

# GYDE

## Clause 4.6 Variation Request

*Section 18(2) of State Environmental Planning Policy (Housing) 2021*

21, 23 & 25 McIntosh Street and 55 Werona Avenue, Gordon

**Submitted to Department of Planning, Housing and Infrastructure  
on behalf of CPDM Pty Ltd**

10 April 2026

## Acknowledgment of Country



Towards Harmony by Aboriginal Artist Adam Laws

Gyde Consulting acknowledges and pays respect to Aboriginal and Torres Strait Islander peoples past, present, Traditional Custodians and Elders of this nation and the cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander people. We recognise the deep and ongoing connections to Country – the land, water and sky – and the memories, knowledge and diverse values of past and contemporary Aboriginal and Torres Strait communities.

Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

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## Glossary and abbreviations

Term/Acronym	Description
AS	Australian Standards
BCA	Building Code of Australia
BC Act	<i>Biodiversity Conservation Act 2016</i>
CEMP	Construction Environmental Management Plan
Council	Ku-ring-gai Council
CPTED	Crime Prevention through Environmental Design
DA	Development Application
DCP	Development Control Plan
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
The Regulations	Environmental Planning and Assessment Regulations 2021
ESD	Ecologically Sustainable Development
FSR	Floor Space Ratio
GFA	Gross Floor Area
INP	Industrial Noise Policy
LALC	Local Aboriginal Land Council
LEP	Local Environmental Plan
LGA	Local Government Area
NCC	National Construction Code
SEPP	State Environmental Planning Policy
WSUD	Water Sensitive Urban Design

## 1. Introduction

This is a formal request that has been prepared in accordance with Clause 4.6 of the *Ku-ring-gai Local Environmental Plan 2015* (KLEP) to justify a variation to Section 18 of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) in a State Significant Development Application (SSDA) in relation to 21-25 McIntosh Street and 55 Werona Avenue, Gordon (the subject site). The SSDA is submitted to the Department of Planning, Housing and Infrastructure (DPHI) seeking consent for a residential flat building development comprising 151 apartments, basement car parking and associated civil and landscaping works.

The SSDA is made subject to the provisions of Chapter 2 Affordable Housing and Chapter 5 Transport Oriented Development of the Housing SEPP. Chapter 5 of the Housing SEPP provides the development standards that allow for higher density development in key locations that are supported by existing or planned public transport. Therefore, whilst the KLEP is the primary environmental planning instrument (EPI) applying to the site, the proposed development is made pursuant to the provisions of the Housing SEPP. In addition, development for in-fill affordable housing as per Chapter 2 of the Housing SEPP provides opportunity for up to 30% additional building height for development that incorporates the minimum required floor space for affordable housing.

Clause 4.3 of Ku-ring-gai LEP requires that the height of buildings for the site does not exceed 9.5m when measured from existing ground level. As noted above, the proposal seeks consent for a development that relies on the provisions in Chapter 5 of the Housing SEPP, which permit a greater density than that envisaged under Ku-ring-gai LEP. The provisions in Chapter 5 of the Housing SEPP allow for a building height of up to 22m. With an additional 30% building height permitted under Chapter 2 of the Housing SEPP, the maximum permissible building height is 28.6m.

The proposed development seeks consent for a building up to 30.95m in height. Therefore, the proposal exceeds the maximum permissible building height by 2.35m (8.22%) when measured from existing ground level. The departure from the standard is set out further in Section 3 (Extent of variation) of this request and the requested variation relates to the maximum building height established by Section 18 of the Housing SEPP.

This request should be read in conjunction with the documents prepared in support of the SSDA lodged for the site, including the Environmental Impact Statement (EIS) and the Response to Submissions and Amendment Report prepared by Gyde and the accompanying architectural drawings prepared by PMDL Architects.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to development, in particular circumstances, and to achieve better outcomes for and from development.

This request has been prepared having regard to the NSW Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decisions in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

There is no constraint on the degree to which a consent authority may depart from a numerical standard under Clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]. As Commissioner Clay explained in his decision in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, that the application of Clause 4.6 should not be constrained by a perceived maximum number by which a standard may be varied (this decision was upheld by the Chief Judge of the Land and Environment Court on appeal in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115).

In brief terms, the requirement to comply with the development standard is unreasonable and unnecessary in the circumstances because:

- The proposal optimises residential yield in response to the current housing supply shortfall, while avoiding unacceptable environmental or amenity impacts. The portions of the buildings that exceed the

height standard do not result in any unacceptable, additional adverse overshadowing, visual, or privacy impacts.

- The proposed variation largely arises from the provision of communal open space on the roof of each building, which has been positioned to optimise its usability and amenity, particularly through maximising solar access.
- The proposed variation also arises from the redistribution of floor space within the development to avoid and minimise impacts on the heritage significance of 17 McIntosh Street (Eryldene Historic House and Garden).
- The development retains and enhances the site's residential land use by delivering 151 apartments, including 31 affordable dwellings, within walking distance of Gordon Railway Station and other key services.
- The proposal responds to the NSW Government's strategic housing initiatives by contributing to housing diversity and affordability, providing 31 affordable housing units, and supporting population growth within an established urban area.
- The variation allows the spatial arrangement of the residential flat buildings to be optimised resulting in improved amenity within and around the development, particularly by maximising solar access to the communal open space located on the roof and ensuring greater than required floor to ceiling heights.

