



Clause 4.6 Variation

Section 16(3) of the Housing SEPP
79-81 Queens Road and 2-8 Spencer Street, Five dock

Prepared for DPG Project 37 Pty Ltd

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Executive Summary

Clause 4.6 of the *Canada Bay Local Environmental Plan 2013* (Canada Bay LEP 2013) enables the consent authority to grant consent for development even though it contravenes a development standard. Its objectives are to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

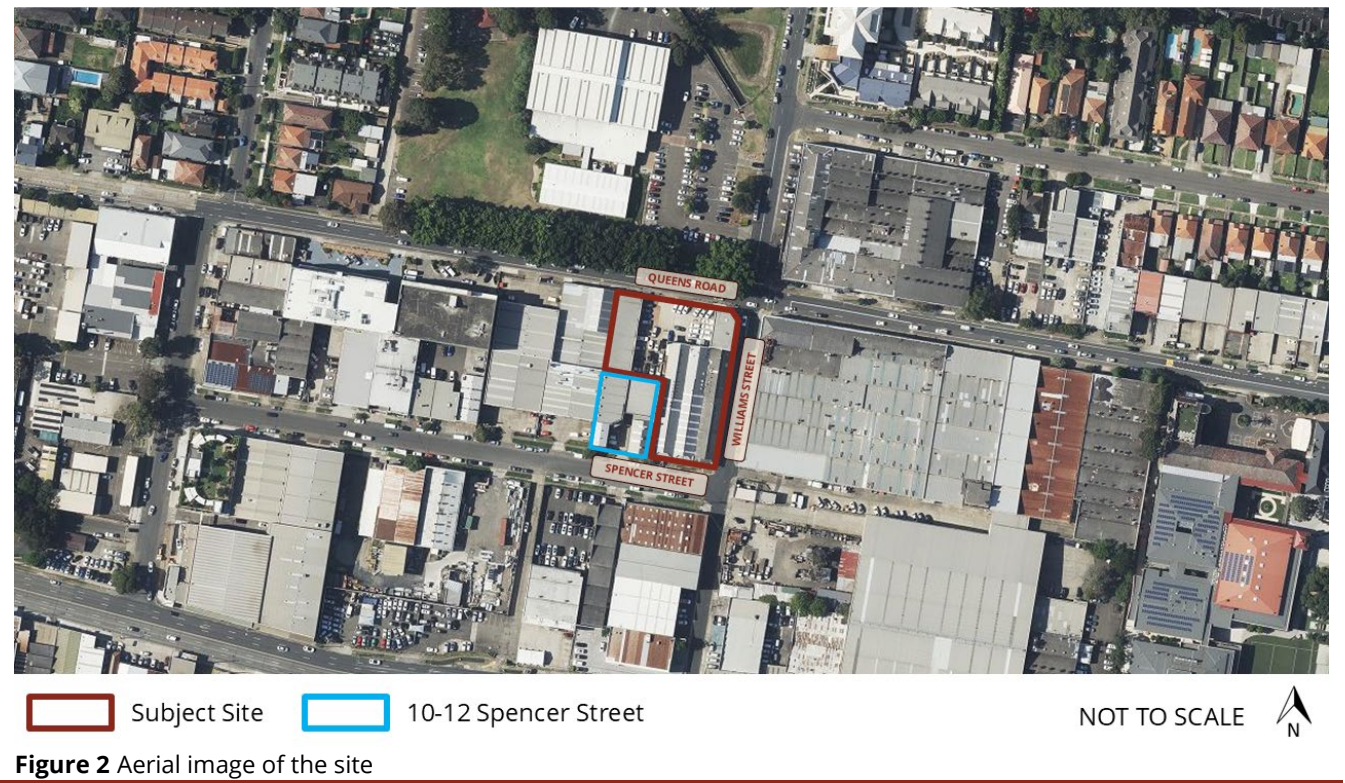
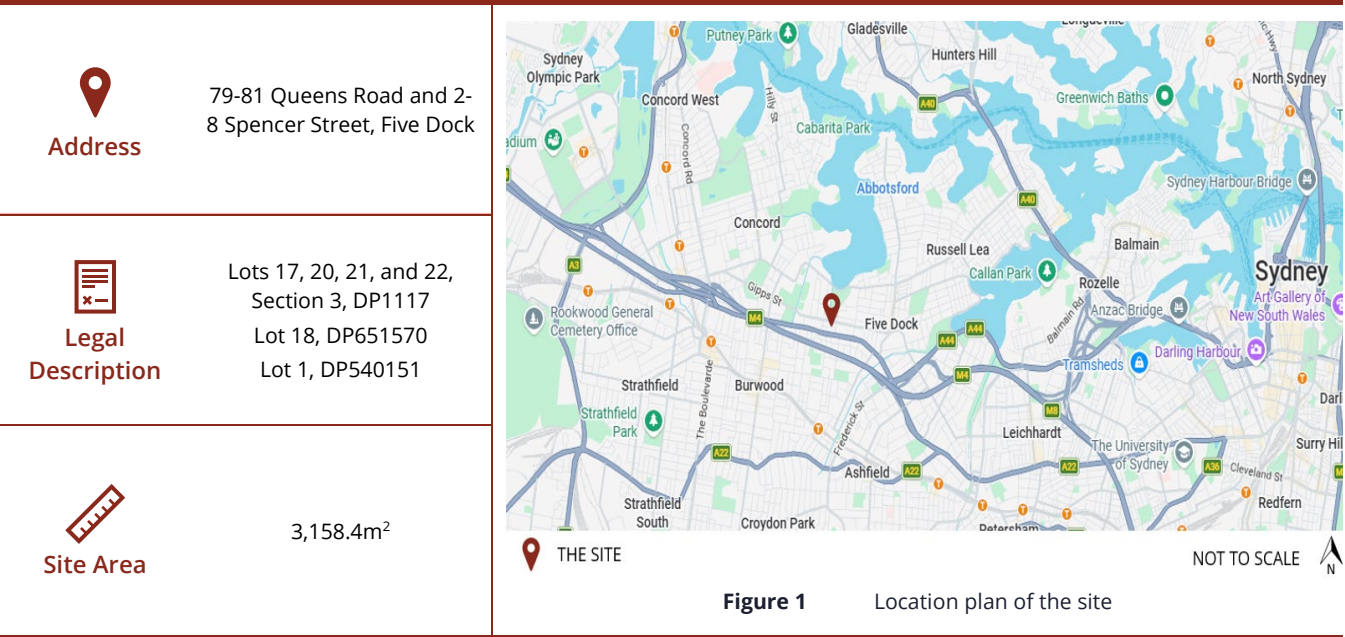
Clauses 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

