

GYDE

Clause 4.6 Variation Request

State Environmental Planning Policy (Housing) 2021 –
Section 16(3) – Height of buildings

27-29 Tryon Rd, Lindfield (SSD-78669234)

Submitted to the Department of Planning, Housing and Infrastructure
on behalf of Bridgestone Projects Pty Ltd

3 December 2025

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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Project: State Environmental Planning Policy (Housing) 2021 – Section 16(3) – Height of buildings

Report Version: **Final**

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Contents

Executive summary	1
1. Background.....	3
2. Standard to be varied.....	4
3. Extent of variation	5
4. Unreasonable or Unnecessary.....	6
4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.....	6
4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.	8
4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.	8
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.	8
4.5 The zoning of the land is unreasonable or inappropriate.....	9
5. Sufficient environmental planning grounds.....	10
6. Conclusion	13

Executive summary

This request has been prepared to justify variation to the maximum building height development standard prescribed in Section 16(3) of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). The request accompanies State Significant Development Application (SSDA) (SSD-78669234) which seeks approval for the demolition of existing structures and the construction of a 9 storey residential flat building and associated works, which are located at 27-29 Tryon Road, Lindfield.

Of note, SSDA (SSD-78669234) and accompanying Environmental Impact Statement (EIS) was submitted to the Department of Planning, Housing and Infrastructure (DPHI) on 11 April 2025 for the construction of a 7-9 storey residential flat building and associated works. The proposed scheme has been revised following consultation with the DPHI and following the public exhibition comments received. As such, this Clause 4.6 request has been prepared to accompany the amended proposal and should be read in conjunction with the Response to Submissions Report and Amendment Report prepared by Gyde, as well as the Architectural Plans prepared by PTW.

It is noted that Chapter 5 of the Housing SEPP relating to Transport Orientated Development (TOD) no longer applies to the Ku-ring-gai local government area (LGA), with the exception of lots that on, or before, 13 June 2025, had valid SEARs and SSD applications lodged but not yet determined.

As the site has been 'saved' under the Housing SEPP TOD provisions pursuant to Clause 1.8A (savings provision relating to development applications) within Schedule 1 of the *State Environmental Planning Policy Amendment (Ku-ring-gai Station Precincts) 2025* (Stations Precincts SEPP), the TOD provisions remain the relevant and current planning controls for the site.

The TOD provisions allow a maximum height of building (HOB) of 22m for residential flat buildings within a TOD Area. The proposal also seeks to utilise the provisions of Chapter 2 of the Housing SEPP as they relate to in-fill affordable housing, enabling a 30% height incentive subject to the provision of affordable housing. Therefore, the maximum permissible building height for the site is **28.6m**.

The proposal complies with the maximum FSR standard, and all habitable floor levels sit below the maximum HOB standard. Notwithstanding this, a minor variation to the standard, being 0.64m or 2.24% occurs in respect to the lift overruns, and to a lesser extent, mechanical fans required to service the proposed basement carpark.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances. This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to Preston J in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018. This request has been prepared having regard to the DPHI'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).

In summary, the proposed variation to the HOB development standard is justified because:

- The variation achieves the relevant objective of the Housing SEPP to facilitate the delivery of new in-fill affordable housing.
- The extent of the variation relates solely to non-habitable floor space being a small portion of the lift overruns and mechanical fan (a maximum variation of 0.64m).
- The elements of the non-compliant portions which relate to the lift overruns are minor in nature to improve the services discharge related to the functioning of the lift and provide access, including Lift B providing access to the roof top communal open space.
- The elements of the non-complaint portions which relate to the mechanical fans are required to service the proposed basement car park and require 2m distance from residential areas and 6m from façade openings. The proposed location on the roof is the preferred location to preserve amenity.

- The proposed minor variations do not detract from the delivery of a development that is appropriate in scale for its location within the desired future character of the area.
- Notwithstanding the proposed minor variations, the development itself steps down from the maximum permissible building height of 29m immediately to the west.
- The non-compliant portions of the building do not result in any overshadowing or privacy impacts to adjoining residential development when compared to a fully compliant building envelope.
- The non-compliant portions of the building will not be discernible from the streetscape.

In summary, all habitable floor space remains below the maximum building height, and it is concluded that the variations do not result in any additional impacts.

It is therefore considered appropriate in this circumstance to vary the development standard.

1. Background

A SSDA (SSD-78669234) and accompanying EIS was submitted to the DPHI on 11 April 2025 for the construction of a 7-9 storey residential flat building and associated works.

