

Clause 4.6 Request to vary a Development Standard

5-9 Cowan Road, St Ives
SSD 88948458



Submitted to DPHI
on behalf of Prosper 5-9 Cowan Road St Ives Pty Ltd

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1. Introduction

This is a written request (the Request) to seek a variation to a development standard in accordance with the provisions of Clause 4.6 Exception to Development Standards of the *Ku-ring-gai Local Environmental Plan 2015* (KLEP) to support a State Significant Development Application (SSDA) for 5-9 Cowan Road, St Ives (the site) within the Ku-ring-gai Local Government Area (LGA).

This Request relates to Chapter 2, Part 2, Division 1, Section 16 of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) which outlines affordable housing requirements for additional building height. Section 180 of Chapter 6 of the Housing SEPP prescribes a maximum building height of 22m for residential flat buildings in Zone R3 Medium Density Residential under the low and mid rise housing provisions. The proposal incorporates 15% of the total gross floor area for affordable housing and seeks to utilise the incentive controls under Chapter 2, Part 2, Division 1, Section 18 of the Housing SEPP to achieve 30% additional height, totalling a maximum building height control of 28.6m.

The SSDA proposes an exceedance of the 28.6m building height development standard that applies to the site:

- seeking a maximum building height of 30.6m calculated in accordance with *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582

This Request has considered the detailed guidance within the NSW Department of Planning and Environment (DPHI) guideline *Varying Development Standards: A Guide, August 2011* (DPHI Guide) and planning system circular PS 20-002 *Varying Development Standards, May 2020*, and addresses the findings and established principles (as relevant) in the following judgements of the NSW Land and Environment Court (the Court):

- *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070
- *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189
- *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- *Big Property Pty Ltd v Randwick City Council* [2021] NSWLEC 1161
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131
- *Hayek v Randwick City Council* [2024] NSWLEC 1631

It is important to note that this Clause 4.6 request has been prepared in accordance with the position adopted in the Court Case *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 (*Merman*) and *Hayek v Randwick City Council* [2024] NSWLEC 1631 in regard to the calculation of building height.

The following sections of this Request critically analyse the proposed variation to the maximum height of building standard applying to the site, its impact and reasonableness.

The proposed development is situated within an area characterised by a dynamic mix of residential properties and the adjacent St Ives Shopping Village. The area is characterised by its diverse architectural styles which encompass both historic and modern developments.

The design responds to the local context of surrounding properties, with careful attention to scale, massing and form. By adhering to the Apartment Design Guide (ADG) and the bonus FSR standard from the Housing SEPP, the design ensures the development responds to the existing fabric of St Ives, respecting its character while contributing to the area's evolution.

This Request demonstrates that an exception to the height of buildings development standard is warranted in this instance.

2. Planning Overview

The *Standard Instrument (Local Environmental Plans) Order 2006* (Standard Instrument) includes various development standards as a means of achieving environmental planning objectives.

Clause 4.6 of the Standard Instrument allows a consent authority to consider and grant consent to a development even in the circumstance where that development would contravene a development standard.

The DPHI Guide recommends that any request to vary a development standard should confirm the planning context and relevant controls to assist the consent authority's assessment. Table 1 below provides a summary of the relevant planning context and provides an overview of the proposed variation.

Information Requirement	Comment
Relevant Applicable Planning Instrument	<i>State Environmental Planning Policy (Housing) 2021</i> (Housing SEPP)
Zoning of the Land	<p>The site is zoned R3 - Medium Density Residential under the KLEP 2015 and ordinarily, residential flat buildings are not permitted within the zone.</p> <p>Notwithstanding, the proposed development for a residential flat building is permitted with consent in the R3 zone in accordance with Chapter 6 Low and mid rise housing of the Housing SEPP). It is noted that the adjoining St Ives Shopping Village is zoned E1 Local Centre and identified as a Town Centre under the Housing SEPP (Refer Figures 1, 2 and 3).</p>
Objectives of the Zone	<p>The objectives of the zone R3 are:</p> <ul style="list-style-type: none"> • <i>To provide for the housing needs of the community within a medium density residential environment.</i> • <i>To provide a variety of housing types within a medium density residential environment.</i> • <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> • <i>To provide a transition between low density residential housing and higher density forms of development.</i>
Development Standard to be Varied	Section 16 of the Housing SEPP - Affordable housing requirements for additional floor space ratio
Nature of the Development Standard	<p>The site is subject to a base height pursuant to Section 180(2)(b) of the Housing SEPP and a bonus height control under Section 16 of the Housing SEPP. The numerical values are outlined below:</p> <ul style="list-style-type: none"> • Section 180(2)(b): 22m • Section 16 (30% incentive height bonus): 6.6m • Maximum height (including 30% bonus): 28.6m • Proposed building height: 30.6m
Objectives of the Development standard	Section 15A of the Housing SEPP outlines the Objective of the Division (which applies to Section 16)

Information Requirement	Comment
	<ul style="list-style-type: none"> 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.
Development Standard Numeric Control for the Site	Maximum height on site (including 30% bonus): 28.6m
Proposed Maximum building Height	The building height measured from the building's lowest point of the existing excavated land (existing ground level) is 30.6m. This is calculated in accordance with the principles established within <i>Merman</i> .
Percentage Variation Between the Proposal and the Planning Instrument	The proposed increase of 2m represents a total of approximately 6.99% height increase (<i>Merman</i>) over the Housing SEPP development standard of 28.6m (5.94% height exceedance when measured from ground level (existing)).