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

The table below provides a summary of the key matters required in a Clause 4.6 Variation set out in the Department of Planning and Environments *Guide to Varying Development Standards November 2023*.

Where is the development site?	79-81 Queens Road and 2-8 Spencer Street, Five Dock
What is proposed development?	The proposed development is for the construction of a new part 5 and part 26 storey mixed-use shop top housing development comprising ground level retail, and 134 apartments above. The proposed development will include 15% infill affordable housing pursuant to Chapter 2 of the <i>State Environmental Planning Policy (Housing) 2021</i> (Housing SEPP).
What is the variation?	The proposed development has a maximum height of building of 89.6m (RL 91.47), measured to the top of the lift overrun, which represents a 2.5m (2.9%) above the 30% infill affordable housing bonus of 87.1m under Section 16(3) of the Housing SEPP. The variation is a direct result of lift overrun and building plant. In addition to this, the proposal comprises a 5m high awning at ground level that is 3m wide, which results in a minor 2.5m variation to the maximum 2.5m street height along William Street under Clause 8.3(3) of the Canada Bay LEP 2013.
Why is compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case?	Notwithstanding the minor non-compliance on the maximum permissible height of building, the proposal still achieves the objectives of Section 15A of the Housing SEPP, as well as Clause 4.3 of the Canada Bay LEP 2013 as follows: • The height of the development is appropriate to the condition of the site and its context. • The development is compatible with the height, bulk and scale of the desired future character of the locality and will positively contribute to the streetscape and public spaces. • It protects the amenity of residential accommodation, neighbouring properties and public spaces in terms of visual and acoustic privacy, solar access and view sharing. • It establishes an appropriate height transition between adjoining zones, lower density development and open space zones to protect local amenity.
What are the sufficient environmental planning grounds to justify contravention of the development standard?	The environmental planning grounds to justify contravention of the height of building standard are: • The building height encroachment is purely a result of the lift overrun and rooftop plant, which are required to ensure an efficient building. • The height protrusion will not result in any adverse environmental impacts, particularly in terms of visual impact and overshadowing. • The provision of affordable housing is directly aligned with several NSW strategic planning objectives and will assist in alleviating the current housing crisis. In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.