This Clause 4.6 variation request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention.

## 2. Standard to be varied

The primary EPI applying to the site is KLEP which prescribes a maximum building height for the subject site of 9.5m. The site is located in a Transport Oriented Development (TOD) area and therefore Section 155 in Chapter 5 of the Housing SEPP establishes a maximum building height of 22m for the subject site as follows:

### **155 Maximum building height and maximum floor space ratio**

- (1) *This section identifies development standards for development under this chapter that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*

**Note—**

*See the Act, section 4.15(3), which does not prevent development consent being granted if a non discretionary development standard is not complied with.*

- (2) *The maximum building height for a residential flat building in a Transport Oriented Development Area is 22m.*
- (3) *The maximum building height for a building containing an independent living unit or shop top housing in a Transport Oriented Development Area is 24m.*
- (4) *The maximum floor space ratio for the following in a relevant residential zone or relevant employment zone in a Transport Oriented Development Area is 2:5:1—*
- (a) *a residential flat building,*
- (b) *a building containing an independent living unit or shop top housing.*
- (5) *This section does not apply to the extent a provision of another chapter of this policy or another environmental planning instrument permits a greater maximum building height or floor space ratio for a residential flat building or building containing shop top housing on the land.*

The proposed development seeks to also utilise the in-fill affordable housing provisions in Chapter 2, Part 2, Division 1 of the Housing SEPP which provide opportunity for up to 30% additional building height for developments that incorporate at least 10% affordable housing. Section 18 in Chapter 2 of the Housing SEPP provides the following:

### **18 Affordable housing requirements for additional building height**

- (1) This section applies to development that includes residential development to which this division applies if the development—
- (a) includes residential flat buildings or shop top housing, and
- (b) does not use the additional floor space ratio permitted under section 16.
- (2) The maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height of up to 30%, based on a minimum affordable housing component calculated in accordance with subsection (3).
- (3) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

In accordance with Section 18(2) the maximum building height for a building that is a residential flat building is the maximum permissible building height for the development on the land plus an additional building

height of up to 30%. Therefore, an additional 30% on top of the maximum permissible building height of 22m results in an overall maximum permissible building height of 28.6m.

The proposal seeks consent for a building with a height of up to 30.95m measured from existing ground level, resulting in an exceedance of 2.35m (8.22%) of the development standard. Therefore, the standard that is proposed to be varied is the maximum height of building standard under Clause 18(2) of the Housing SEPP.

The development standard to be varied is not excluded from the operation of Clause 4.6 of Ku-ring-gai LEP and therefore, can be varied under Clause 4.6.

## 3. Extent of variation

### 3.1 Context

The site has an area of 7,776sqm and is located on the southern side of McIntosh Street with main frontage to McIntosh Street and secondary access to via an access handle, as illustrated in **Figure 1**.

There is a noticeable change in the existing topography across the site, which falls from its southern boundary of the Werona Avenue property (RL113.44) to north-east corner of 25 McIntosh Street (RL 107.56) by 5.88m.



**Figure 1** Aerial view, subject site outlined in red (Source: NearMap with markups by Gyde Consulting)

The site is zoned R2 Low Density Residential pursuant to KLEP and while the site is surrounded by mostly low-density residential dwellings, to the north, lots are zoned R4 High Density Residential and lots to the south and west are located within the Low and Mid Rise housing outer area, suggesting that the area is expected to undergo transition to higher density.

The site lies partly within the Gordon Park Estate McIntosh Ansell Grant Conservation Area (CA) and borders the Gordon Park CA located to the north-west of the site. The site is in proximity to several listed heritage items, notably 17 McIntosh Street (Eryldene House), abutting the access handle of the site to the north-west (**Figure 2**).



Figure 2 Heritage map – Heritage listed buildings shown in brown, conservation area shown hashed red, site shown in red line. Item 18 is “Eryldene”, dwelling house (Source: Gyde Consulting)