The proposed development originally incorporated:

- Demolition of existing structures and site preparation / earthworks;
- Construction of 4 basement levels including 101 car parking spaces with vehicular access via Tryon Lane;
- Construction of a 7-9 storey residential flat building across 4 apartment blocks, including 62 units comprising a mix of 1, 2 and 3 bedroom apartments; and 14 affordable units;
- Communal open spaces on the ground floor and roof terrace; and
- Landscape works including tree replacement.

The SSDA was exhibited for public comment between 24 April 2025 and 21 May 2025. DPHI carried out an assessment of the SSDA and issued their Request for Information (RFI) on 22 May 2025. A detailed Response to Submissions (RtS) Report prepared by Gyde Consulting has been submitted to the DPHI which addresses the issues raised and presents an amended scheme reflecting the necessary design changes.

As such, this request should be read in conjunction with these documents.

It is noted that Chapter 5 of the Housing SEPP relating to TOD no longer applies to the Ku-ring-gai LGA, with the exception of lots that on, or before, 13 June 2025, had valid SEARs and SSD applications lodged but not yet determined.

As the site has been 'saved' under the Housing SEPP TOD provisions pursuant to Clause 1.8A (savings provision relating to development applications) within Schedule 1 of the Stations Precincts SEPP 2025, the TOD provisions remain the relevant and current planning controls for the site.



Figure 1 : Revised TOD Map, site outlined in red (Source: NSW Legislation)

2. Standard to be varied

The development standard proposed to be varied is the maximum building height prescribed in Chapter 2, Section 16(3) of the Housing SEPP as extracted and emphasised in **bold** below.

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—*

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

- (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).*

Section 16(3) notes that if the development includes residential flat buildings, the maximum building height is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

It is noted that the site has a maximum permissible building height of 18.5m pursuant to the KLEP, as recently amended by the *State Environmental Planning Policy Amendment (Ku-ring-gai Station Precincts) 2025*. As previously noted, the site is a 'saved TOD site' and as such the proposal seeks to apply the TOD provisions, which allow residential flat buildings with a maximum permissible building height of 22m.

The proposed development also utilises the in-fill affordable housing provisions delivering 15% affordable housing, enabling a 30% bonus height, as per the Housing SEPP outlined above. The resulting maximum building height applicable to the site is therefore **28.6m**.

For context, it is noted that Ku-ring-gai Council's Stations Precincts SEPP allows heights of up to 29m on land immediately west of the subject site. This is detailed further in the Sections below.

3. Extent of variation

The maximum extent of the variation is 0.64m (or 2.24%) which occurs at the centrally located lift overrun (Lift B) on the southern end of the building (refer to the figure below). The second lift overrun (Lift A), located further north results in a variation of 0.61m (or 2.13%). A mechanical fan (required to service the proposed basement car park) is located further south and results in a variation, to a lesser extent of 0.36m (or 1.26%).