1.0 The Development Site



2.0 The Proposed Development

The proposal involves the redevelopment of the site for the purposes of a mixed-use shop top housing development, comprising ground level retail, and residential accommodation above (including 15% infill affordable housing).

Specifically, the proposed works include the following:

- Site preparation works, including demolition and excavation.
- Construction of 2 x shop top housing buildings, including a 5-storey building along Queens Road, and a 26-storey building along William Street, comprising a shared single storey non-residential podium, with approximately 134 dwellings above (including affordable housing).
- Construction of a shared basement carpark accessed from Spencer Street.
- Public domain and landscaping upgrades, including landscaped street setbacks to all boundaries, and the provision of part of a shared through site link connecting Queens Road to Spencer Street.
- Associated infrastructure upgrades and diversions.

Architectural drawings and a design report prepared by Plus Architecture illustrating the proposed development are included with the SSDA. An Artist Impression of the proposed development is provided **Figure 3**.



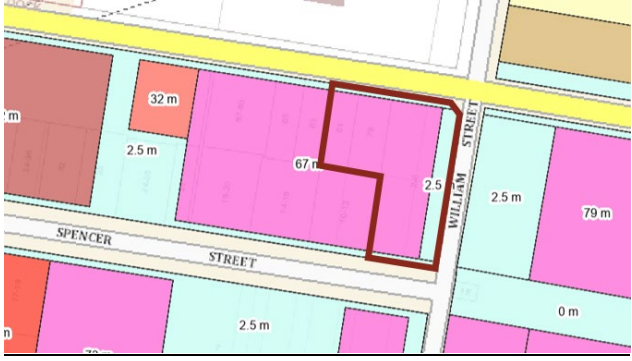
Figure 3 Artist Impression

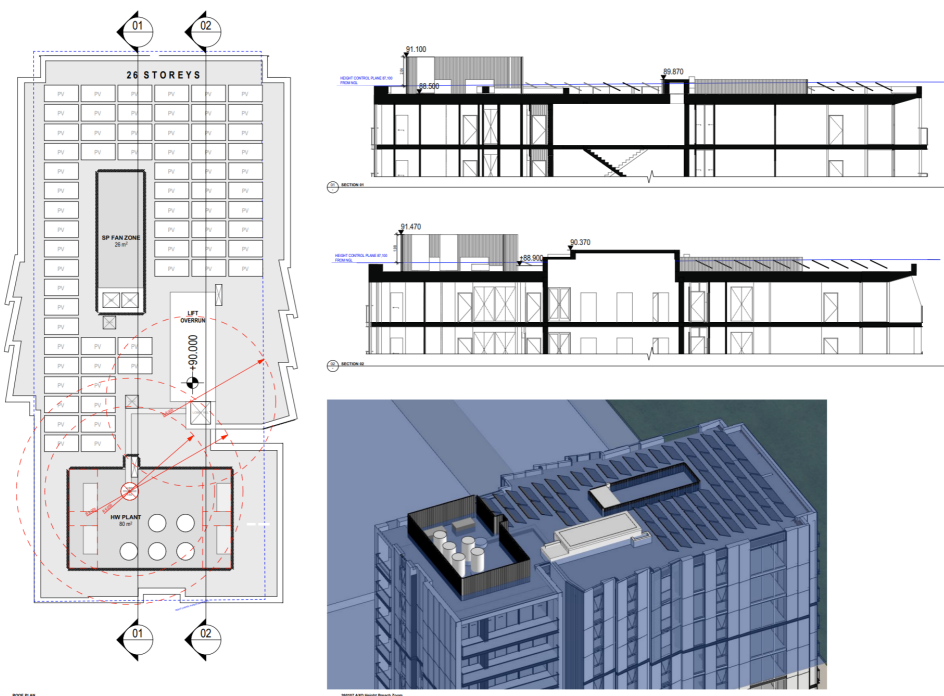
Source: Plus Architecture

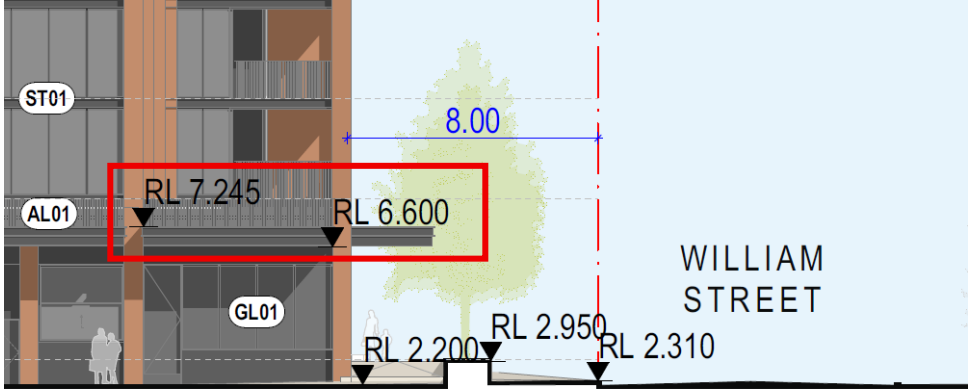
3.0 The Proposed Variation

This section outlines the relevant environmental planning instrument (EPI), the development standard to be varied and proposed variation.

Table 1 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	<i>Canada Bay Local Environmental Plan 2013 (Canada Bay LEP 2013) and State Environmental Planning Policy (Housing) 2021 (Housing SEPP)</i>
The site's zoning	MU1 Mixed Use The objectives of this land use zone are: • <i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i> • <i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i> • <i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i> • <i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i> It is noted that a small portion of the site along the William Street boundary is zoned RE1 Public Recreation, which is the area that will comprise the 8m landscaped and public domain setback. However, the proposed building is entirely located within the MU1 Mixed Use portion of the zone. Furthermore, it is important to acknowledge that a concurrent planning proposal is being pursued, which seeks to rezone the RE1 portion of the site to MU1 Mixed use, and therefore, the objectives of the RE1 zone are not necessary and have not been considered.
