



Clause 4.6 Variation Request – Height

Dian, Rose Bay – State Significant Development (SSD-101842729)

2A-6 Conway Avenue, 15-15A Fernleigh Avenue and 38-40 Carlisle Street

Prepared on behalf of Two Conway Pty Ltd

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Document control

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Project summary

Prepared on behalf of	Two Conway Pty Ltd
Land to be developed	2A-6 Conway Avenue, 15-15A Fernleigh Avenue and 38-40 Carlisle Street
Legal description	Various
Project description	Redevelopment of the site for an 8 storey residential flat building including infill affordable housing

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Executive Summary

Introduction

This Report has been prepared to request a variation to the maximum height of buildings standard in connection with a State Significant Development Application (SSDA) for the development of 2A-6 Conway Avenue, 15-15A Fernleigh Avenue and 38-40 Carlisle Street (the site) for an infill affordable housing development. The Clause 4.6 Request has been prepared by FPD Planning on behalf of Two Conway Pty Ltd as the applicant.

The SSD application seeks consent for redevelopment of the site for a residential flat building of 8 storeys, comprising 70 dwellings

Clause 4.6 of the *Woollahra Local Environmental Plan 2014* (Woollahra LEP) includes provisions that allow the consent authority to vary development standards in certain circumstances.

The Department of Planning, Housing and Industry (DPHI) has issued the *Guide to Varying Development Standards* (November 2023) to assist applicants in applying to vary development standards. This Clause 4.6 variation report has been prepared in accordance with the *Guide to Varying Development Standards*.

This report seeks a variation of the maximum height control of 28.6m which applies under the Housing SEPP low and mid rise and infill affordable housing bonus provisions. The variation arises from interpretation of existing ground level and also from a minor exceedance for the purpose of rooftop services and accessing rooftop communal open space. The minor height exceedance effects only a small portion of the overall rooftop area and is centrally located within the building envelope.

The Department of Planning, Housing and Infrastructure (DPHI) have advised (29 May 2026) a preference to reference the natural ground level plane for the proposal, rather than the existing ground level to remove potential ambiguity. There is also extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated.

Based on the advice provided by DPHI on 29 May 2026, this report considers the height exceedance from an extrapolated ground level (referred to as natural ground level).