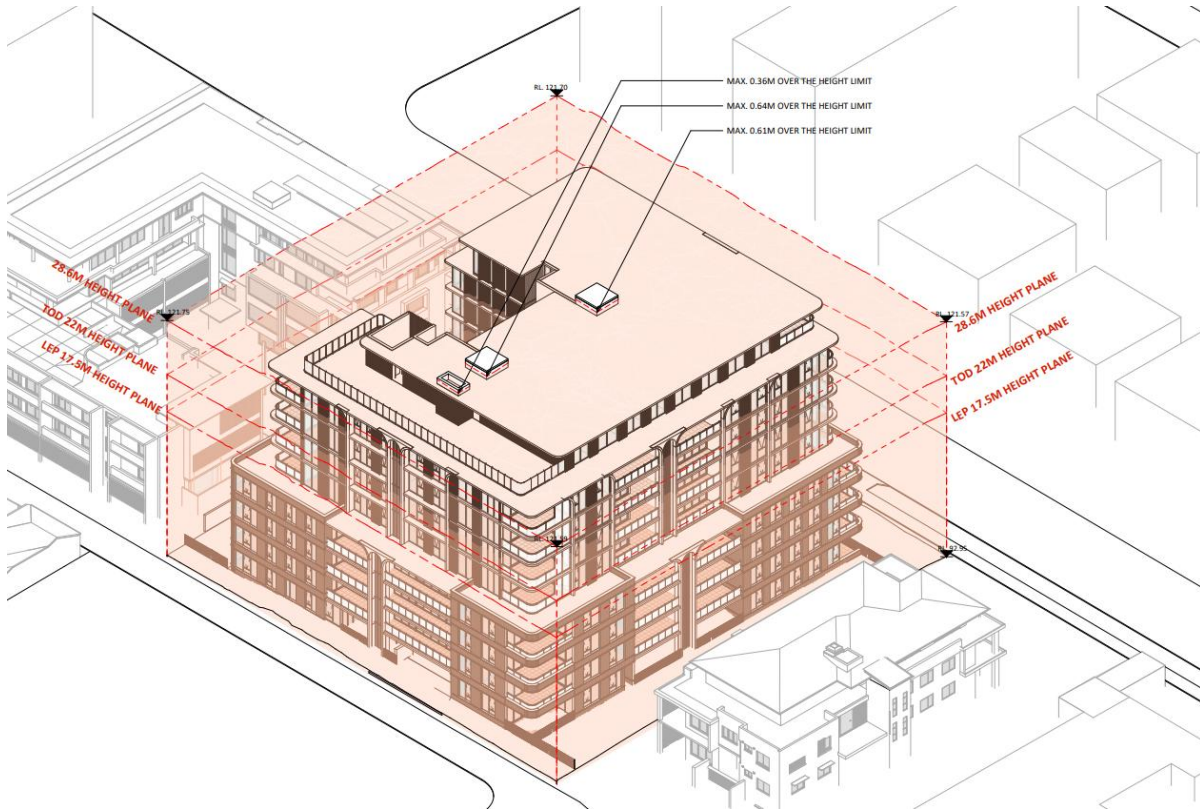


Figure 2: Height plane diagram (Source: PTW)

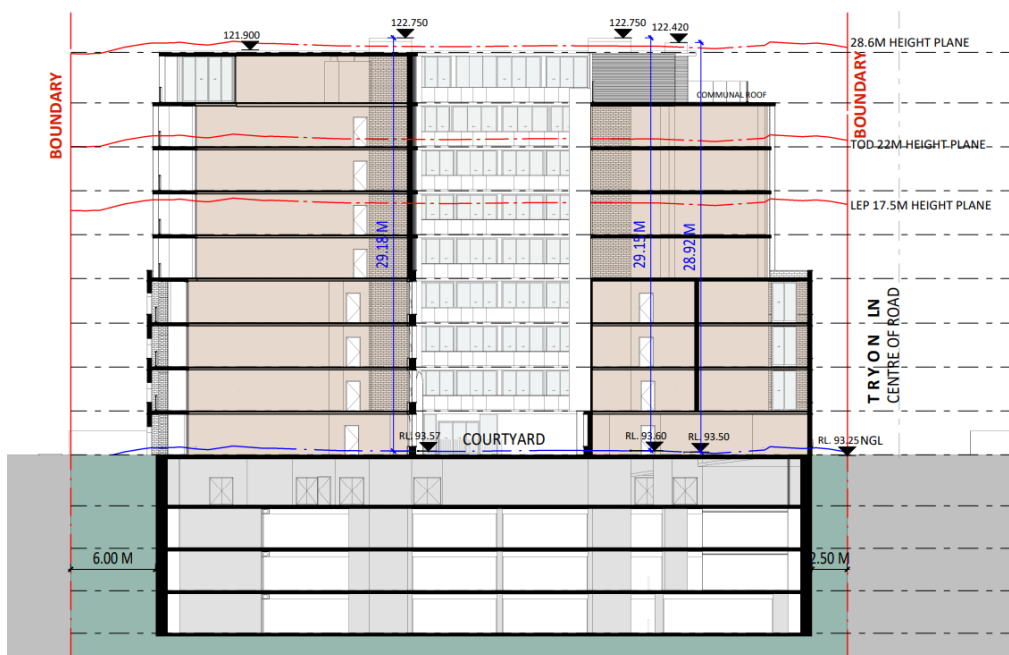


Figure 3: Section 2 detailing lift overrun height (Source: PTW)

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 LEP.

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.

Clause 16(3) of Division 1, Part 2, Chapter 2 of the Housing SEPP sets the maximum permissible building height for development on the site whereby development includes affordable housing. There are no explicit objectives for the development standard, however, the objective of Division 2 generally, is to *facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households*.