Table 1: DPHI Guide recommended planning information and numeric overview

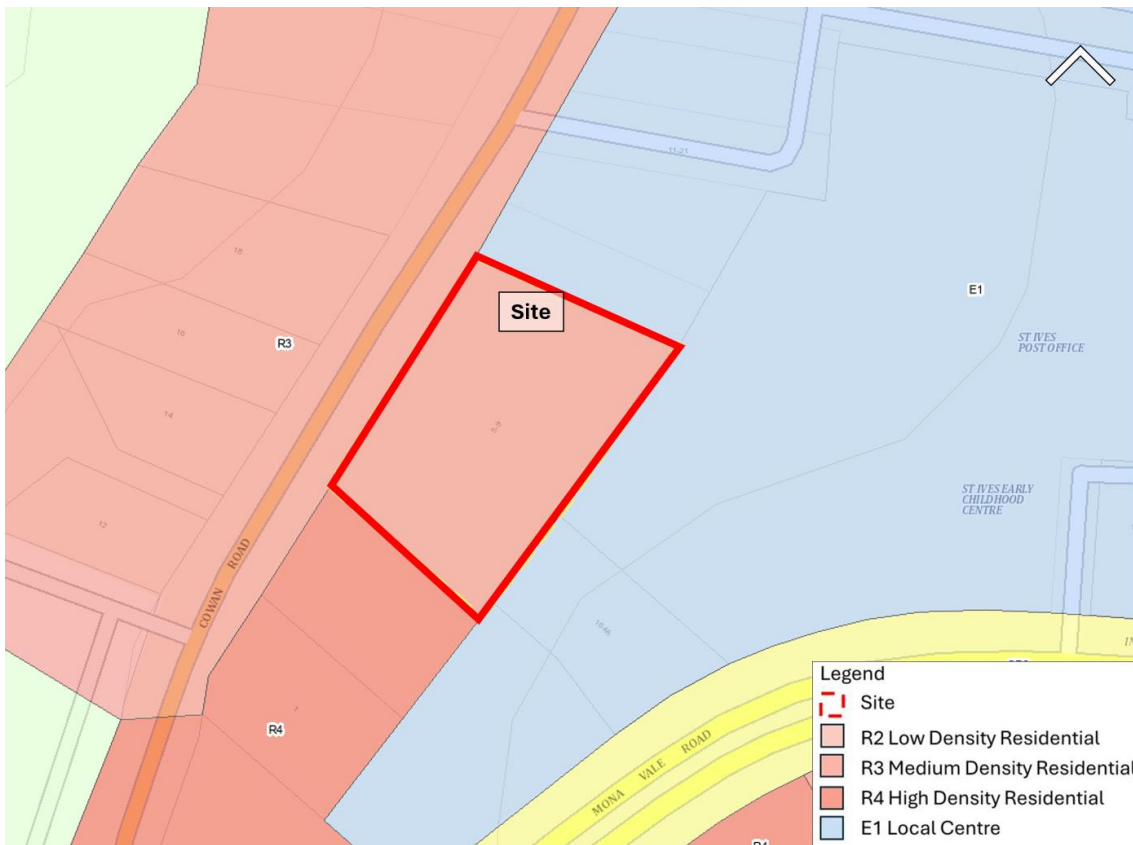


Figure 1: Land zoning map (Source: Espatial Viewer)

LMR Centre



Indicative LMR Housing Area

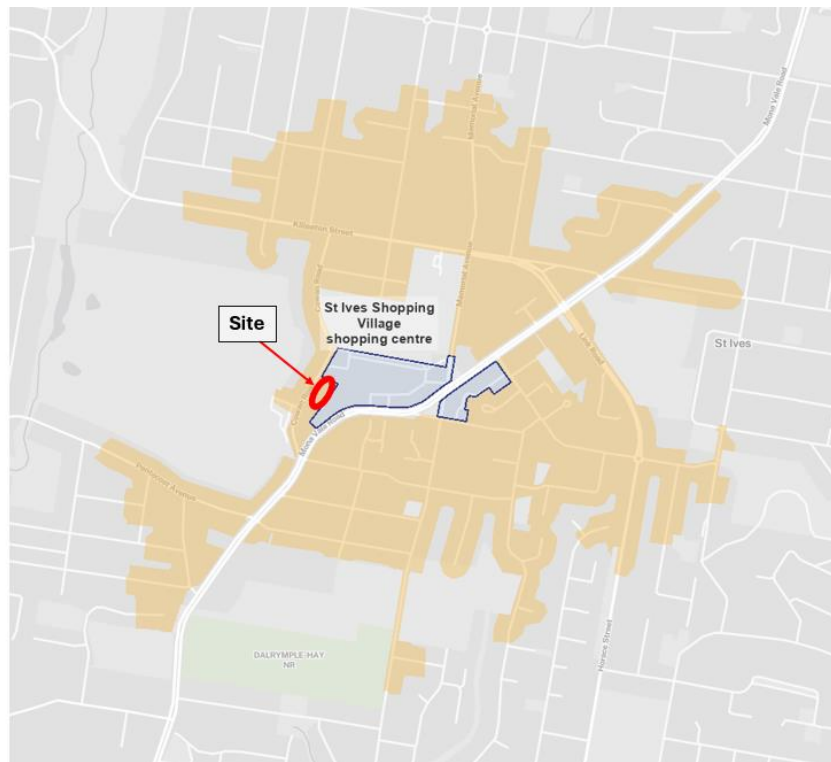


Figure 2: Low and Mid Rise Housing Policy Indicative Map (Source: LMR Viewer)

Section 180 of the Housing SEPP applies to the site as the site is within the low and mid rise housing inner area on land within 400m walking distance of St Ives Town Centre (Figure 3). Section 180(2)(b) sets the maximum building height for a residential flat building at 22m.



Figure 3: Town Centre zone map (Source: Espatial Viewer)

The project is afforded the bonus height under Section 16 of the Housing SEPP, given the project is supplying 15% affordable housing on site. This takes the maximum height with bonuses to 28.6m under this section of the Housing SEPP as follows:

16 Affordable housing requirements for additional floor space ratio

(1) *The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the development on the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).*

(2) *The minimum affordable housing component, which must be at least 10%, is calculated as follows—*

$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{\text{(as a percentage)}} + 2$$

(3) *If the development includes residential flat buildings or shop top housing, 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 that is the same percentage as the additional floor space ratio permitted under subsection (1).*

(4) *(This section does not apply to development on land for which there is no maximum permissible floor space ratio.*

3. Proposed Development

This Request supports a SSDA for a proposed residential flat building, including in-fill affordable housing at 5-9 Cowan Road, St Ives.