Canada Bay LEP 2013 Development standard sought to be varied	Clause 4.3 Height of Building The objectives of this clause are: <i>to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces,</i> <i>to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of—</i> <i>visual and acoustic privacy, and</i> <i>solar access and view sharing,</i> <i>to establish a transition in scale between medium and high density centres and adjoining lower density and open space zones to protect local amenity,</i> <i>to ensure that buildings respond to the natural topography of the area.</i> Under Clause 4.3 of the Canada Bay LEP 2013, the site is prescribed a base height of building of 12m. However, the site is located within Area 17 of the Kings Bay Precinct and therefore, is subject to site-specific provisions under Part 8 of the Canada Bay LEP 2013, which grants an incentive height of building of part 67m for majority of the site, and part 2.5m along the street frontages. The height of building map is provided in Figure 4.  Figure 4 Incentive Height of Building Map Source: NSW Planning Portal Spatial Viewer (Digital Maps)

Matter	Comment
Housing SEPP Development standard sought to be varied	Section 16 Affordable housing requirements for additional floor space ratio The section does not have a specific objective, however, the objective of the division is <i>"to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households."</i> The section provides for development to exceed the maximum permitted height under the LEP by 30%, subject to the provision of 15% affordable housing. The proposal comprises 15% affordable housing, and therefore, the majority of the site has a maximum building height of 87.1m. The 2.5m height limit along the street boundaries will remain.
The proposed Variation	The proposed development has a maximum building height of 89.6m (RL 91.47), which results in a 2.5m (2.9%) variation above the 30% infill affordable housing bonus, which allows a maximum height of building of 87.1m. Figure 5 illustrates the extent of the proposed height variation above the 30% infill affordable housing bonus. As shown, the exceedance is minor in nature and is primarily associated with the lift overrun and building plant, which encroaches the maximum permissible height plane by 2.5m. The lift overrun has been designed accordingly and located at the centre of the building to minimise associated visual and shadow impacts to surrounding development.  Figure 5 Proposed Building Height Variation Source: Plus Studio In addition to the above, minor encroachments are proposed into the William Street 8m setback zone, which is prescribed a maximum height of building of 2.5m under Clause 8.3 of the Canada Bay LEP 2013. The majority of the development complies with this control, with the exception of a minor non-compliance arising from a 3m wide ground level awning to the street frontage that is 5m in height. This results in a 2.5m or 100% variation to the maximum 2.5m building height. Notwithstanding the minor variation, the proposal satisfies the objectives of the street setback controls by maintaining a high quality, landscaped public domain that enhances pedestrian amenity and the overall streetscape. Figure 6 below illustrates the proposed awning along William Street.