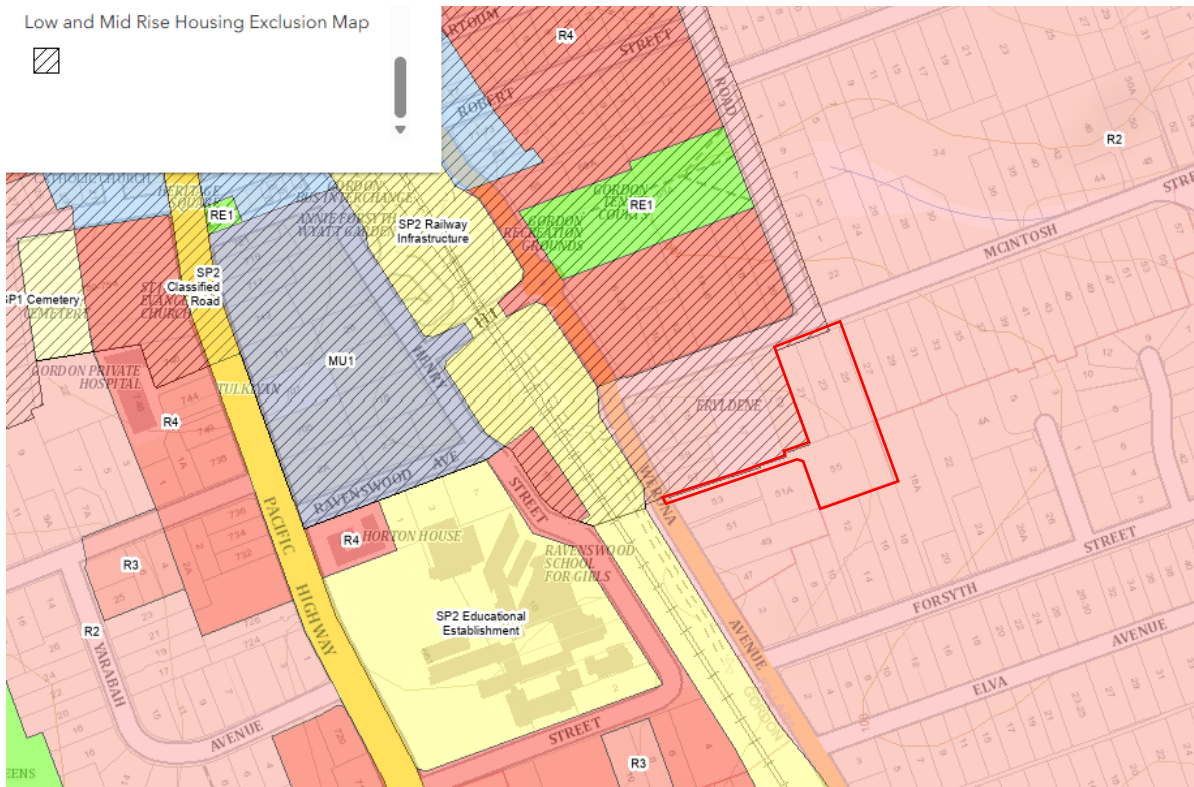


Figure 3 Zoning and Low and Mid Rise Housing Exclusion Map, site shown in red line. (Source: NSW Planning Portal Spatial Viewer)

**3.2 Extent of variation**

The standard that is proposed to be varied is the maximum height of buildings under Clause 18(2) of the Housing SEPP. Clause 18(2) of Housing SEPP states the following:

**18 Affordable housing requirements for additional building height**

(2) *The maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the development on the land plus an additional building height of up to 30%, based on a minimum affordable housing component calculated in accordance with subsection (3).*

In accordance with Clause 18(2) of the Housing SEPP and as discussed in Section 2, a maximum building height of 28.6m is prescribed for the site. The proposal seeks to vary the maximum height of buildings development standard by up to 2.35m (8.22%) at the greatest extent, as illustrated in **Figure 4** to **Figure 6** below. Building A is the tallest building, with a maximum height of 30.95m (RL 140.04) at the lift overrun, a total exceedance of 2.35m (8.22%). The roof has a maximum exceedance of 29.55m (RL138.54) at the north-west corner, or 0.95m (3.32%).



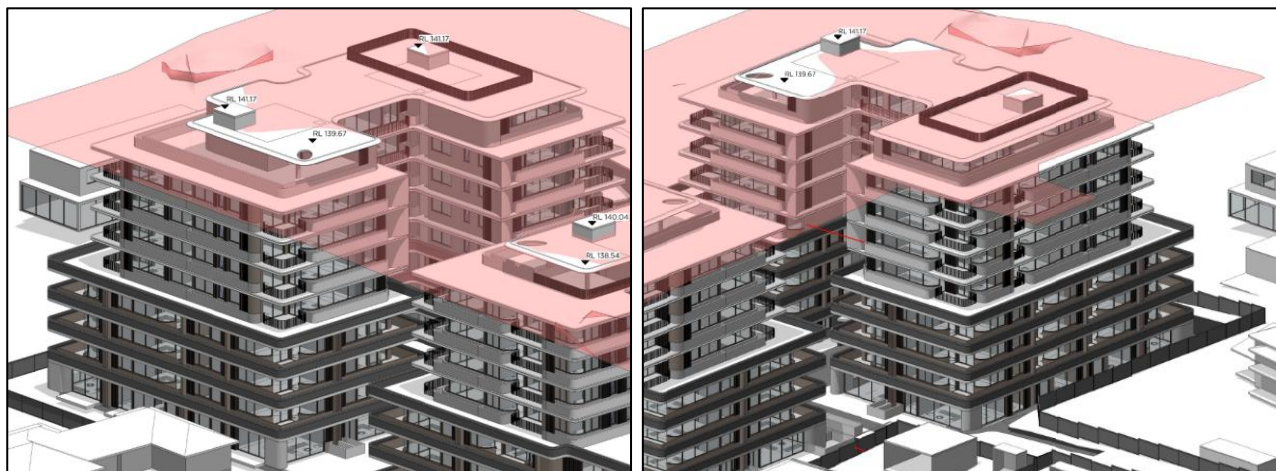
**Figure 4** Building height plane of Building A when viewed from the north-east (left) and north-west (right) (Source: PMDL Architects)

Building B has a maximum height of 29.54m at the lift overrun (RL 140.04) exceeding the 28.6m height limit by 0.94m.