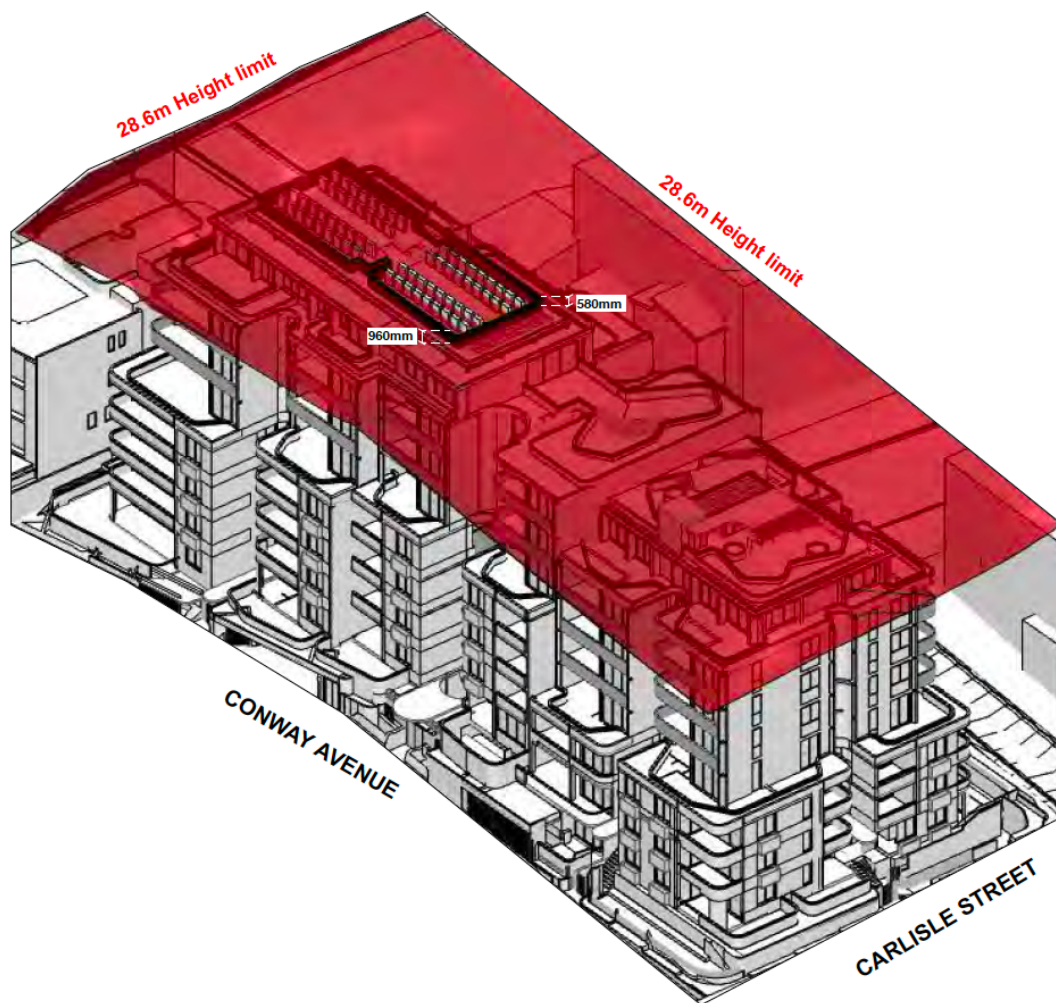
Proposed variation

This report seeks a variation of the maximum height control of 28.6m.

In detailing the extent of the excavation this report considers the height exceedance from an extrapolated ground level (referred to as natural ground level) as set out below.

- Natural ground level: As shown in Figure 3 and Figure 4 the height exceedance above natural ground level ranges from 580mm to a maximum 960mm at the greatest extent (2% to 3.4% of the permissible height of buildings).

The proposed development is fully compliant with the maximum permissible GFA of 8,880sqm.



Height plane diagram – natural ground level (Source: Source: MHNDU Architects)

Justification

Clause 4.6 of the Woollahra LEP includes provisions that allow the consent authority to vary development standards in certain circumstances. Clause 4.6 requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances.
- There are sufficient environmental planning grounds to justify contravening the development standard.

This Clause 4.6 variation request demonstrates that compliance with the height of buildings controls is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravention of the standard as summarised below and detailed within this report.

Compliance is unreasonable and unnecessary in the circumstances

Compliance with the development standard is considered unreasonable and unnecessary in this instance as it:

- The height exceedance is minor and set back from the facade, and does not create any adverse environmental impacts.
- The proposed development is consistent with the relevant aims and objectives of the Housing SEPP.
- The height exceedance does not compromise compliance with the objectives of Clause 4.3. Height of buildings under the Woollahra LEP
- The relevant underlying object of purpose of the Housing SEPP would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
- The development standard (being the height control under the Woollahra LEP) has been virtually abandoned or destroyed as a result of numerous consents departing from the standard.

There are sufficient environmental planning grounds to justify the contravention

There are sufficient environmental planning grounds to justify the variation to the height control in this instance given the minor nature of the exceedance.

The approach in this Clause 4.6, is consistent with advice from DPHI which outlined a preference to reference the natural ground level for this proposal. There is also extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated.

In relation to the minor height exceedance, this is limited to rooftop services which form a minimal component of the overall roof area and are located centrally within the building having a negligible impact on the surrounding area.

Overshadowing analysis which forms part of the Architectural Plans and Design Review Report highlights that the height exceedance would not result in any additional overshadowing due to the central location of the lift overruns and rooftop services.

A Visual Impact Assessment has been prepared which sets out that visual impacts of the proposed development are acceptable and that the visual impacts of the height exceedance are negligible.

The proposed development is fully compliant with the maximum permissible GFA of 8,880sqm.

The proposed height exceedance does not seek to accommodate additional storeys than could be otherwise achieved within the height control.

In summary the minor variation will result in negligible environmental impacts, while delivering significant benefits through the provision affordable and private housing.

1 Introduction

This Report has been prepared to request a variation to the maximum height of buildings standard in connection with a State Significant Development Application (SSDA) for the development of 2A-6 Conway Avenue, 15-15A Fernleigh Avenue and 38-40 Carlisle Street (the site) for an infill affordable housing development.

The Clause 4.6 Request has been prepared by FPD Planning on behalf of Two Conway Pty Ltd as the applicant.