Matter	Comment
	 Figure 6 Proposed Variation along the William Street frontage Source: Plus Studio

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Canada Bay LEP 2013 provides that:

- 3) *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 of the case, and*
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard.*

These key considerations are considered in their respective sections below.

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary

This Clause 4.6 Variation Request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height control pursuant to the 'First Method' outlined in Wehbe.

Given the Housing SEPP does not contain any specific objectives relating to the height of building development standard, an assessment against the objectives of the height of building development standard under Clause 4.3 of the Canada Bay LEP 2013 has been undertaken. Furthermore, an assessment against the overarching objectives of the Housing SEPP infill Affordable Housing objective has been undertaken, demonstrating that the objectives can still be achieved notwithstanding the non-compliance.

4.1.1 Assessment against the Height of Building Development Standard Objectives

Objective 4.3(1)(a) to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively contribute to the streetscape and public spaces

The proposed building has been the subject of extensive design reviewing, which has ultimately confirmed that the proposal exhibits design excellence and is compatible with the intended height, bulk and scale of the desired future character of the locality, particularly with consideration of the evolution and transformation of the Kings Bay precinct, along with the broader Parramatta Road Corridor. These areas have been identified for future urban growth, which will include new residential and mixed-use developments. As the precinct transitions from a low-rise industrial area to a high rise mixed-use urban centre, the proposed height, bulk and scale of the development will directly respond to the shift in urban context.

The variation is confined to the lift overrun and building plant, with the bulk of the building remaining below the permissible building height. Therefore, the additional height does not increase the perceived bulk or scale of the development, and the proposal delivers a high quality contemporary built form outcome consistent with the strategic vision of the locality.

It is also important to note that the proposed development seeks significant landscaping and public domain improvements along all street frontages, as well as a through site link along the western boundary, ensuring that the proposed development, irrespective of the minor variation will positively contribute to the streetscape and public spaces.

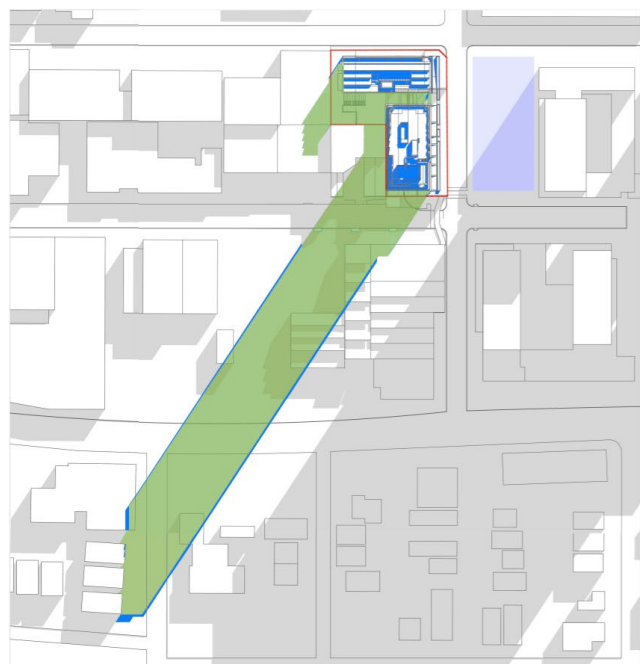
Objective 4.3(1)(b) to protect the amenity of residential accommodation, neighbouring properties and public spaces in terms of— (i) visual and acoustic privacy, and (ii) solar access and view sharing

The proposed built form has been designed with careful consideration for the surrounding development, ensuring that it sits comfortable within both the existing and future context, while minimising any potential amenity impacts on neighbouring properties.

The height variation at the top of the building relates entirely to minor rooftop elements that have been designed accordingly to avoid any adverse impacts, particularly with respect to overshadowing, view loss and visual impact, and visual and acoustic privacy.

Extensive shadow analysis has been undertaken by Plus Studio, which clearly demonstrates that the minor height and setback encroachments, will not result in any additional shadow impacts to the surrounding development as illustrated in the shadow diagrams excerpted in **Figure 7** below. The shadow resulting from the proposed lift overrun and building plant is confined to the extent of the roof.