**Figure 5** Building height plane of building B when viewed from the north-east (left) and north-west (right) (Source: PMDL Architects)

Building C has a maximum height of 30.57m (RL 141.17) at the lift overrun, an exceedance of 1.97m (6.89%) and 29.17m (RL 139.67) at the north-east corner of the roof, an exceedance of 0.57m (1.99%).



**Figure 6** Building height plane of building C when viewed from the north-east (left) and north-west (right) (Source: PMDL Architects)

### 3.2.1 Reason for variation

#### 3.2.1.1 Communal Open Space

The extent of the variation arises primarily from the provision of communal rooftop open space on Buildings A, B and C. The height exceedance is largely limited to built elements associated with this use, including lift overruns, canopy structures, and parapet heights required to provide safe and equitable access for all residents to the rooftop areas.

While ground-level communal open space is also provided, reliance solely on ground-level areas would result in a less optimal outcome, with reduced solar access, limited daylight, and increased potential for privacy and overlooking impacts on both existing and future residents.

The proposed design incorporates rooftop communal open space to maximise solar access and amenity. As a result, 72.84% (2,398.22 sqm) of the communal open space achieves a minimum of 2 hours of direct sunlight to at least 50% of its area between 9 am and 3 pm on 21 June.

#### 3.2.1.2 Heritage context

Heritage context is also a relevant factor of the variation. In accordance with Clause 5.10 (Heritage Conservation) of the KLEP 2015, the design has also been developed to conserve environmental heritage and minimise impacts on the significance of the state heritage-listed dwelling at 17 McIntosh Street (Eryldene Historic House). Heritage was identified early in the design process as a key factor influencing built-form outcomes.

In consultation with the project architect and heritage consultant, the building massing was carefully modelled and refined to respond to this context. This process led to a redistribution of height and bulk away from the western side setback, where visual sensitivity and heritage interface was greatest, toward the rear (southern) and central portions of the site. The building fronting McIntosh Street (Building A) was deliberately reduced in scale and articulated, with upper levels stepped back to soften the visual transition.

By contrast, additional height was concentrated between Buildings A and B, and at the rear (southern portion) of the site, where the visibility from the public domain and potential overshadowing on heritage impacts are lesser. This approach ensures that the proposal meets the intent of Clause 5.10, achieving a contextually appropriate built form that respects local heritage values while achieving the objectives of the Housing SEPP, through the delivery of additional, much needed housing with acceptable levels of amenity.

As part of this design response, additional communal open space has been incorporated at the rooftop level of Building C. The built form elements associated with this rooftop space contribute to a component of the height exceedance.

**4. Unreasonable or unnecessary**

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the KLEP.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*.

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council’s own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council [2007] NSWLEC 827, Initial Action Pty Limited v Woollahra Municipal Council [2018] NSWLEC 118 at [22] and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [28]*) and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31]*).

Nonetheless, we have considered each of the ways as follows.

**4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.**

Section 18(2) sets the maximum permissible building height for development on the site where development includes affordable housing and does not use the additional floor space available under Section 16.

There are no explicit objectives for the development standard, however, the objective of Part 2, Division 2 of the SEPP (Section 15A) is “... facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.”


The development will provide 17% of the total gross floor area (GFA) as affordable housing for those with very low, low and moderate income households. In this respect the objectives of the development standard are achieved because of (and notwithstanding) non-compliance with the standard.

In addition to the objective of Chapter 2, we have also considered the aims of Chapter 5 of the Housing SEPP which sets the maximum height for the development, prior to the application of the in-fill affordable housing provisions.

The aims of Chapter 5 of the Housing SEPP are listed in Section 150. They are considered in terms of the proposal in **Table 1** below.

**Table 1 Assessment against the aims of Chapter 5 of the Housing SEPP**

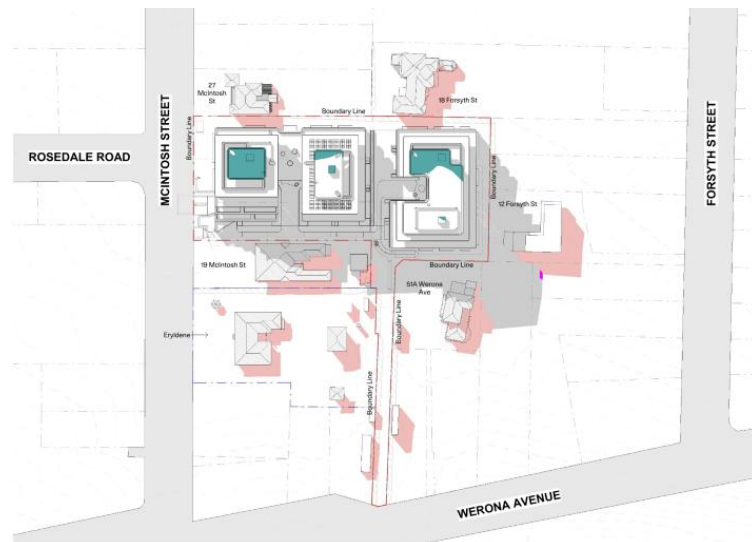
Objective	Demonstration
<i>150. The aims of this chapter are as follows –</i>	
<i>(a) To increase housing density within 400m of</i>	The site is located within 400m distance of Gordon Station and is therefore within the catchment identified for increased housing density under the Housing SEPP and Transport Oriented Development (TOD)