The site is zoned R3 Medium Density Residential under the *Woollahra Local Environmental Plan 2014* (Woollahra LEP). The following non-discretionary height and floor space ratio (FSR) standards apply under the low and mid rise provisions of Chapter 2 of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP):

- Height of buildings: 22m
- FSR: 2.2:1

Infill affordable housing bonus provisions set out in Chapter 2, Division 1 Housing SEPP also apply to the site allowing the following maximum height of buildings:

- Height of buildings: 28.6m.
- FSR: 2.86:1 (allowing a maximum GFA of 8,880sqm)

The relevant provisions of the Woollahra LEP and Housing SEPP are outlined in more detail in the Section 4 of the EIS.

The minor variation arises from a minor exceedance for the purpose of rooftop services. The height exceedance affects only a small portion of the overall rooftop area and is centrally located within the building envelope having a negligible environmental impact.

The Department of Planning, Housing and Infrastructure (DPHI) have advised a preference to reference the natural ground level plane, rather than the existing ground level for the Proposal.

This report considers the height exceedance from an extrapolated ground level (referred to as natural ground level).

Clause 4.6 of the Woollahra LEP includes provisions that allow the consent authority to vary development standards in certain circumstances. The objectives of clause 4.6 are:

- To provide an appropriate degree of flexibility in applying certain development standards to particular development.
- To achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances.
- There are sufficient environmental planning grounds to justify contravening the development standard.

The Department of Planning, Industry and Environment has issued the *Guide to Varying Development Standards November 2023* to assist applicants in applying to vary development standards. The guide sets out five common ways which has been established by the NSW Land

and Environment Court which may be considered in applying Clause 4.6 to determine whether the objection to the development standard is well founded. The matters have been considered and addressed by this report.

2 The site and proposed development

2.1 Site description

The site comprises land at 2A-6 Conway Avenue, 15-15A Fernleigh Avenue and 38-40 Carlisle Street, Rose Bay including land shown at Table 1 and has a land area of 3,105sqm.

The site has frontages to Conway Avenue to the South, Carlisle Street to the west and Fernleigh Avenue to the north and is within an area characterised by low density dwellings and low rise apartment buildings.

The area is undergoing a process of renewal with the site and much of the surrounds included in the R3 Medium Density Residential zone under the Woollahra LEP and more recently being subject of the low and mid rise and infill affordable provisions of the Housing SEPP which allows for development of up to eight storeys.

Table 1 Site description

Address	Lot details
2A Conway Avenue	Lot 8 DP74055
2 Conway Avenue	SP81375
4 Conway Avenue	Lot 2 DP303984
6 Conway Avenue	Lot 3 DP303984
38 Carlisle Street	Lot B DP73175
15 Fernleigh Avenue	Lot 3 DP1201196
15A Fernleigh Avenue	Lot 2 DP1201196
40 Carlisle Street	Lot 1 DP1201196

2.2 Overview of the proposed development

The SSD application seeks consent for the following:

- Site preparation works including demolition of existing buildings, tree removal and excavation
- Construction of a residential flat building of 8 storeys, comprising 70 dwellings
- Car parking within a 2-3 level basement
- A single driveway from Conway Avenue providing access to basement parking
- Associated landscaping and communal open space
- Infrastructure servicing
- amalgamation of the properties into one development lot, which will be further strata subdivided post development.

A minimum of 15% of floor space is proposed as affordable housing suited to key workers comprising 17 of the total number of dwellings (24%).



Figure 1: Subject site (Source: Mecone Mosaic 2025)

3 Extent of proposed variation

This report seeks a variation of the maximum height control of 28.6m.

In detailing the extent of the excavation this report considers the height exceedance from an extrapolated ground level (referred to as natural ground level) as set out below.

- Natural ground level: As shown in Figure 3 and Figure 4 the height exceedance above natural ground level ranges from 580mm to a maximum 960mm at the greatest extent (2% to 3.4% of the permissible height of buildings).

The proposed development is fully compliant with the maximum permissible GFA of 8,880sqm.

There is extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated. The DPHI have also advised a preference to reference the natural ground level for the proposal, rather than the existing ground level to minimise any ambiguity (as outlined in the advice provided 29 May 2026).

As shown in Figure 2, the minor height exceedance is limited to rooftop plant and servicing. The height exceedance is minor ranging from 580mm to 960mm for a small portion of the roof area, and is located centrally on the rooftop of the building ensuring the minor exceedance does not result in any significant visual, privacy or overshadowing impact as discussed in further detail in Section 4.2.

As shown in Figure 2, the proposed rooftop communal open space is located within the 28.6m height control.