Specifically, the SSDA seeks development consent for:

- demolition of the existing row of 10 attached townhouses at the site;
- construction of a 9-storey residential flat building comprising:
 - 77 new dwellings (64 market residential units and 13 affordable housing units)
 - 3 basement levels for car parking
 - Communal open space at Ground Level, Level 7 and Level 8
- landscaping; and
- associated site works.

The proposal also incorporates 15% of the total gross floor area for affordable housing and seeks to utilise the incentive controls under Chapter 2, Part 2, Division 1, Section 16 of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) to achieve 30% additional building height and 30% additional floor space ratio (FSR).

The proposed Floor Space Ratio (FSR) of 2.86:1 is compliant with the maximum FSR controls of Section 180(2)(a) of the Housing SEPP which provides the base FSR of 2.2:1, with an additional 30% FSR bonus afforded by Section 16.

The proposed 30.6m maximum building height is an additional 2m (6.99% measured in accordance with *Merman*, 5.94% measured from ground level (existing)) above the 28.6m height limit pursuant to Section 16 of the Housing SEPP. The additional height comprises the lift overrun (30.6m) which ensures access is provided to Level 9, part of the roofline of the apartments (29.1m) on the uppermost level and associated solar panels located on top of this roof (29.3m).

An overview of the site and extent of this non-compliance is shown in the figures below and within the Architectural Plans prepared by PBD Architects.

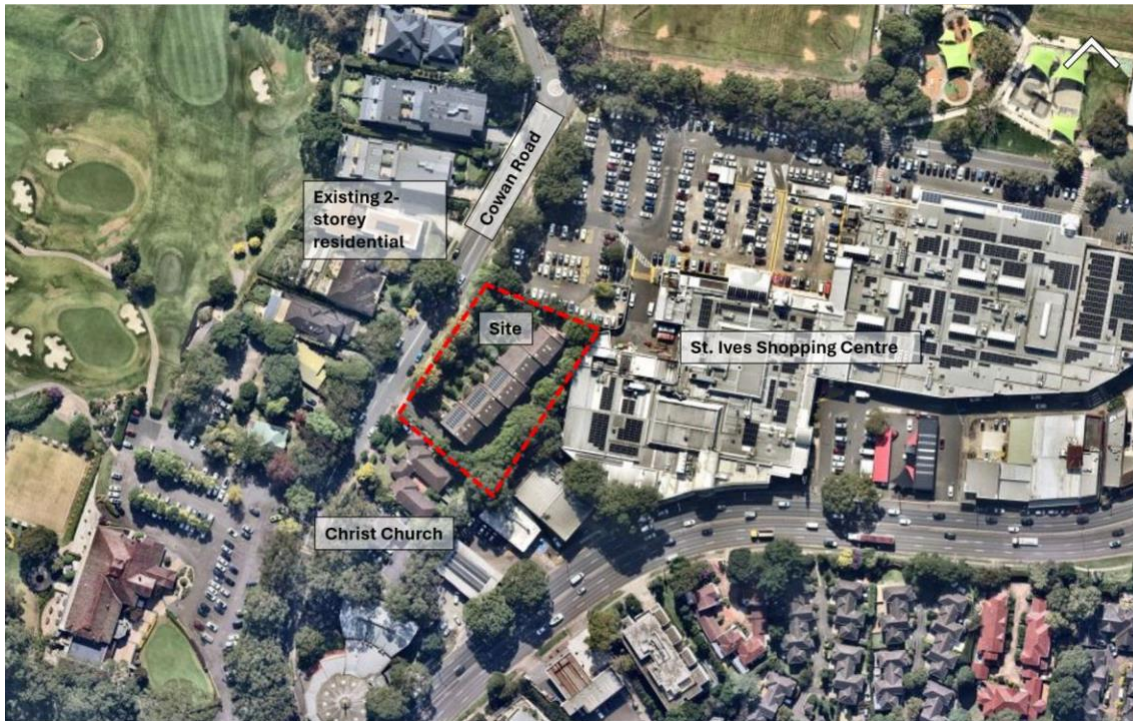


Figure 4: Site Location (Source: Nearmap 2025)



Figure 5: South-west elevation (Source: PBD Architects)



Figure 6: North-west elevation (Source: PBD Architects)

The area is undergoing transition as a result of the low and mid rise housing controls. A site context diagram has been undertaken which shows what the site and surrounding context could look like in the future should the uptake of the low and mid-rise housing provisions be pursued.