<p><i>existing and planned public transport</i></p>	<p>provisions. The proposal will deliver 151 apartments, including 31 affordable dwellings, significantly contributing to housing supply in an accessible, well-serviced location.</p>
<p>(b) <i>to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that –</i></p> <ul style="list-style-type: none"> <li>(i) <i>are well designed, and</i></li> <li>(ii) <i>are of appropriate bulk and scale and</i></li> <li>(iii) <i>provide amenity and liveability</i></li> </ul>	<p><b>Well-designed and contextually appropriate built form</b></p> <p>The design has been developed to respond sensitively to the site’s heritage context, including its frontage to the adjacent heritage-listed dwelling at 17 McIntosh Street. To achieve this, the proposal redistributes height and building mass away from the western side setback and toward the centre and rear of the site, ensuring that visual impacts to 17 McIntosh Street are minimised. The amended development incorporates additional western side setbacks of Building A of 9m at ground floor stepped back to 19.35m at Level 4 and above.</p> <p><b>Bulk and Scale</b></p> <p>The proposal achieves a FSR of 2.5:1, which complies with the permitted 2.5:1 of the TOD provisions and does not utilise the 30% FSR bonus available under the in-fill affordable housing provisions, despite the provision of 15% GFA for the purpose of affordable housing. The proposed height variation does not include any habitable floor space. This demonstrates that the overall bulk and scale remain consistent with the TOD planning intent for higher-density development near train stations, while accommodating the site’s physical and contextual constraints. It should be noted that, the consistent height and FSR controls applied under the State’s TOD program did not distinguish between sites affected by mapped heritage or biodiversity constraints. A fully compliant scheme would result in greater height along the western side setback than that proposed, resulting in unacceptable overshadowing and visual dominance. The proposed height variation produces a graduated form, consistent with the future desired character and which minimises impact on neighbouring heritage items.</p> <p>As demonstrated in the visual below, it is acknowledged that the height exceedance as a result of the communal roof canopy on Building A will be visible when viewed from Rosedale Road, which slopes down from the site. The visual impact of the roof of the communal roof terrace was considered as part of the visual impact analysis. This concluded the following <i>“The design of the roof top level canopy structure was adjusted to express the slender canopy as a visual termination of the built form when viewed from pedestrian areas along Rosedale Road.”</i></p> <p>Therefore, while the roof of the communal roof terrace will be visible, it is considered to compliment the proposed built form and will not result in any additional visual impacts when considered against a compliant built form.</p>  <p><b>Amenity and liveability</b></p> <p>The redistributed height achieves equal or better amenity outcomes compared with a compliant scheme. Overshadowing diagrams below</p>

show that additional shadowing from the height exceedance (Shown in fuchsia pink below) is marginal and short in duration, while the reduction in building height of the western side of Building A and B reduces shadowing to heritage items and neighbouring dwellings. The design provides high quality internal amenity, generous setbacks, and landscaped deep-soil zones that enhance privacy, daylight, and outlook.



1 21 June - 9am  
Plan 1:1000



2 21 June - 10am  
Plan 1:1000



<p>(c) <i>to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community</i></p>	<p>The proposal will include 31 affordable dwellings that can accommodate essential workers and vulnerable members of the community. The proposal is therefore consistent with this aim.</p>

It is not considered a requirement to consider the proposal against the height objective of the KLEP because this is not the standard to be varied. Notwithstanding this, and on a without-prejudice basis, an assessment has been provided below in **Table 2**.

**Table 2** Assessment against the Clause 4.3 objectives of the KLEP

Objective	Demonstration
to ensure that the height of buildings is appropriate for the scale of the different	The site is located within the Gordon Station precinct as identified under the State Environmental Planning Policy (Ku-ring-gai Station Precincts) 2025 (Stations Precincts SEPP).

