objectives of the development standard contained in clause 6.60B of the Sydney LEP 2012 are:

- (1) The objective of this clause is to create incentives for carrying out development*
 - (a) for employment generating uses, and*
 - (b) if compatible with existing non-residential land uses—to provide affordable housing, and*

(c) to provide community infrastructure, and

(d) resulting in buildings with high environmental performance.

The below sections demonstrate that the proposal achieves the objectives of clause 6.60B.

Objective (a): [Create incentives for carrying out development] for employment generating uses.

The proposal creates genuine opportunities for new jobs for the State of NSW, through provision of 1,123.5m² of commercial floor space.

Both the construction and operational phases of the development are expected to generate indirect employment from the broader supply chain.

The additional height allows for additional affordable housing to be provided without compromising the extent of non-residential employment generating floor space required on Ground Level and Level 1 which are required under the SLEP 2012.

Objective (b): [Create incentives for carrying out development] if compatible with existing non-residential land uses—to provide affordable housing.

The proposal provides affordable housing and is compatible with the existing non-residential land uses. Refer to Objective 4.3(a) above.

Objective (c): [Create incentives for carrying out development] to provide community infrastructure

The proposal includes the provision of new community infrastructure in the form of a publicly accessible laneway and public domain dedications for footpath widening. The future laneway site will be designed as a 'shared zone' to prioritise pedestrians. The development is also subject to a Voluntary Planning Agreement which secures a monetary contribution being made by City West Housing to Council for the provision of community infrastructure in Green Square. The proposed variation does not impact the contribution to community infrastructure.

Objective (d): [Create incentives for carrying out development] resulting in buildings with high environmental performance.

The proposed development seeks a high environmental performance and complies with the stretch BASIX targets required for accessing the alternative building height control within the Botany Road Precinct, as prescribed by the Sydney LEP.

Conclusion on clause 4.6(3)(a)

The above sections have demonstrated that compliance with the Botany Road Precinct Opportunity Land height of building development standard under clause 6.60B is unreasonable or unnecessary in the circumstances of the case. The objectives of the development standard, set out in clause 6.60B of the Sydney LEP 2012 have been achieved by the proposed development, notwithstanding variation to the mapped height of building control in favour of improved built form and public domain outcomes. Further, the above section demonstrates that compliance with the mapped height of building controls would contravene the flexibility and innovative design approach that achieves an improved local amenity outcome.

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 4.08m (11.6%) to the 35m height of buildings control, although the breach only applies to the setback 11th storey. 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 allows for affordable housing and apartment amenity, consistent with the National Housing Accord

The NSW State Government has agreed to a National Housing Accord with other states and territories, local government, institutional investors and the construction sector. The Accord includes an initial aspirational target agreed by all parties to build 1.2 million new well-located homes over 5 years from mid-2024. NSW has a target to deliver 377,000 new homes over five years by July 2029 under the National Housing Accord.

The additional level above the prescribed height of buildings control will provide more affordable housing than if strict compliance with the control was required, which is considered a suboptimal outcome with a lower number of affordable housing dwellings provided at the site.

The proposed development has been designed to retain the design of the competition scheme where possible and has also included additional affordable housing units. This approach achieves the projects vision which is to “maximise the provision of quality fit-for-purpose affordable housing. The project will improve people’s lives by providing stable homes close to jobs, support networks and public transport”.

As previously discussed, the site is located in the highly urbanised suburb of Alexandria, which is in close proximity to the Sydney CBD. The additional proposed height will utilise this urban context to support additional provision of affordable housing dwellings.

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 Compliance with the FSR standard is achieved

Notwithstanding the height variation, the proposal maintains compliance with the maximum 3.575:1 FSR control (an FSR of 3.53:1 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 and is not of a density that exceeds what was envisaged for the site.

4.2.4 No Adverse Overshadowing Impacts

The additional level has been designed so that there are negligible impacts to the surrounding public domain and nearby residential dwellings. The existing residential apartments at 64-68 McEvoy Street are to the south of the subject site and could therefore be overshadowed by the development. However, if the additional level is sufficiently set back from the southern edge, then additional overshadowing can be minimised. This is shown conceptually at **Figure 11**.

View from the sun diagrams prepared by EMBECE show that additional shadows caused by the proposed development are acceptable and that the additional level results in an imperceptible change in solar access beyond a compliant form. EMBECE have also undertaken a detailed solar analysis of 64-68 McEvoy Street on the winter solstice, at 15-minute increments between 9am and 3pm. The results of this analysis are summarised at **Figure 10**, which demonstrates that

These have been recorded at 15-minute intervals between 09:00 and 15:00 on 21 June. It demonstrates that the additional level has a negligible impact on hours of sunlight for dwellings at 64-68 McEvoy Street when compared to the approved Concept DA maximum building envelope. A majority of the key windows and private open space will continue to receive more than 2hrs sunlight mid-winter as required by the NSW Apartment Design Guidelines and the Sydney DCP.