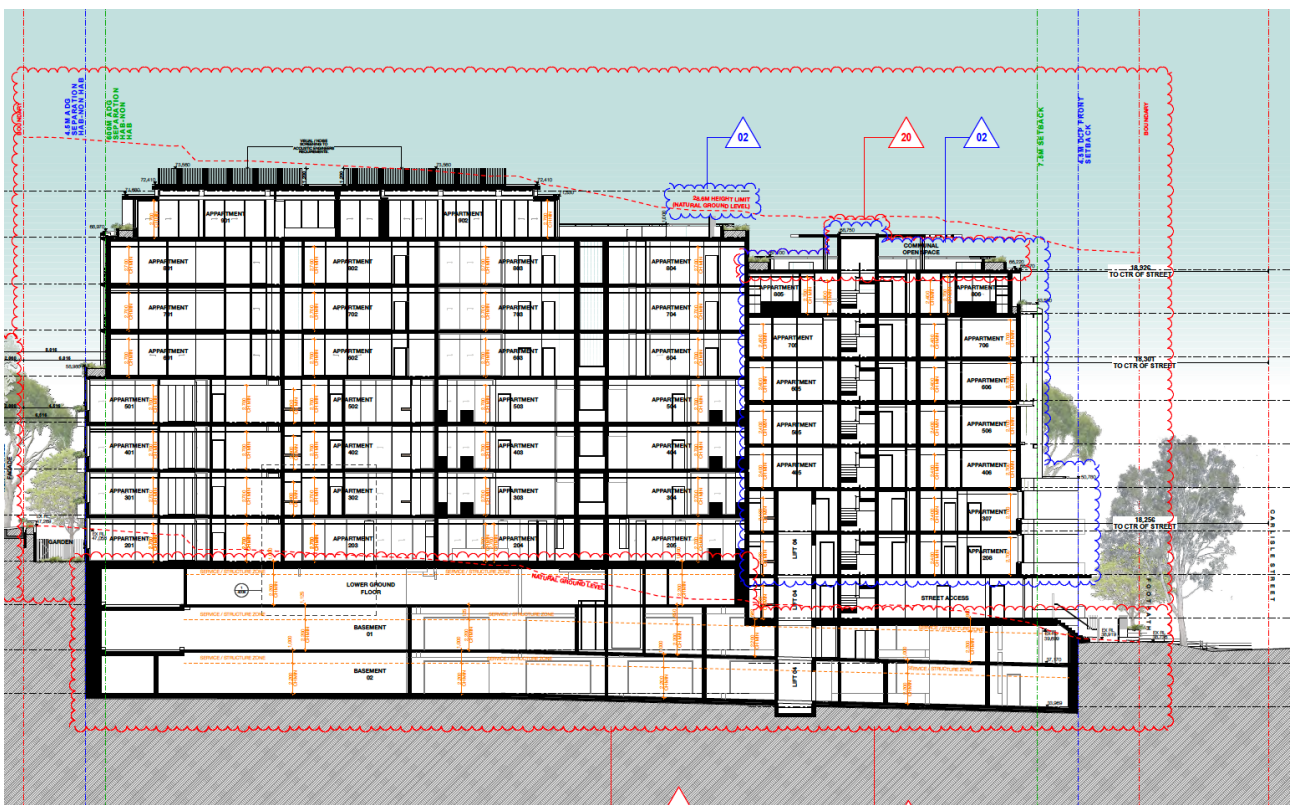


Figure 2: Cross section showing height exceedances (Source: MHNDU Architects)