Overall, the components of the building exceeding the building height limit will be hardly visible and imperceptible from the street and the surrounding public domain, thereby maintaining the quality and amenity of the neighbouring properties and public spaces. The variation to the height limit along the William Street setback will not have any impact to amenity, but rather will improve it by creating a weather protected awning for residents and visitors to enjoy while using the retail premises and the public domain.



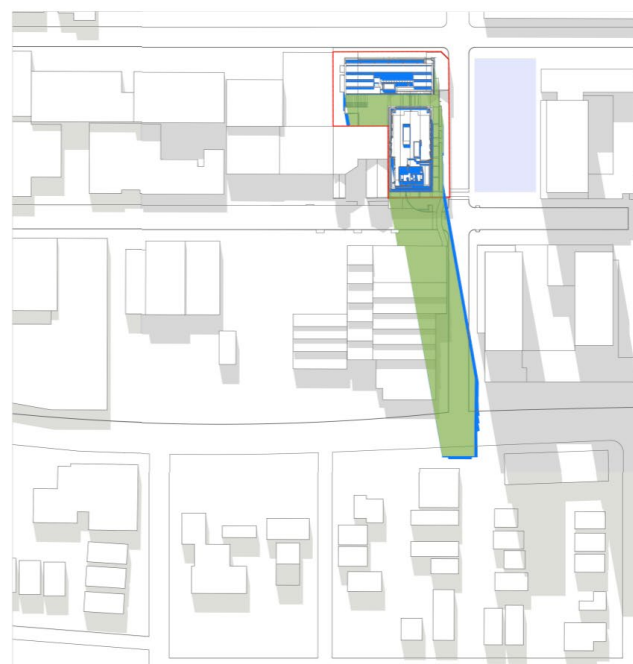
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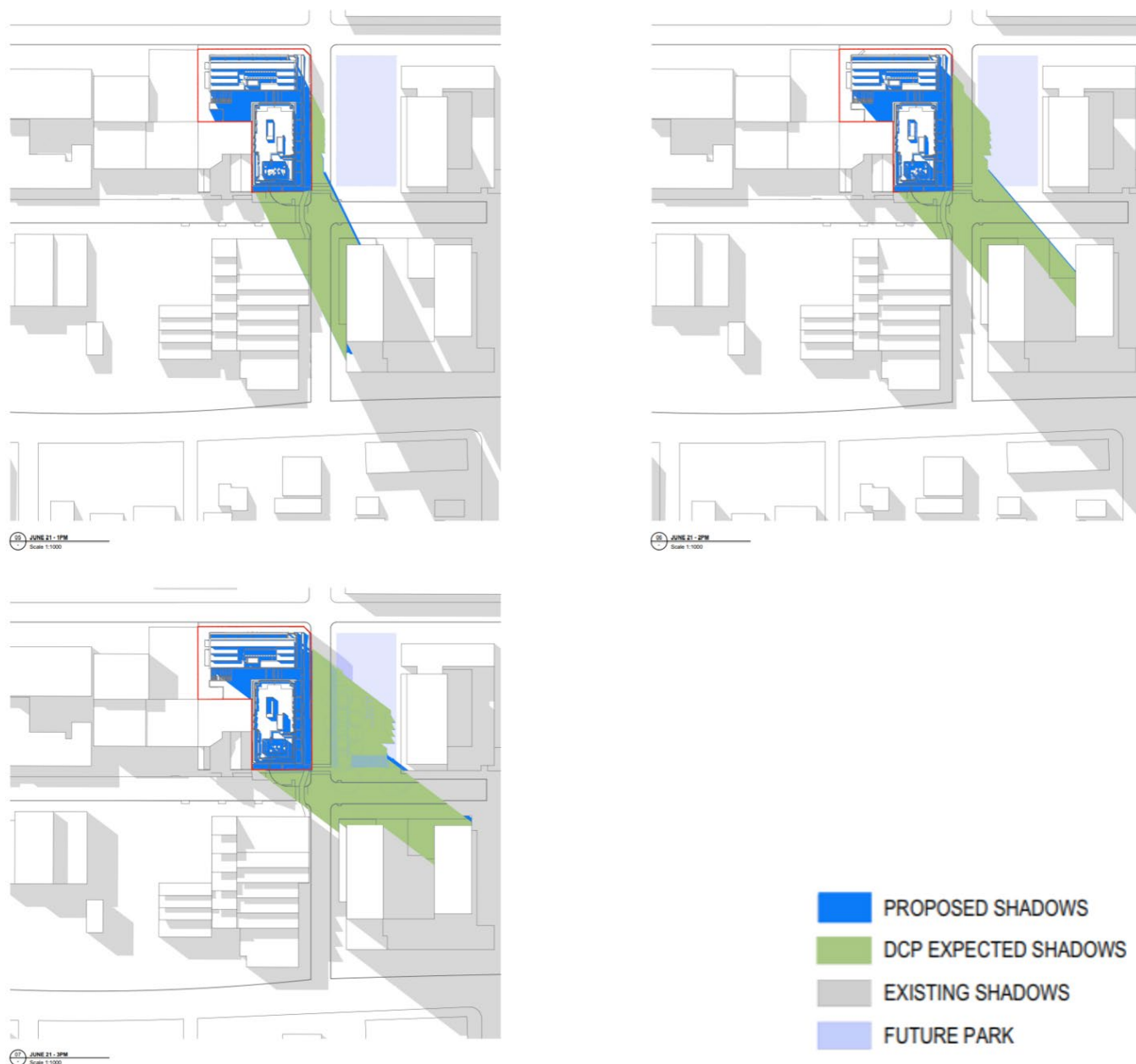