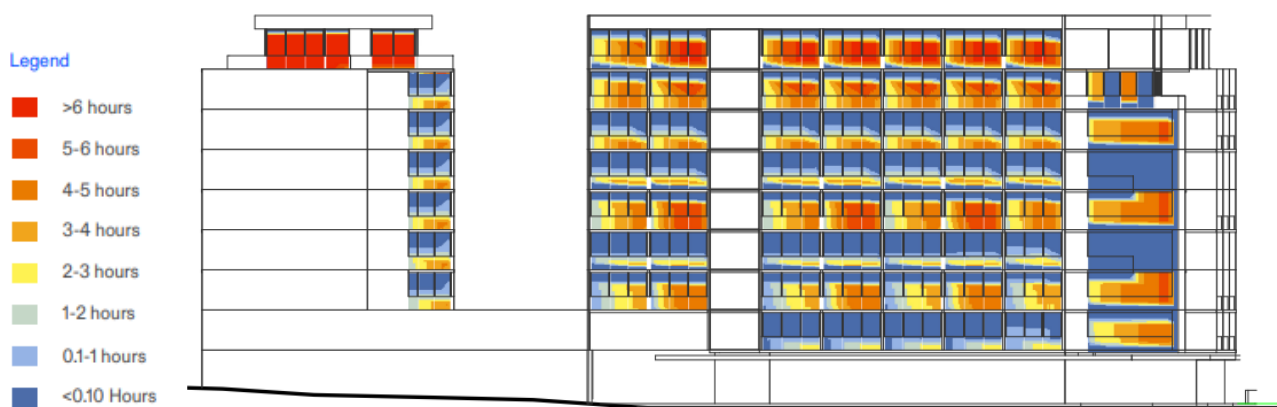


Figure 9 64-68 McEvoy Street Elevation with hours of sunlight study from approved building envelope

Source: EMBECE

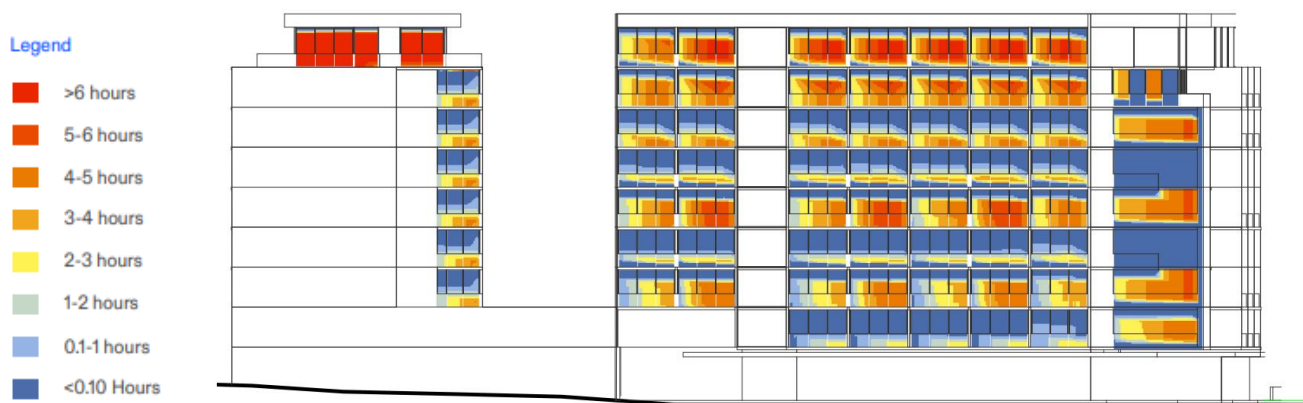


Figure 10 64-68 McEvoy Street Elevation with hours of sunlight study from proposed development