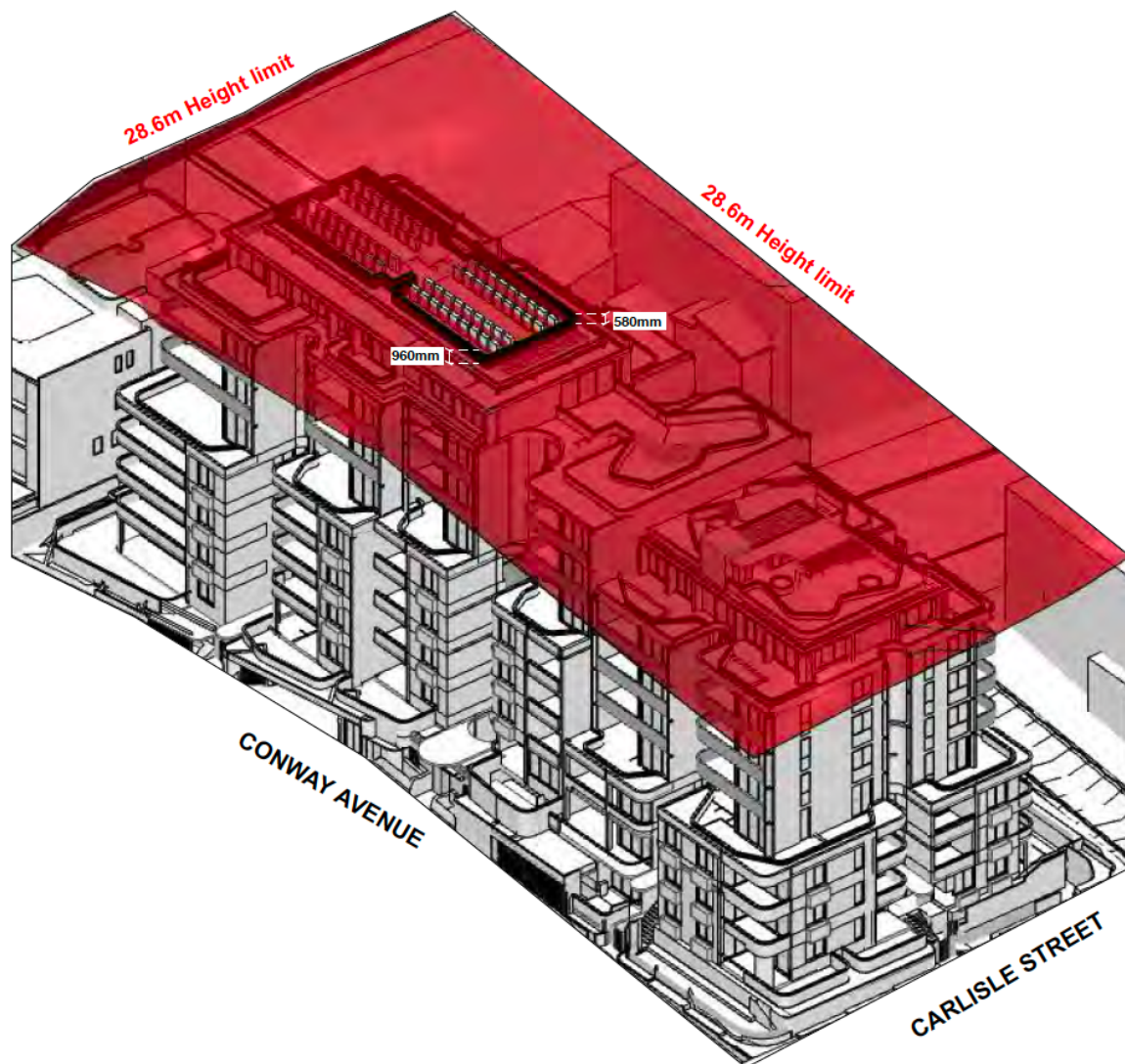


Figure 3: Height plane diagram – natural ground level (Source: MHNDU Architects)