Figure 7 Shadow Diagrams

Source: Plus Studio

Objective 4.3(1)(c) to establish a transition in scale between medium and high-density centres and adjoining lower density and open space zones to protect local amenity

As illustrated in the 3D view of the Kings Bay Precinct (**Figure 8**), the Canada Bay DCP concentrates the larger density along Spencer Street to establish the civic centre of the precinct, with built form stepping down toward Queens Road to ensure an appropriate transition in scale between medium and high-density development and surrounding open space.

Consistent with the envisaged form, the proposal locates the 26-storey building at the corner of William Street and Spencer Street, which reinforces the civic centre function, while also providing a strong and legible corner market within the high-density core. The development then transitions in scale to Queens Road through a five-storey building, creating a comfortable, human scale presence at street level. This lower scale form also ensures an appropriate relationship with the Five Dock Leisure Centre and Charles Heath Reserve opposite the site to the north, and the medium density residential development to the northeast.

Furthermore, the Queens Road frontage is further articulated as a stepped form is adopted, which creates a two-storey street wall height. This datum is closely aligned with the existing fig tree canopy along Queens Road, reinforcing the established streetscape and providing a well resolved architectural response that supports the protection of local amenity and the character of the area.



Figure 8 3D View of the Kings Bay Precinct (site outlined in red)

Source: Group GSA, edits by Beam Planning

Objective 4.3(1)(d) to ensure that buildings respond to the natural topography of the area.

The site is generally flat, and the proposal responds to this condition by maintaining a consistent ground plane and street relationship. It is acknowledged that the finished floor levels are slight raised, which is a deliberate and necessary response to the site's flood constraints. The slight increase in levels mitigates flood risk, while being carefully integrated into the design so the building can continue to sit comfortably within the streetscape. This is achieved through sensitive podium and landscape treatment at the interface, which manages level changes, without creating excessive retaining, visual bulk, or an abrupt edge to the public domain.

4.1.2 Assessment against the Housing SEPP Infill Affordable Housing Objective

Objective 15A 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 seeks to deliver a minimum of 15% affordable housing, equating to 27 dwellings, which are located within the Spencer Street tower. In addition to the provision of on-site affordable housing, the proposed development also seeks to deliver an additional 4% affordable housing by way of monetary contribution.

Therefore, despite the minor exceedance to the height of building, the proposed development directly responds to this objective in that it will deliver new affordable housing to meet the needs of very low-, low- and moderate-income households. The provision of different housing typologies will support the varying demographic needs and household types, while also fostering an inclusive and equitable community that will assist in alleviating the current housing crisis, a key strategic planning objective.

Requiring a strict compliance with the height of building would result in the loss of one storey, and therefore, result in the loss of 3-5 dwellings and a corresponding reduction in the affordable housing yield, contrary to the specific objective of the Housing SEPP in relation to the Infill Affordable Housing bonus. In this context, the negligible impacts of the minor height variation are outweighed by the public benefit of delivering additional housing within a built form that is consistent with the precinct's desired future character and does not give rise to any material additional impacts on the surrounding development.