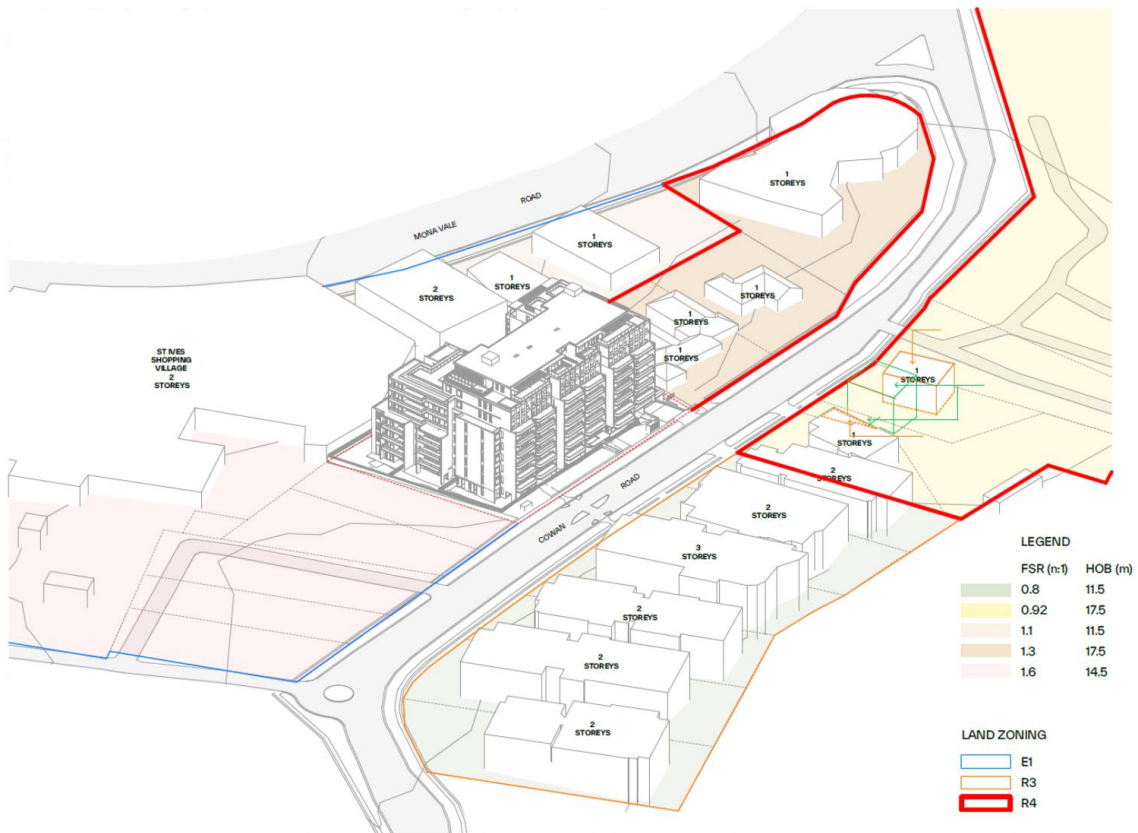


Figure 7: Future site context (Source: PBD Architects)

The proposal will provide much-needed residential accommodation, including 15% affordable housing, in a location that is not only appropriately identified under the Housing SEPP for such land uses but is also highly suitable for increased density, given its proximity to key services and infrastructure.

Importantly, the site is located immediately adjacent to the St Ives Shopping Village, which is a key hub offering a range of retail, community, transport and employment opportunities. The strategic location of the site makes it an ideal candidate for uplift in development intensity, consistent with the broader objectives of the Housing SEPP to deliver well-located housing that meets the needs of a growing and diverse population.

As indicated, nearby sites are anticipated to be suitable for redevelopment under the Housing SEPP, therefore the future character of the area will continue to evolve to reflect the increased heights and densities permissible under the low and mid rise and in-fill affordable housing provisions of the Housing SEPP.

3.1. Proposed variation

This Clause 4.6 request has been prepared in accordance with the position adopted by the Court in *Merman* in relation to measuring building height.

The proposed variation is in relation to Section 16 of the Housing SEPP which provides FSR and height bonuses for a residential flat building on the site. The proposed 30.6m maximum height of the building is an exceedance of 2m over the 28.6m maximum height limit imposed by the Housing SEPP. This is a maximum 6.99% variation (*Merman*) and 5.94% variation (measured from ground level (existing)).

The portion of the development that represents the height breach on the uppermost residential level. As the top level is setback from the edge of the structure, this variation is not a blanket exceedance and is not perceptible from street level.

The design steps back the building form incrementally, responding to the surrounding developments to the north, east and west. This transition softens the massing, ensuring a smooth flow from neighbouring properties.

The height increase allows the development to better align with the evolving character of the area adjacent to the St Ives Town Centre subject to the low and mid rise housing controls of the Housing SEPP. The development will contribute positively to the desired future streetscape.

In *Merman*, the Court determined that the existing ground level at the site was the excavated ground level below the existing building. The building height was then calculated from the bottom of the excavated ground level.

This approach differs from a conventional merit-based approach to measuring building height, which is based on the existing topography of the site and ground floor of an existing building.

The conventional approach is traditionally adopted by consent authorities, including (in the past) the Court. In *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (*Bettar*) and *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (*Stamford*), the Court found that existing ground level should not be taken literally and that a building should be considered in its context. In *Bettar*, the level of the footpath at the boundary of the site was taken as the existing ground level, and in *Stamford*, the Court took an average between the ground level of the public domain and the level of the excavated portion of the site.

Notwithstanding the above, the more recent jurisprudence of the Court is consistent with *Merman: Triple Blue Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1065 (at [47]); *Stokes v Waverley Council (No 3)* [2020] NSWLEC 1224 at [59].

When *Merman* is applied to the proposed development, the bottom of the excavated ground level would be considered the existing ground level. The Architectural Plans prepared by PBD Architects provide further details. The plans form part of this Clause 4.6 Request.

Whilst this Clause 4.6 addresses the case of *Merman*, the approach taken in the *Bettar* and *Stamford* is considered to be a more appropriate method to assess the merits of the building height. In *Merman*, the Court said (at [74]) that:

The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

In *Merman*, the Clause 4.6 request was evaluated against a height plane that was extrapolated by the surrounding topography of the site, as per the *Bettar* decision. The Clause 4.6 request was upheld.

When applied at the site, the *Merman* approach reflects a height plane that differs from the building form envisioned when the height controls were set for the area. This results in an exceedance of the height control of 2m when measured by the *Merman* approach.

Strict adherence to a height plane measured for the existing excavated ground level would result in an illogical building height that follows the subsurface levels, including lift pits, of the existing excavated level. This should have no bearing on the ultimate height of development on the site and does not reflect the natural topography and future character of the area.

Accordingly, this Clause 4.6 request demonstrates that compliance with the height of buildings development standard, as measured in accordance with *Merman*, is unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify this contravention.