<p>centres within the hierarchy of Ku-ring-gai centres,</p>	<p>The proposed development is consistent with the intended scale of development within this precinct, which is characterised by medium to higher density residential buildings in proximity to the station. This reflects the strategic planning intent to concentrate increased density within accessible locations.</p> <p>In this context, it is noted that sites within approximately 800 m of the subject site are subject to planning controls permitting building heights of up to 83.5 m. While the proposed development is of a greater scale than some surrounding development, it remains consistent with the broader planning framework, including the Housing SEPP (Transport Oriented Development) and the Stations Precincts SEPP.</p> <p>Accordingly, the proposed building height is appropriate having regard to the site's strategic context and its position within the local centre hierarchy as a transit-oriented residential precinct. The scale of development is compatible with the emerging and desired future character of the Gordon Station precinct.</p>
<p>to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,</p>	<p>This site does not adjoin any public open spaces.</p> <p>The proposal establishes a transition in built form within a locality undergoing significant transformation, influenced by planning controls that facilitate increased residential density in highly accessible areas. The design responds to this strategic framework through a combination of setbacks, a clearly articulated four-storey podium, and architectural modulation between the lower and upper levels.</p> <p>In response to the removal of Low and Mid Rise (LMR) development opportunities for 19 McIntosh Street, the western setback has been increased to 9 m at the lower levels of Buildings A and B. The remaining setbacks are compliant with the Apartment Design Guide (ADG), with a minimum 6 m separation that reflects the potential higher density residential character of surrounding sites. These sites are all located within the LMR zone, where residential flat buildings are permitted and future redevelopment is anticipated.</p> <p>While the proposal achieves an appropriate transition in scale relative to the existing urban context, the locality is expected to evolve. Many sites on the opposite side of McIntosh Street are capable of accommodating heights of up to 24.05 m under the Stations Precincts SEPP with in-fill affordable housing, and sites to the south and west are within the LMR outer area, permitting heights of up to 9.5 m or 12.35m including in-fill affordable housing. Over time, it is anticipated that surrounding development will transition to a scale more comparable to that proposed.</p> <p>The building form is carefully stepped and sited away from the adjacent heritage item at 17 McIntosh Street, with setbacks of 9 m at the lower levels of Buildings A and B, increasing to up to 19.35 m for Building A and 12 m for Building B at upper levels.</p>
<p>to enable development with a built form that is compatible with the size of the land to be developed.</p>	<p>The proposal satisfies Objective (c) by providing a built form proportionate to the size and configuration of the land. The site exceeds the 2,400sqm minimum site area under Clause 4.3 and accommodates a three-building layout with generous setbacks, landscaping and deep-soil zones.</p> <p>The proposed FSR of 2.5:1 complies with the permitted 2.5:1, confirming that the site is not overdeveloped.</p> <p>It should be noted that the wording of this objective was informed on the basis of the KLEP maximum height provisions and not the TOD controls applying to the site. As noted, the height and FSR controls applied under the State's TOD program did not distinguish between sites affected by mapped heritage or biodiversity constraints. A fully compliant scheme</p>

would have resulted in increased bulk along the western-side setback, resulting in additional overshadowing and visual presence adjacent to the neighbouring heritage item at 17 McIntosh Street.

**4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.**

The underlying objective or purpose is relevant to the development and therefore this test is not relied upon.

**4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.**

The underlying purpose of the height of buildings standard, as expressed through the Objectives of Clause 4.3 of the KLEP, is to: ensure that building height is appropriate to the role and scale of centres within the local hierarchy; provides a transition in scale between higher- and lower-density areas to protect local amenity; and, enables development with a built form compatible with the size and capacity of the land. Similarly, Section 150 of Chapter 5 of the Housing SEPP seeks to facilitate the delivery of well-designed housing that responds appropriately to site context, maintains local character and amenity, and supports sustainable residential growth near transport and services.

Strict compliance with the 28.6m height limit would defeat these purposes by concentrating excessive building mass along the western-side setback, increasing overshadowing and visual prominence adjacent to the state listed heritage item at 17 McIntosh Street (Eryldene Historic House). The State-wide TOD controls applied uniformly across precincts did not differentiate sites containing heritage constraints. For this site, a fully compliant scheme would have resulted in development that produced a more visually dominant frontage less consistent with the intended transition in scale.

Accordingly, strict compliance would be unreasonable, as it would result in a less sensitive design outcome with greater heritage impacts. The proposed variation achieves the underlying intent of the height control and delivers a well-designed, appropriate and heritage sensitive built form that results in a better planning outcome than should strict compliance be enforced.

**4.4 The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.**

There are several applications that have recently been approved which exceed the Housing SEPP maximum height controls. These are outlined in **Table 3** below. A review of Council’s Clause 4.6 variations register also identifies consent has been granted to variations to Clause 4.3 under Ku-ring-gai LEP, see **Table 4**, which therefore demonstrates that the standard, in some cases, has been virtually abandoned or destroyed.

**Approved variations under Section 18 of the Housing SEPP**

The tables below provide examples of approved Clause 4.6 requests relating to height.

It is evident that the Housing SEPP control has been varied on many occasions by granting consent to other similar developments in the locality. The examples listed illustrate the changing density around the TOD stations, including Gordon Station. These variations have set a precedent for varying the Housing SEPP height of building standard in accessible/well-located areas.