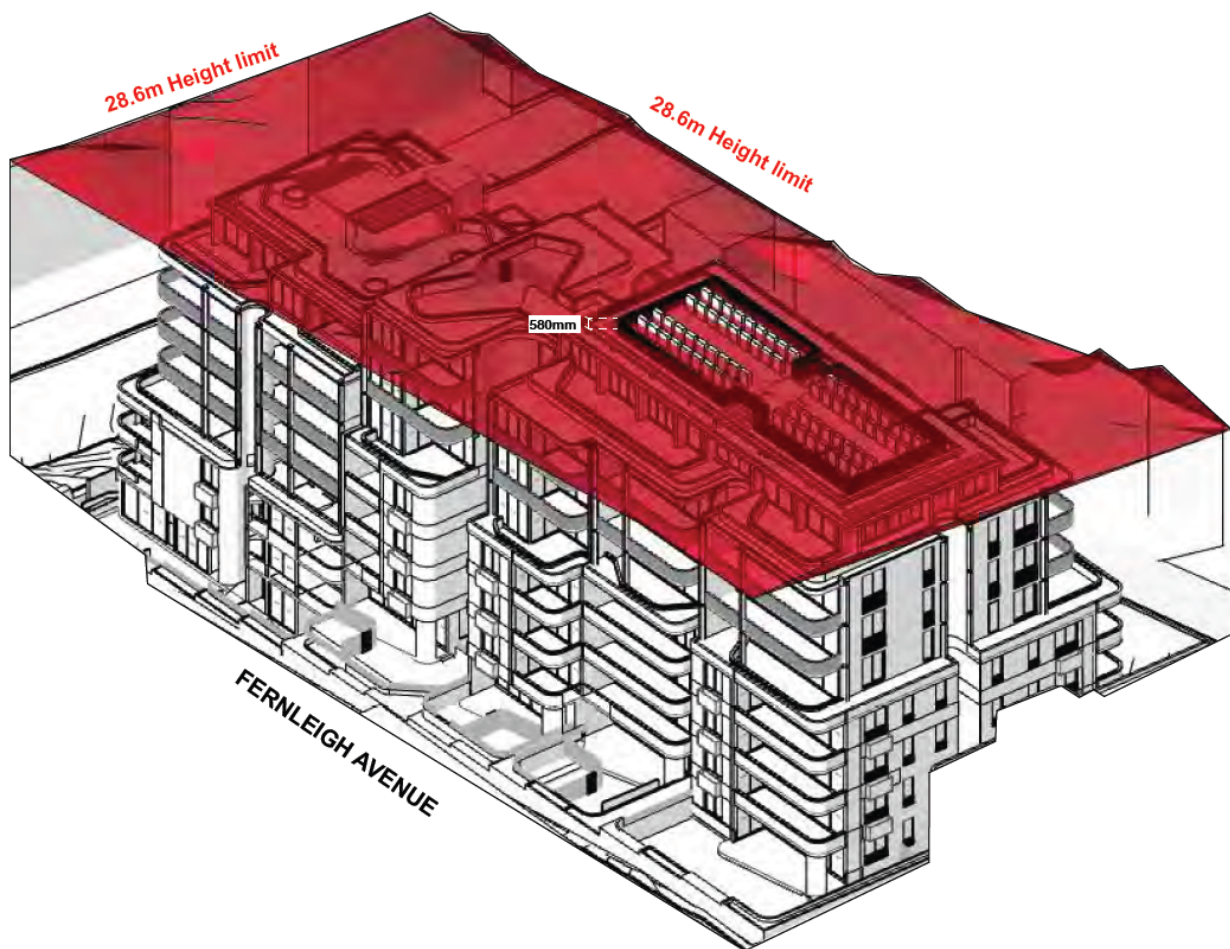


Figure 4: Height plane diagram – natural ground level (Source: MHNDU Architects)

4 Justification of proposed variation

This section of the report provides consideration of the requirements of Clause 4.6 and the five common ways to demonstrate compliance is unreasonable or unnecessary as set out in *Guide to Varying Development Standards November 2023*.

4.1 How is compliance with the development standard is unreasonable or unnecessary in the circumstances of this particular case?

The Department of Planning, Housing and Infrastructure has issued the *Guide to Varying Development Standards November 2023* to assist applicants applying to vary development standards. The guide sets out five common ways that compliance with a development standard may be demonstrated to be unreasonable or unnecessary as established by the NSW Land and Environment Court in determining whether the objection to the development standard is well founded. A Clause 4.6 application is not required to meet all the tests.

The five common ways that compliance with a development standard may be demonstrated to be unreasonable or unnecessary are addressed in Table 2.

Table 2: Five ways to demonstrate compliance is unreasonable or unnecessary

Objective	Consideration
The objectives of the standard are achieved notwithstanding non-compliance with the standard	The proposed development applies the following in terms of maximum height of buildings: • The low and mid rise non-discretionary development standards under the Chapter 6 of the Housing SEPP • Bonus height provisions under for infill affordable housing under Chapter 2, Division 1 of the Housing SEPP. No objectives are applied directly to these standards under the Housing SEPP however: • Chapter 6 sets out the following: <i>The aim of this chapter is to encourage the development of low and mid rise housing in areas that are well located with regard to goods, services and public transport.</i> • Chapter 2, Division 1 sets out the following: <i>The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.</i> The proposed development meets the relevant aims and objectives of the Housing SEPP through the identification of a mid rise housing project in an accessible area which accommodates affordable housing. This is outlined in further detail in the EIS. Clause 4.3 of the Woollahra LEP sets out objectives which relate to the height of buildings controls under the LEP. Whilst these objectives are not directly relevant to the proposed development, they have been considered for the purposes of this Clause 4.6 request. As detailed in The objectives of Clause 4.3 Height of Buildings of the Woollahra LEP would be achieved notwithstanding the non-compliance as shown in Table 3. Table 3 the proposed height exceedance will not impact on the ability to achieve the relevant objectives of the Clause 4.3 of the Woollahra LEP.