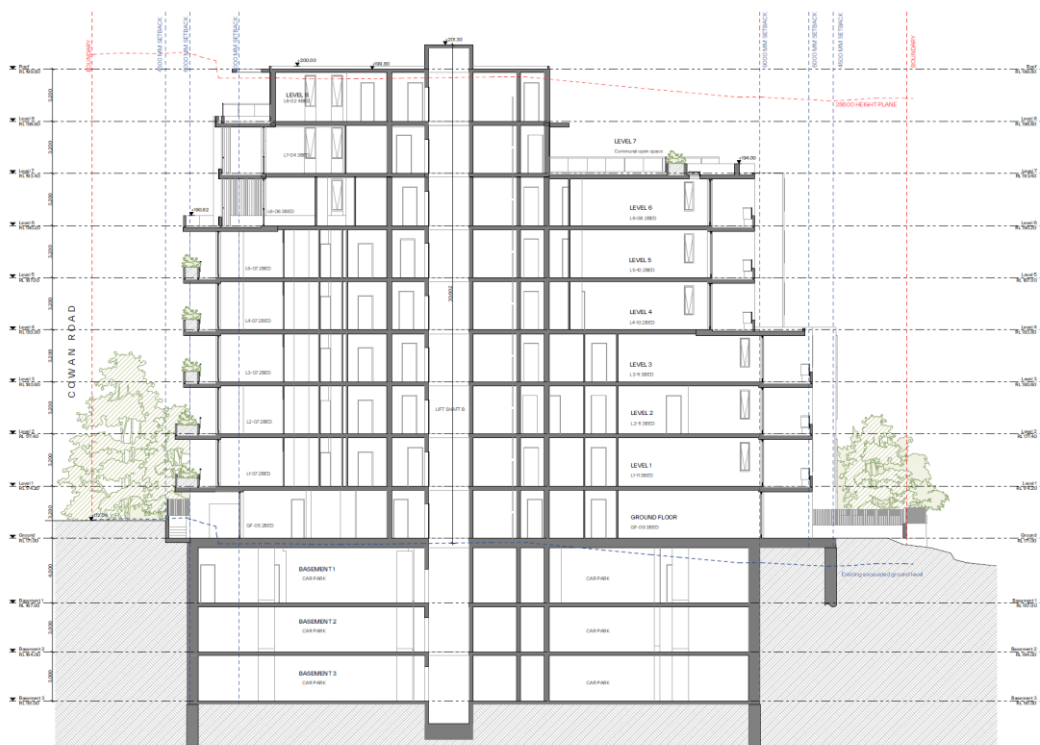


Figure 8: Section B of proposed development (Source: PBD Architects)

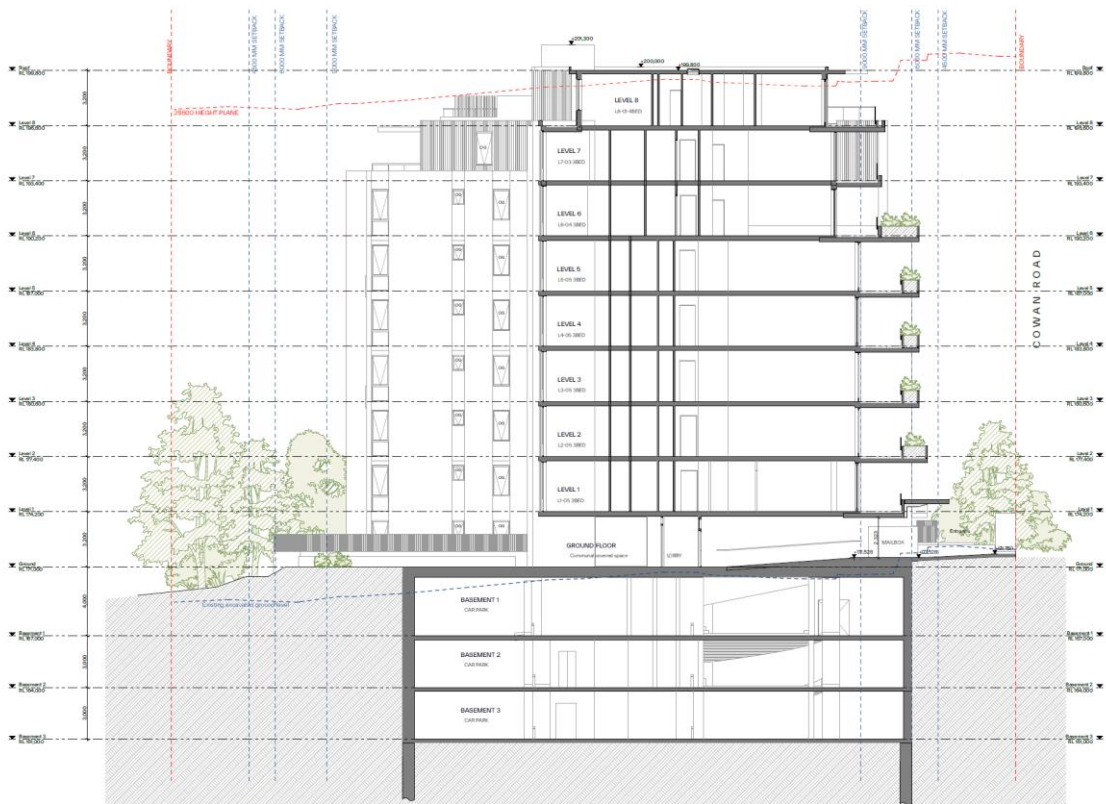


Figure 9: Section C of proposed development (Source: PBD Architects)

4. Legislative Context

4.1. Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the Ku-ring-gai LEP 2015 sets out key assessment criteria which enables Council to consider and grant development consent for a development that contravenes a development standard. The overarching objectives of this clause are contained in subclause (1) as detailed below:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Subclauses (3) and (4) of Clause 4.6 are relevant and development consent can only be granted subject to their consideration.

4.1.1. Clause 4.6(3)

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—

- (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.*

4.1.2. Clause 4.6(4)

Clause 4.6(4) requires that the consent authority to keep a record of its assessment carried out under subclause (3).

4.2. Relevant Judgements - NSW Land and Environment Court

The following key Land and Environment Court (NSW LEC) judgements provide guidance on key considerations in the assessment of a Clause 4.6 Variation Request. These judgements focus on the degree to which a consent authority may be satisfied about the matters in Clause 4.6 and therefore further refine the requirements for variation requests:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- *Big Property Pty Ltd v Randwick City Council* [2021] NSWLEC 1161
- *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243

The key findings and established principles (as relevant) of the above judgements of the Land and Environment Court are summarised below.