**Table 3 Approved variations to Housing SEPP provisions**

<b>SSDA Number</b>	<b>Address</b>	<b>Description</b>	<b>Extent of Variation</b>	<b>Status of SSDA</b>
SSD-78775458	3 – 9 Park Avenue & 2 Park Lane, Gordon	The proposal is for the construction of a residential flat building with infill affordable	8.40% (2.4m) exceedance of maximum building height.	Approved – 19 December 2025

		housing comprising a 100 units, including 31 affordable housing units.		
SSD-78156462	12 – 16 Bent Street, Lindfield	Construction of a 10 storey residential flat building with infill affordable housing and basement car parking near Lindfield Station.	18.18% (5.2m) exceedance of maximum building height.	Approved – 23 December 2025
SSD-82395459	3A, 3B, 5A and 7 Burgoyne Street and 1 and 3 Pearson Avenue and 4 Burgoyne Lane, Gordon	Demolition of the existing structures on the site and construction of two (2) residential flat buildings with communal open space, associated demolition works, landscaping and shared car parking in basement levels.	17.50% (3.85m) exceedance of maximum building height.	Approved – 15 December 2025
SSD-81623209	9-21 Beaconsfield Parade, Lindfield	Demolition and site preparation. Construction of a residential flat building (comprising 340 market apartments and 59 affordable housing apartments) with basement levels.	11.70% (3.18m) exceedance of maximum building height.	Approved – 13 February 2026
SSD-77829461	2-4 Larkin Street and 1-5 Pockley Avenue, Roseville	Demolition of existing buildings and construction of a residential apartment development, including affordable housing apartments, above basement car parking.	7.8% (2.24m) exceedance of maximum building height	Approved – 23 February 2026

**Approved variations under Clause 4.3 of the KLEP**

In addition to the above, there are a number of examples of approved Clause 4.6 requests relating to Council’s height control.

It is evident that Council’s control has been varied on many occasions by granting consent to other similar developments.

The examples listed illustrate the changing density around the TOD stations in Ku-ring-gai, even prior to the NSW Government introducing the TOD precincts to Lindfield, Gordon, Roseville and Killara. These variations have set a precedent for varying the KLEP height of building standard in accessible/well-located areas.

**Table 4** Approved variations to cl4.3 of the KLEP

DA Number	Address	Description	Extent of Variation	Status of DA
DA0223/24	7-9 Merriwa Street, Gordon	Mixed-use development comprising 27 apartments and 3 commercial tenancies.	27.2% exceedance of maximum building height.	Approved – 07/03/2025

DA0038/23	26 McIntyre Street, Gordon	Two residential flat buildings comprising 29 apartments.	11.7% exceedance of maximum building height.	Approved – 19/12/2023
DA0466/22	186 Pacific Highway, Roseville	Residential flat building comprising 8 apartments.	9.74% exceedance of maximum building height	Approved – 18/09/2023
DA0300/19	1A-3 Corona Avenue, Roseville	Residential flat building comprising 23 units.	19.1% exceedance of maximum building height.	Approved – 21/09/2020
DA0570/18	259 & 265-271 Pacific Highway, Lindfield	Mixed use development comprising 130 apartments and a commercial tenancy.	14% exceedance of maximum building height.	Approved – 19/08/2020
DA0197/18	376-390 Pacific Highway, Lindfield	Mixed use development comprising 70 apartments and commercial tenancies.	12.90% exceedance of maximum building height.	Approved – 10/01/2019
DA0610/17	810 & 818 Pacific Highway, Gordon	Mixed use development comprising 56 residential apartments and ground floor commercial and retail tenancies.	19.20% exceedance of maximum building height.	Approved – 12/12/2018
DA0443/17	305-311 Pacific Highway, Lindfield	Mixed use development comprising 40 apartments and retail tenancies.	8.70% exceedance of maximum building height.	Approved – 20/08/2018
DA0403/17	4 & 8 Marian Street, Killara	Residential flat building comprising 31 apartments, including affordable housing.	32.60% exceedance of maximum building height.	Approved – 21/05/2018
REV0002/18	844-846 Pacific Highway, Gordon	Mixed use development comprising 36 residential apartments and ground floor retail tenancy.	18.63% exceedance of maximum building height.	Approved – 21/05/2018
DA0586/16	20-24 McIntyre Street, Gordon	Residential flat building comprising 50 apartments.	10.86% exceedance of maximum building height.	Approved – 19/10/2017
DA0180/14	870-898 Pacific Highway, Gordon	Mixed use building comprising 147 units and retail space across 3 buildings.	11.32% exceedance of maximum building height.	Approved – 30/06/2016
DA0130/15	1089 Pacific Highway, Pymble	Residential flat building comprising 13 apartments.	23% exceedance of maximum building height.	Approved – 28/06/2016
DA0075/14	916 Pacific Highway, Gordon	Mixed use building comprising 31.	4% exceedance of maximum building height.	Approved – 28/04/2016

#### **4.5 The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is not unreasonable or inappropriate and therefore this test is not relied upon.