Objective	Consideration
The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary	This test is not applicable in this instance.
The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable	There is extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated. Accordingly, it can be assumed that in developing the low and mid rise and infill affordable housing controls, it was intended that height of buildings would be measured from ground level without measuring 'ground level (existing)' from the base of previously excavated parts of the site. The DPHI have also advised of their preference to reference the natural ground level, rather than existing ground level. If a strict application of existing ground level is applied where the maximum height is measured from the base of existing excavations it is considered that the intention of the low and mid rise and infill affordable housing provisions in supporting the development of residential flat buildings of 8 storeys in height would be thwarted.
The development standard has been virtually abandoned or destroyed by council's own actions in granting consents departing from the standard.	Numerous exceedances to the maximum height of buildings under the Woollahra LEP have been approved by Woollahra Council to account for previously excavations and measurement from existing ground level. This applies the following DAs based on Council's published Clause 4.6 register for 2023 and 2024. • DA224/2023 46 Hopetoun Avenue, Vaucluse: residential alterations and additions with 22.1% variation of the 9.5m height control which is attributed to the sloping topography and to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA55/2023 94 Bellevue Road, Bellevue Hill: Residential alterations and additions with 5% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA216/2023 35 Vaucluse Road, Vaucluse: Residential alterations and additions with 14.7% variation of the 9.5m height control which is attributed to the sloping topography and to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA157/2023 6 Hopetoun Avenue: New single dwelling with 62% variation of the 9.5m height control with the extent exacerbated as a result of a previously excavated area of the site and the measurement of height from 'existing ground level'. • DA247/2023 7 Marine Parade Watsons Bay: residential alterations and additions with 11.34% variation of the 8.2m height control which is attributed to the sloping topography and to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA12/2023: 44 Towns Road, Vaucluse: residential alterations and additions with 21.45% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'.

Objective	Consideration
	• DA65/2022 17 Bay Street, Double Bay: commercial alterations and additions with 21.5% variation of the 14.7m height control with the extent exacerbated as a result of a previously excavated area of the site and the measurement of height from 'existing ground level'. • DA402/2022 137 Victoria Road, Bellevue Hill: Residential development with 7.89% variation of the 9.5m height control which is attributed to the sloping topography and to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA39/2022 186 Hopetoun Avenue, Watsons Bay: residential alterations and additions with 9.1% variation of the 8.2m height control which is attributed to the sloping topography and the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA347/2022 80 Beresford Road, Bellevue Hill: residential alterations and additions with 12% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA266/2022 49 Beresford Road Bellevue Hill: New single dwelling with 2.2% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA376/2023 2 Manion Avenue, Rose Bay: residential alterations and additions with 6.3% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA297/2022 106A Wolseley Road, Point Piper: New single dwelling with 31.5% variation of the 9.5m height control which is attributed to the sloping topography and to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA472/2022 72 Boronia Road, Bellevue Hill: Residential alterations and additions with 21.6% variation of the 9.5m height control which is attributed to the previously excavated area of the site and the measurement of height from 'existing ground level'. • DA257/2022 51 Drumalbyn Road, Bellevue Hill: Residential alterations and additions with 9.4% variation of the 9.5m height control which is attributed to the sloping topography and the previously excavated area of the site and the measurement of height from 'existing ground level'.
The compliance with the development standard is unreasonable or inappropriate due to the existing use of the land and current character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.	This test is not applicable in this instance.

The objectives of Clause 4.3 Height of Buildings of the Woollahra LEP would be achieved notwithstanding the non-compliance as shown in Table 3.