4.2.1. Wehbe v Pittwater Council (2007)

This case establishes five potential grounds ‘Wehbe tests’ to ascertain whether strict compliance with a development standard is unreasonable or unnecessary, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
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 compliance with the standard is unnecessary and unreasonable; or
5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

4.2.2. Initial Action Pty Ltd v Woollahra Municipal Council (2018)

Initial Action Pty Ltd v Woollahra Municipal Council [2018] (Initial Action) further clarifies the correct approach for the consideration of clause 4.6 requests. Clause 4.6 does not require that a development that contravenes a development standard to have a *neutral or better* environmental planning outcome than a fully compliant development.

A legal consequence of the decision in *Initial Action* is that Clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

In *Initial Action*, the Court also confirmed that the five common ways of establishing that compliance with a development standard is unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007)* continue to apply.

4.2.3. Linfield Developments Pty Ltd v Cumberland Council (2019)

The ‘third’ Wehbe test is concerned with the underlying object or purpose of the development standard and that it would be defeated, thwarted or undermined if strict compliance was required. The reference to ‘undermined’ is an extension of Wehbe which was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]) (Linfield). In Linfield, the court found that:

“...requiring compliance would thwart or undermine at least one of the objectives of the height control development standard...”

4.2.4. SJD DB2 Pty Ltd v Woollahra Council (2020)

The *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (SJD) established greater flexibility in applying clause 4.6 to vary development standards where a better outcome would be achieved in the context of the site.

This case concluded that the numerical controls and objectives associated with development standards should not be used to strictly define desired future character. One relevant outcome of the case was that other provisions of the local environmental plan as well as development in the area that contravenes the development standard can indicate the desired future character of an area.

4.2.5. Big Property Pty Ltd v Randwick City Council (2021)

Big Property Pty Ltd v Randwick City Council [2021] NSWLEC 1161 (Big Property) is also a relevant case associated with a clause 4.6 request in the context of the desired future character of an area. This judgement followed *SJD DB2* and affirmed that the desired future character should not solely be determined by the development standards that control building envelopes, stating:

“...As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development...”

4.2.6. HPG Mosman Projects Pty Ltd v Mosman Municipal Council (2021)

Similar to the *Big Property* case, in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243* (HPG) a clause 4.6 request was considered in the context of desired future character. This case determined that desired future character of an area can be evaluated by reference to matters other than the controls and objectives of the development standard.

“...The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site”.

5. Assessment of the variation to development standard

As noted, the SSDA incorporates residential flat buildings pursuant to the low and mid rise housing provisions under Chapter 6 of the Housing SEPP and furthermore, seeks to utilise the additional FSR and height control under Section 16 of the Housing SEPP to achieve additional floor space (i.e. a FSR of 2.86:1) and 6.6m additional building height, totalling a maximum height of building standard of 28.6m.

The SSDA proposes an exceedance of the 28.6m building height development standard that applies to the site, seeking a maximum building height of 2m. As such, this Request relates to Section 16 of the Housing SEPP.

The proposed building height is an exceedance of 6.99% (*Merman*) and 5.94% (measured from ground level (existing)) over the maximum building height pursuant to the Housing SEPP (28.6m).

The proposed variation is necessary to accommodate the intended built form. This is considered appropriate for the site given its strategic merit in delivering additional housing in a location within 400m from a town centre under the low and mid rise housing provisions. The proposal aligns with the objectives of the Housing SEPP and leverages the site's proximity to St Ives Town Centre as a highly suitable and desirable area to provide residential accommodation, including affordable housing.

The construction of 77 new homes will also assist in achieving the Ku-ring-gai LGA housing targets along with the National Housing Accord (NHA) target of 377,000 well located homes within NSW by 2029.

The height exceedance allows for a better design outcome at the site. It provides for height variation along Cowan Road and is setback from the front of the building, being imperceptible from street level.

Furthermore, the proposed additional height does not represent an overdevelopment of the site, as the proposed FSR of 2.86:1 aligns with the maximum applicable permissible FSR on site under Section 16 of the Housing SEPP.

The following assessment comprehensively considers the provisions of Clause 4.6 with regard to the relevant case law.

5.1. Clause 4.6(3)(a) – Compliance is Unreasonable or Unnecessary

Wehbe establishes at least five potential alternative grounds to ascertain whether strict compliance with a development standard is unreasonable or unnecessary. An assessment against the relevant tests is provided below to outline how compliance with the development standard is unreasonable or unnecessary.

An assessment against the relevant tests is provided below to outline how compliance with the height of building development standard is unreasonable and unnecessary.

The five methods outlined in *Wehbe* were:

- 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).

5.1.1. Wehbe Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard

Whilst Chapter 6 of the Housing SEPP does not explicitly identify objectives of the development standard to be varied, this section makes reference to the aims and objectives of the policies which are relevant to the proposal.

The aims of Chapter 6 of the Housing SEPP are:

162 Aim of chapter

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.

Additionally, the underlying objective of Chapter 2 of the Housing SEPP states:

15(A) Objective of division

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.

The proposed development and exceedance achieve compliance with the underlying objectives, notwithstanding the non-compliance with the height of building standard. The proposal is for a residential flat building, including 12 in-fill affordable housing units, that falls within the low and mid rise housing inner area as the site directly adjoins the St Ives Town Centre. As such, the proposal directly responds to and aligns with the aims and objectives outlined above.

This is a considerable uplift from the row of 10 attached townhouses currently existing on the site. Whilst the proposed development will result in a marginal height exceedance, the environmental impacts as a result of this exceedance are minimal.

Clause 4.3 of KLEP 2015

In light of the above, the objectives of Clause 4.3 of the Ku-ring-gai LEP 2015 are considered for assessment in the context of the proposed height variation.