## **5. Sufficient environmental planning grounds**

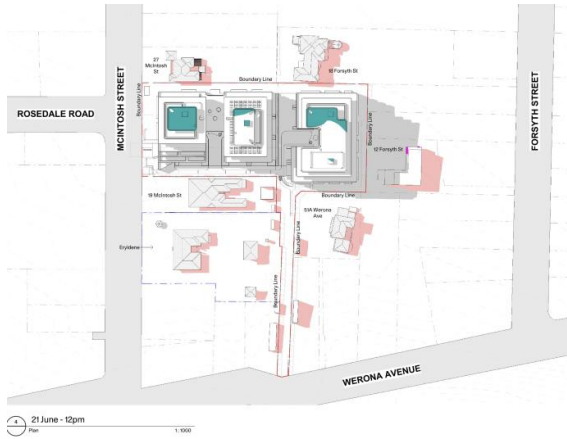
In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

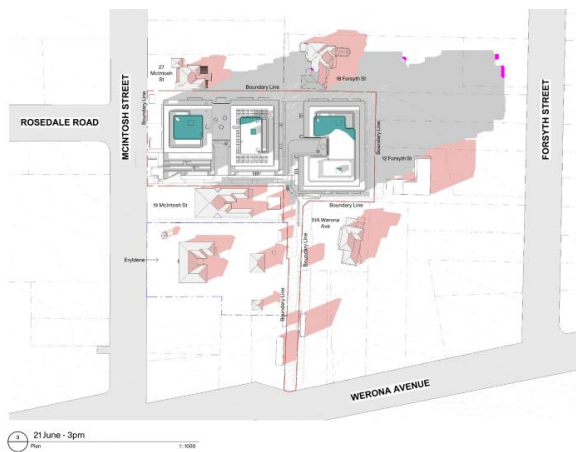
In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning ground to justify the departure of the height of buildings development standard are as follows:

- The proposed variation is consistent with, and a direct response to, the following objects of the Environmental Planning and Assessment Act 1979:
  - (b) to promote the supply, delivery and maintenance of housing, including affordable housing,*  
The proposal responds to the NSW Government’s strategic housing initiatives by delivering 151 residential units including 31 affordable housing units, increasing the supply of housing within the LGA. The development provides a high quality of amenity for the affordable units, afforded by the minor variation to the building height relating to the communal open space on the roof level which maximises solar access to the communal open space.
  - (g) to promote good design, amenity and the proper construction and maintenance of built environments, including the protection of the health and safety of the occupants of buildings,*  
The proposed development promotes good design and amenity by providing generous setbacks, significant landscaped deep-soil zones that enhance privacy, daylight, and outlook, and access to high-quality communal open space for residents. The portions of the buildings that exceed the height standard do not result in any unacceptable, additional adverse overshadowing, visual, or privacy impacts.
  - (k) to promote the orderly and economic use and development of land.*  
The height is appropriate to the site’s strategic context and remains compatible with the emerging and desired future character envisaged for the Gordon Station precinct, despite the minor variation. The proposal optimises residential yield in response to the current housing supply shortfall, delivering much need market-rate and affordable housing in an accessible area and therefore promotes the orderly and economic use of the land.
- The proposed height is largely compliant with the 28.6 metre height limit, with all habitable floor space falling below the height plane. Minor exceedances are limited to centrally located rooftop services, communal open space structures, lifts and lift overruns and mechanical plant equipment, and roof structures only.
- The proposed variation largely arises from the provision of communal open space on the roof of each building. The communal open space was positioned to optimise its usability and amenity, particularly through maximising solar access as well as minimising privacy and overlooking impacts for existing and future residents to the site.
- The proposed variation partly arises from the redistribution of floor space within the development to avoid and minimise impacts on the heritage significance of 17 McIntosh Street (Eryldene Historic House and Garden). The proposal redistributes height and building mass away from the western side setback and toward the central and rear, portion of the site, ensuring that visual impacts to 17 McIntosh Street are minimised.
- The proposal does not result in any overshadowing to public recreation areas. While the shadow analysis identifies some additional overshadowing at midwinter, the extent of shadow is broadly consistent with that expected from a compliant built form in an evolving urban context. The marginal

additional overshadowing caused by non-compliant building elements is identified in green (in the Figure below) and is considered contextually minor and inconsequential.





For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under Clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

## 6. Conclusion

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 in particular circumstances. This Clause 4.6 variation is necessary to provide the required flexibility in the maximum height development standard under Section 18 of the Housing SEPP to enable the proposed residential development.

The request concludes that strict compliance with the numerical standard of the height limit is unnecessary and unreasonable, and satisfies the tests under Clause 4.6 for the following reasons:

- Strict compliance with Section 18 of the Housing SEPP would be unreasonable and unnecessary in the circumstances as the aims of Chapter 2 of the SEPP are achieved notwithstanding non-compliance (Clause 4.6(3)(a) and Wehbe test 1).
- There are sufficient environmental planning grounds to justify the minor contravention of the development standard.
- The matters required to be demonstrated by sub-clause (3) are adequately addressed (Clause 4.6(3)(a)).
- The proposed development is appropriate for its context, with the area subject to the non-compliance not noticeably visible from the public domain thus respecting the character of the streetscape.

Overall, the objectives of Clause 4.6(1) are to provide an appropriate degree of flexibility to achieve a better outcome for and from development. Strict compliance with the maximum height standard would not result in the best planning outcome for the site and the surrounding area. The proposal will have minimal impact on the community and is compatible with the local character of the area.

The relevant tests under Clause 4.6 are satisfied and there are sufficient environmental planning grounds to justify the minor non-compliance with the minimum dimension standard.