Table 3: Consideration of Clause 4.3 Height of buildings objectives

Height of building objectives	Consistency
(a) to establish building heights that are consistent with the desired future character of the neighbourhood,	The desired future character for the area is established through the Housing SEPP low and mid rise and infill affordable controls. The low and mid rise controls envisage heights of up to 22m to allow for development of up to six storeys. The infill affordable housing provisions allow for 30% bonus height and floor space where 15% of floor space is affordable housing allowing for development of up to around eight storeys. This proposal is for a residential flat building which applies the Housing SEPP bonuses and includes 15% of the floor space as affordable housing which is consistent with the Housing SEPP objectives. Accordingly, it is considered that the proposed development is consistent with the desired future character for the area.
(b) to establish a transition in scale between zones to protect local amenity,	The proposed development provides for a transition to the adjacent R2 Low Density Residential zone through identification of a three storey street wall in this location. The proposed height exceedances would not have any impact on this transition.
(c) to minimise the loss of solar access to existing buildings and open space,	Overshadowing analysis which forms part of the Architectural Plans and Design Review Report highlights that the height exceedance would not result in any additional overshadowing due to the central location of the lift overruns and rooftop services.
(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,	As set out above, the proposed height exceedance does not result in any additional overshadowing. Loss of privacy has been fully addressed through the EIS and Response to Submissions through suitable building setbacks and screening. A Visual Impact Assessment has been prepared which sets out that the impact of the height exceedance is negligible.
(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.	A Visual Impact Assessment has been prepared which sets out that visual impacts of the proposed development are acceptable and that the visual impacts of the height exceedance are negligible.

As detailed above compliance with the development standard is considered unreasonable and unnecessary in this instance as:

- The proposed development is consistent with the relevant aims and objectives of the Housing SEPP.
- The height exceedance does not compromise compliance with the objectives of Clause 4.3. Height of buildings under the Woollahra LEP (see The objectives of Clause 4.3 Height of Buildings of the Woollahra LEP would be achieved notwithstanding the non-compliance as shown in Table 3.
- Table 3)
- The relevant underlying object of purpose of the Housing SEPP would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

- The development standard (being the height control under the Woollahra LEP) has been virtually abandoned or destroyed as a result of numerous consents departing from the standard as outlined in Table 2.

4.2 Are there are sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds to justify the variation to the height control in this instance given the minor nature of the exceedance.

There is extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated.

This is also supported by DPHI's advice which has outlined a preference to reference the natural ground level for the proposal, rather than the existing ground level in this instance to minimise ambiguity.

In relation to the exceedance above natural ground level, this is a minor exceedance limited to rooftop services, which are located centrally within the building and would have negligible impact on the surrounding area.

Overshadowing analysis which forms part of the Architectural Plans and Design Review Report highlights that the height exceedance would not result in any additional overshadowing due to the central location of the lift overruns and rooftop services.

A Visual Impact Assessment has been prepared which sets out that visual impacts of the proposed development are acceptable and that the visual impacts of the height exceedance are negligible.

The proposed development is fully compliant with the maximum permissible GFA of 8,880sqm.

The proposed height exceedance does not seek to accommodate additional storeys than could be otherwise achieved within the height control.

In summary the minor variation will result in negligible environmental impacts, while delivering significant benefits through the provision affordable and private housing.

5 Conclusion

This Clause 4.6 variation request demonstrates that compliance with the height of buildings controls is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravention of the standard as summarised below and detailed within this report.

Compliance is unreasonable and unnecessary in the circumstances

Compliance with the development standard is considered unreasonable and unnecessary in this instance as it:

- The height exceedance is minor and set back from the façade and does not create any adverse environmental impacts.
- The proposed development is consistent with the relevant aims and objectives of the Housing SEPP.
- The height exceedance does not compromise compliance with the objectives of Clause 4.3. Height of buildings under the Woollahra LEP
- The relevant underlying object of purpose of the Housing SEPP would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
- The development standard (being the height control under the Woollahra LEP) has been virtually abandoned or destroyed as a result of numerous consents departing from the standard.

There are sufficient environmental planning grounds to justify the contravention

There are sufficient environmental planning grounds to justify the variation to the height control in this instance given the minor nature of the exceedance.

There is extensive Land and Environment Court case law which supports extrapolation of ground levels either from within the site or surrounding the site where a site has been significantly developed and/or excavated. This approach is also consistent with advice from DPHI, which outlined a preference to reference the natural ground level for the proposal – rather than the existing ground level in this case to remove potential ambiguity.

In relation to the minor exceedance above natural ground level, this is limited to a small portion of the roof area to accommodate rooftop services, which are located centrally within the building and would have negligible impact on the surrounding area.

Overshadowing analysis which forms part of the Architectural Plans and Design Review Report highlights that the height exceedance would not result in any additional overshadowing due to the central location of the lift overruns and rooftop services.

A Visual Impact Assessment has been prepared which sets out that visual impacts of the proposed development are acceptable and that the visual impacts of the height exceedance are negligible.

The proposed development is fully compliant with the maximum permissible GFA of 8,880sqm.

The proposed height exceedance does not seek to accommodate additional storeys than could be otherwise achieved within the height control.

In summary the variation will result in negligible environmental impacts, while delivering significant benefits through the provision affordable and private housing.