The development achieves compliance with the objectives as outlined in the table below:

Objective	Comment
<p><i>(a) to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,</i></p>	<ul style="list-style-type: none"> Given the site's location in close proximity to St Ives Town Centre, identified as a town centre under the LEP, the proposal takes advantage of the opportunity to increase the scale of development in this area. The proposal responds to the surrounding built form and height of buildings as the proposed massing has been designed to align with the established streetscape pattern and the future scale of the area. Given the proposed height exceedance is located centrally and is setback from the edges of the structure, it will not be readily visible from the public domain and will not noticeably add to the perceived bulk or scale of the development.
<p><i>(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,</i></p>	<ul style="list-style-type: none"> Being in close proximity to the St Ives Shopping Village, the site layout has been carefully designed to respond to other mid-rise buildings in the surrounding area. As such the location of the proposed height exceedance is centrally located within the site and is imperceptible from the public domain, while the development marks the area's transition from R3 zone to E1 zone.
<p><i>(c) to enable development with a built form that is compatible with the size of the land to be developed.</i></p>	<ul style="list-style-type: none"> The built form of the proposal is compatible with the size of the land to be developed. The majority of the proposal is in line with the height and FSR standards, as per the Housing SEPP, with the exception of a minor height exceedance on the top level of the development. Additionally, the built form has been carefully designed to optimise land use efficiency and maximise functionality of this highly suitable site.

Table 2: Assessment against objectives of Clause 4.3 under the KLEP 2015

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge said (at [34]) that:

establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary.

In this matter it has been demonstrated that the contravention does not cause any material environmental harm (of a kind that the objectives seek to avoid) and the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

5.1.2. Wehbe Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not applicable.

The underlying objective of the development standard is considered relevant therefore is not relied upon in this instance.

5.1.3. Wehbe Test 3: The underlying object or purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable

Not applicable in relation to the objectives of Clause 4.3 of the KLEP 2015, i.e, compliance with the applicable height control would not defeat, thwart or undermine these objectives.

However, strict compliance with the standard would defeat, thwart and undermine the underlying object or purpose of the height of building development standard as per Clause 16 of the Housing SEPP. This was applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 (at [24]).

As discussed above, the underlying objective of Chapter 6 the Housing SEPP is to facilitate the development of low and mid rise housing in areas well located with regard to goods, services and public transport and to provide housing for very low, low and moderate income households.

In the case that strict compliance with the height control was required, this would reduce the amount of affordable housing GFA proposed, relative to the total housing yield, which is contrary to the objectives of the Housing SEPP, therefore, the underlying objective and purpose of the standard would be undermined.

Additionally, strict compliance with the height control would also adversely impact the site's ability to deliver a development that aligns with the desired future character of areas that fall under the low and mid rise housing area provisions of the Housing SEPP, which encourages development of suitable serviced locations.

Overall, strict compliance with the height control will adversely impact the number and quality of units and feasibility of the project, therefore, undermining the objectives and aims of the Housing SEPP. For this reason, strict compliance with the provisions of the Housing SEPP is considered unreasonable and unnecessary.

5.1.4. Wehbe Test 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 compliance with the standard is unnecessary and unreasonable

Not applicable.

5.1.5. Wehbe Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone

Not applicable.

The site's R3 Medium Density Residential zoning is not explicitly relevant, as the site is on land within 400m of a 'Town Centre' and therefore, the low and mid rise housing provisions of the Housing SEPP applies. Subsequently, the permissibility, building height and development standards pursuant to Chapter 2 and 6 of the Housing SEPP prevail.

5.2. Clause 4.6(3)(b) – Environmental Planning Grounds to Justify Contravening the Development Standard

The development, including the non-compliance with the applicable height of buildings control, will provide for a high quality residential flat building on a site well located with regard to goods, services and public transport.

In this context, there are sound planning grounds and significant benefits to justify contravening the height of building development standards of which are outlined in the following sections.

5.2.1. Consistency with the Strategic Context

The provision of both market and affordable housing in this well serviced location responds to the strategic to local, state and national plans as outlined below:

- The proposed height exceedance enables additional homes to be provided, thereby addressing the NHA target of providing 377,000 new dwellings by 2029.
- The proposal utilises the increased height to deliver a greater number of affordable housing units directly supporting the objectives of the Housing SEPP, Ku-ring-gai LSPS, Ku-ring-gai Community Strategic Plan 2032, Ku-ring-gai Housing Strategy and Ku-ring-gai Affordable Housing Policy.
- The site's proximity to public transport, retail, health, and community services aligns with the Greater Sydney Region Plan (A Metropolis of Three Cities), which emphasises housing diversity and access to infrastructure.

Overall, the proposal demonstrates strong strategic merit by responding to local, state and national objectives, of contributing to housing diversity, liveability and accessibility for affordable housing.

5.2.2. Intensity of the development

The proposal seeks an FSR (2.86:1) which is in line with the maximum FSR development standard. Given this, the proposed height variation does not increase the intensity of development on the site, nor is it an overdevelopment of the site.

The height exceedance as a result of the proposed variation is acceptable in the context of the development and broader area and will not be an overdevelopment of the site given the FSR compliance.

5.2.3. Desired future character

The proposed development has been thoughtfully designed to align with the objectives of both Chapter 2 (Infill Affordable Housing) and Chapter 6 (Low and Mid-Rise Housing) of the Housing SEPP. The development will provide much-needed residential accommodation, including affordable housing, in a location that is not only appropriately zoned under the Housing SEPP for such land use but is also highly suitable for increased density, given its proximity to key services and infrastructure.

Importantly, the site is located immediately adjacent to the St Ives Shopping Village, which is a key hub offering a range of retail, community, transport and employment opportunities. The strategic location of the site makes it an ideal candidate for uplift in development intensity, consistent with the broader objectives of the Housing SEPP to deliver well-located housing that meets the needs of a growing and diverse population.



Figure 10: Perspective looking west towards the proposal from Cowan Road (Source: PBD Architects)

5.2.4. Improved urban design outcomes

In summary, the proposed height variation is considered acceptable in regard to its urban design and responsiveness to the local context for the following reasons:

- The proposed height exceedance is a minor non-compliance with the height development standard set by the Housing SEPP utilising the 30% height bonus.
- The non-compliant component of the building height is located centrally to the rooftop, setback from the front of the building and consequently will contribute to very limited perceivable bulk or scale of the building.
- The exceedance in height results in minimal additional overshadowing when compared to a height compliant scheme, as shown in Figure 11 below.