4.1.3 Assessment against the zoning objectives

Furthermore, the proposed development (inclusive of the proposed height of building exceedance) is consistent with the objectives of the MU1 Mixed Use land use zone, as presented in **Table 2**.

Table 2 The proposed development's alignment with the objectives of the MU1 Mixed Use zone

Objective	Alignment
<i>To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.</i>	The proposed supports land use diversity and employment generation by delivering ground floor retail and commercial, alongside residential accommodation (including 15% affordable housing). Flexible commercial and communal areas broaden the mix of uses, increase day-to-day activity and reinforce the mixed-use function intended under the MU1 zone.
<i>To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.</i>	The ground floor is designed to create an active and legible public interface through non-residential uses and high-quality landscape treatment. Generous public domain setbacks (including an 8m setback) and the through site link along the western boundary improve permeability, strengthen pedestrian connections and contribute to an engaging, safe and functional streetscape.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	The building form, orientation and site planning ensure an appropriate interface with surrounding existing and future development, minimising potential conflicts to adjoining land use zones. Specifically, the proposal has given regard external environmental considerations and has designed the building accordingly. For example, the western façade has been designed accordingly to incorporate angled architectural elements that act as shade structure to assist with managing the heat load.
<i>To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.</i>	The development incorporates non-residential uses at ground level to support activity at the street edge and contribute to the mixed-use character of the precinct. This provides opportunities for five grain retail and business premises, which will enhance passive surveillance and activation of the public domain. It will also allow for out spill onto the future open space to the east, as well as the existing Charles Heath Reserve to the north.

In summary, the proposed development achieves the objectives of the Housing SEPP development standard, the height of building development standard and the zoning objectives, notwithstanding the non-compliance with the standard.

4.2 Clause 4.6(3)(b): Sufficient environmental planning grounds to justify the contravention of the development standard

Clause 4.6(3)(b) of the LEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action at [24]*). In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 Variation Request must be particular to the circumstances of the proposed development on that site at [60].

In this instance, the relevant aspect of the development is the proposed exceedance of building height. There are sufficient environmental planning grounds to justify this contravention, as described below.

4.2.1 Design Excellence

The proposed development has been the subject of extensive design review to ensure that the proposal can exhibit design excellence. Specifically, this process involved a competitive design competition, as well as a subsequent design integrity process, whereby the Jury/Design Integrity Panel (DIP) expressed clear support for the built form and massing of the development.

The scheme that was presented to the DIP in November 2025 comprised an exceedance to the building height due to the lift overrun, whereby the DIP raised no concern regarding the building height. Specifically, the DIP noted that they are supportive of the tower floor plate and refinements.

4.2.2 Environmental Impacts

The proposed building height exceedance will not generate any adverse environmental impacts such as overshadowing or visual impacts. The portion of the building exceeding the height limit, including the lift overrun and building plant is positioned largely towards the centre of the building, and will be hardly visible from the public domain or neighbouring properties. This design approach mitigates potential visual impacts and preserves the aesthetics of the area.

Additionally, as illustrated in the shadow diagrams at **Figure 7**, any shadow cast by the lift overrun will be minimal and confined to the rooftop of the building itself or to areas already overshadowed by the bulk of the building. As such, there will be no significant increase in the extent of shadowing onto adjacent residential properties or public domain, ultimately, minimising the environmental impacts of the proposed variation.

4.2.3 Delivery of housing diversity and supply

The proposed development comprises 134 dwellings, including 15% affordable housing, equating to 27 dwellings, which will support very low-, low-, and moderate-income households. This significant provision of housing, integrating both market and affordable housing will foster an equitable and inclusive community, while supporting a diverse mix of housing tenures and apartment sizes that will accommodate a wide demographic of community needs.

The proposed development, including the minor building height exceedance, is inherently linked to the broader goal of maximising residential yield, including affordable housing, which is critical in addressing the growing housing crisis. This approach is directly aligned with several strategic planning outcomes established by NSW Government initiatives and will assist in alleviating housing shortages and affordability and contribute to the achievement of housing targets established under the National Housing Accord, a Federal Government commitment to delivering one million new homes across Australia over a five-year period.

In light of the above, it is clear that the minimal environmental impacts posed, together with the delivery of housing diversity and supply, particularly affordable housing provides sufficient environmental planning grounds to justify the contravention to the height of building development standard.