Source: EMBECE

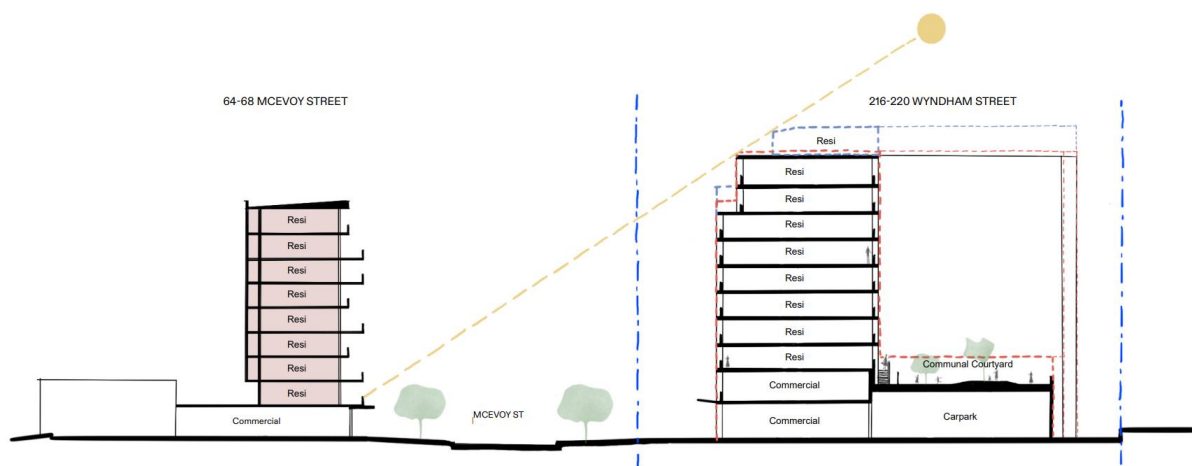


Figure 11 Current proposed massing (outlined in red checked line) with additional proposed massing on level 10 (outlined in checked blue line)

Source: EMBECE

4.2.5 No Adverse Visual Impacts from the Public Domain

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 setback, which means that the portion of the development exceeding the height limit is indiscernible from the public domain. Refer to **Appendix B** for visualisations of the proposed development from the street, in which the height exceedance is not visible from McEvoy, Botany or the southern part of Wyndham Street within the public domain.

4.2.6 Consistency with Object 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 proposed development is broadly consistent with each object, notwithstanding the proposed variation of the height of building development standard.

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 overall development promotes the social and economic welfare of the community through the provision of affordable housing. This will significantly benefit the local community and those in need. If the development were to comply with the height development standard, less housing for those in need would be provided, which would result in less positive impact on the social and economic welfare of the community. As such, the proposed variation will promote the economic and social welfare of the community by providing much-needed affordable housing for the community during a housing crisis.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The proposed development will facilitate the ecological sustainable development and exceed the minimum BASIX water and energy efficiency standards in accordance with the Botany Road Precinct controls.
(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), metro (Waterloo Metro Station) and bus routes to service future residents. Strict compliance with the maximum building height control 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

Object	Comment
	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 111 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 proposed development will carefully manage any unexpected finds of Aboriginal relics and non-Aboriginal relics through proper construction management techniques. See more details in the ACHAR appended to the Statement of Environmental Effects.
(g) to promote good design and amenity of the built environment	The proposal contributes to good design amenity of the built environment through the provision of high-quality buildings that are capable of exhibiting Design Excellence, as determined by the project Design Review Panel. A high level of amenity is retained for surrounding dwellings as described above. A complete assessment of the amenity for the proposed development is provided in the SEE. The development will achieve a high level of amenity for occupants
(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants	The proposed development will be constructed in accordance with a detailed Construction Environmental Management Plan, which will minimise any environmental impacts.
(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.
(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.

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 minor, particularly in the context of surrounding development and planned future context.
- The variation allows for more affordable housing to be provided in the development than if strict compliance was enforced and contributes to the National Housing Accord.
- Compliance with the FSR development standard is retained despite the height variation and therefore the density of development is consistent with that envisaged at the site.
- The additional height will not result in any adverse overshadowing impacts.
- The additional height does not result in any adverse visual impacts when viewed from the public domain.
- 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 maximum height of building development standard contained in clause 4.3 and clause 6.60B of the Sydney LEP 2012 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 maximum height of building development standard, the proposed development:

- The objectives of clause 6.60B of the SLEP 2012 are achieved notwithstanding the height variation, for the following reasons:
 - The proposal creates employment generating uses through a development which includes commercial uses at ground level and level 1, equating to 1,123.5m² of commercial floor space.
 - The proposal seeks to enable the timely provision of much-needed affordable housing in a highly sought-after location, strategically located in close proximity to established public transport networks and amenities.
 - The proposal includes the provision of new community infrastructure in the form of a publicly accessible through-site link and laneway.
 - The proposed development seeks a high environmental performance.
- The objectives of clause 4.3 (maximum height of buildings development standard) of the SLEP 2012 are also achieved, notwithstanding the proposed variation, since:
 - The proposed development provides a building height which is contextually appropriate and provides an appropriate height transition to adjoining areas.
 - The proposed development ensures an appropriate height transition between the site and the adjoining heritage item.
 - The proposed development promotes the sharing of views by being setback from the edges of the level below.
- Compliance with the development standard would be unreasonable and unnecessary because the underlying objective and purpose of the building design and massing methodology would be thwarted if strict compliance to individual heights under the controls were to be complied with.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - The extent of the variation is minor, particularly in the context of surrounding development and planned future context.
 - The variation allows for more affordable housing to be provided in the development than if strict compliance was enforced and contributes to the National Housing Accord.
 - Compliance with the FSR development standard is retained despite the height variation and therefore the density of development is consistent with that envisaged at the site.
 - The additional height will not result in any additional adverse overshadowing impacts.
 - The additional height does not result in any additional adverse visual impacts when viewed from the public domain.
 - 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.
- 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 and contributes to the National Housing Accord.
 - 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 consent authority can be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the Sydney LEP 2012 and may grant development consent notwithstanding the contravention of the maximum height development standard.