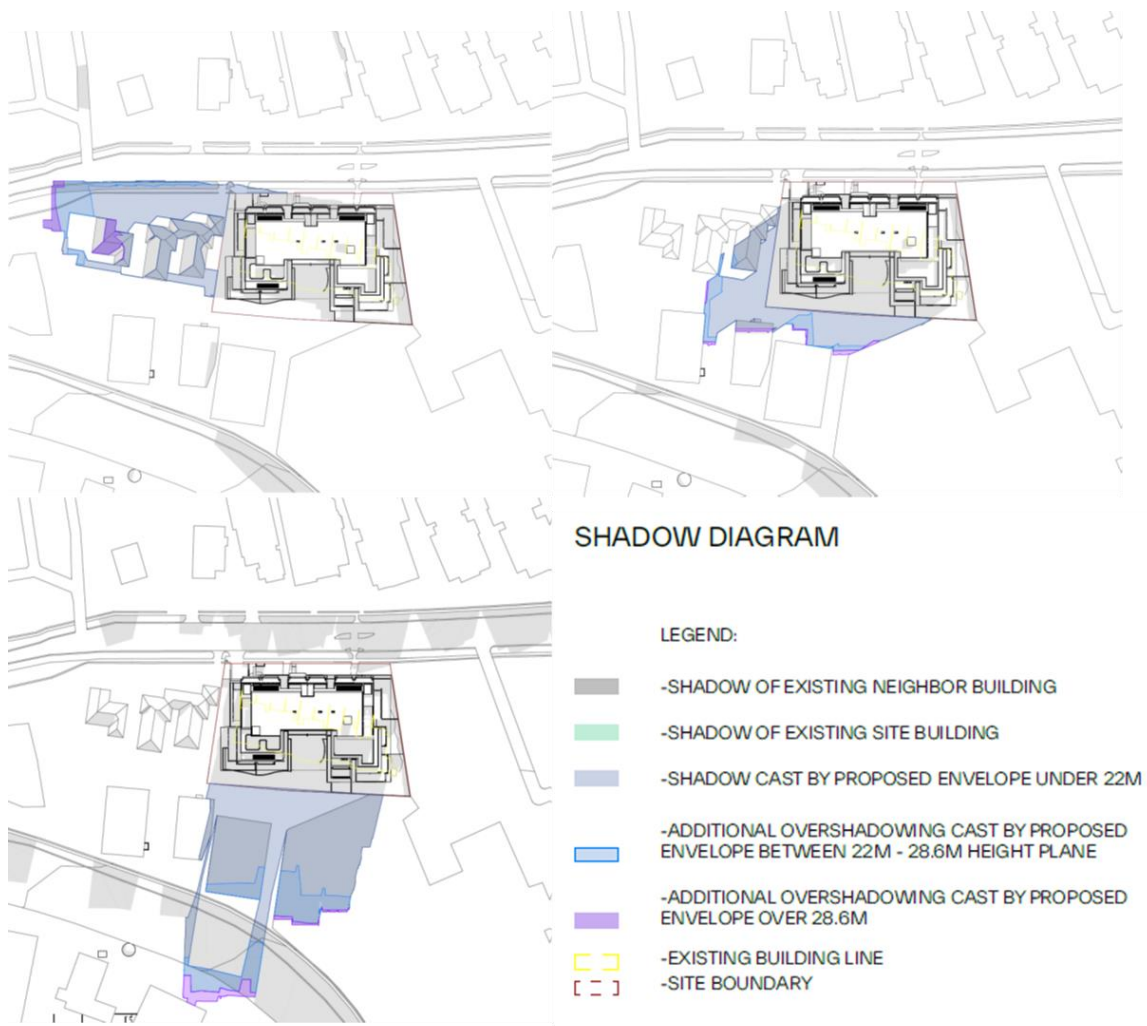


Figure 11: Shadow Diagrams (Source: PBD Architects)

- The communal open space located at Level 7 and Level 8 has been designed and setback to ensure that the privacy of adjoining residential properties are not affected by overlooking.

- The proposed height will allow for a building with landmark qualities - an instantly recognisable development, which is desirable for a site of this size, location and importance.
- The building design focuses on a modern yet timeless style, using a carefully chosen mix of materials including PGH brick, rendered painted walls, glass balustrades and aluminium frame glazing, all of which tie into the surrounding environment and reflect the area's local aesthetic

Overall, the design blends seamlessly with the evolving landscape of St Ives, adding a fresh architectural element that complements the area's vibrant community. By incorporating durable, locally inspired materials and offering a design that is both modern and sympathetic to its surroundings, the proposal enhances the aesthetic fabric along Cowan Road, contributing positively to the streetscape while delivering a contemporary residential development.

6. Conclusion

Clause 4.6 allows for flexibility in the application of development standards in appropriate circumstance and this Request has been shown to satisfy the aims and objectives of the Housing SEPP.

This Clause 4.6 Request is prepared in response to the measurement of height as determined by the case of *Merman*. The height variation as a result of the application of *Merman* is justified for the following reasons:

- The departure from the height development standard is due to providing beneficial features for the development including additional affordable housing units.
- The proposed development aligns with strategic objectives set out within the district and state plans to locate housing in close proximity to public transport, facilities and services.
- The proposal includes development of 77 new dwellings (64 market residential units and 13 affordable housing units), providing additional diverse housing in line with the national and State and local strategic planning objectives.
- The proposal seeks an FSR (2.86:1) which is in line with the maximum FSR development standard (2.86:1). Given this, the proposed height variation does not increase the intensity of development on the site, nor is it an overdevelopment of the site.
- The proposal incorporates building articulation, setbacks and a stepped built form that responds to the lower density development to the north and west.
- The proposed height is contextually appropriate with the prevailing and evolving built form character of the locality and the additional proposed height will not undermine the objectives of the Housing SEPP.
- The development complies with the relevant overshadowing and solar access requirements in the ADG, ensuring adequate residential amenity for the residents and neighbouring properties.

Overall, and for the reasons set out above, the proposed development represents a superior outcome for the site that is justified. Therefore, it is appropriate that the development standard be varied as proposed.