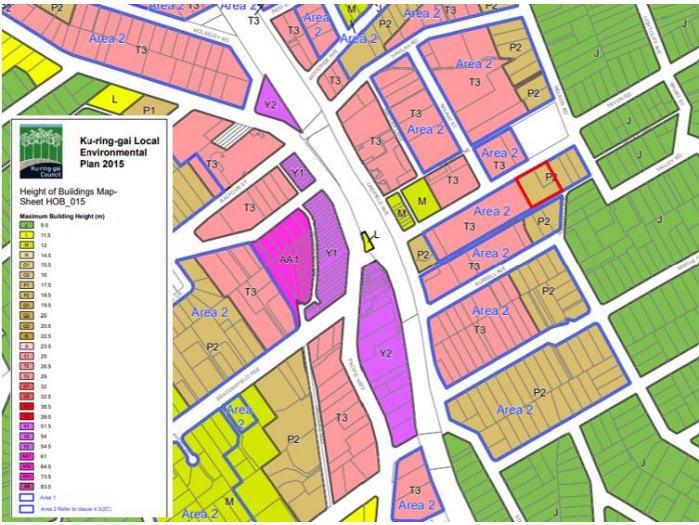
Further, the aims of Chapter 5 for TOD (relevant to the site, as 'saved') are as follows:

- a) *to increase housing density within 400m of existing and planned public transport,*
- b) *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. *are well designed, and*
 - ii. *are of appropriate bulk and scale, and*
 - iii. *provide amenity and liveability,*
- c) *to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.*

In this respect, the objectives of the in-fill affordable housing development standard, as well as the aims of the TOD Chapter are achieved as the proposed development provides additional housing, being both diverse and affordable, of an appropriate density despite the minor variations (refer to sections below for further discussion).

For completeness, the table below addresses the achievement of the objectives of the underlying building height development standard provided by Clause 4.3 (Height of buildings) of the KLEP.

Table 1: Achievement of Objectives of Clause 4.3 of the KLEP

Objective	Demonstration
<p>(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,</p> <p>(b) 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>The proposed minor variations do not prevent the development from being appropriate in scale for its location and with consideration of the desired future character of the area. This is particularly relevant in the context of Tryon Road and Russell Avenue to the rear which are anticipated to increase in density .</p> <p>Ku-ring-gai Council's Stations Precincts SEPP contains revised planning controls for Lindfield as detailed in the figure below.</p> <p>Of relevance, the HoB map has been revised to increase the height of the site from 17.5m to 18.5m. Immediately to the west of the site the height has increased from 17.5m to 29m, further demonstrating this significant density increase. This pattern is repeated around the site, increasing sites closer to Lindfield Station up to 29m and stepping down to 18.5m of the edge of the R4 zoned land.</p>  <p>Figure 4: Station Precincts HoB map 2025, site outlined in red (Source: KLEP)</p> <p>Therefore, in the context of recent planning reforms, the site and its surroundings are likely to transition towards higher density.</p> <p>As such, notwithstanding the proposed minor variations, the development itself steps down from the maximum permissible building heights to the west and creates a residential flat building that delivers much needed housing, including affordable housing, in a well-located area.</p>
<p>(c) to enable development with a built form that is compatible with the size of the land to be developed.</p>	<p>Notwithstanding the proposed variation, all habitable floor space is located below the maximum building height of 28.6m. The minor variations solely relate to a portion of the lift overrun and mechanical fan required to service the proposed basement car park.</p> <p>The proposal has been revised to ensure increased and adequate setbacks to the east and west boundaries, requiring redistribution of the building mass. The revised design ultimately results in a minor variation relating to a portion of the lift overruns and mechanical fan, albeit a more suitable design outcome is proposed.</p> <p>The design of the proposal, despite the proposed minor variations, complies with other relevant built form standards such as FSR, setbacks and building separation.</p> <p>The minor variation will not be discernible from the streetscape.</p>

The above sections have demonstrated that compliance with the maximum permitted building height standard is unnecessary in the circumstances of the case.

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

It can be inferred that the underlying objective or purpose of the development standard in the SEPP is to provide additional building height beyond that allowed in the LEP to enable the achievement of the additional floor area required to deliver new in-fill affordable housing. The underlying objective or purpose is relevant and therefore is not relied upon in the context of this reason.

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

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

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.

The development standard has not been virtually abandoned or destroyed.

We do note, however, the maximum building height development standard provided under the SEPP has been approved or proposed to be applied flexibly on many occasions in circumstances similar to this application – namely as a response to topography and or to accommodate lift overruns as follows.

Table 2: Review of proposed variations to height standard – Lindfield

SSD Number	Address	Description	Extent of variation	Status
SSD-78156462	12-16 Bent Street, Lindfield	Residential flat building including infill affordable housing.	11.18% exceedance of maximum building height.	Assessment
SSD-79276958	59- 63 Trafalgar Avenue and 1A & 1B Valley Road, Lindfield	Residential flat building comprising 220 apartments, including infill affordable housing.	15.6% exceedance of maximum building height.	Response to Submissions
SSD-78493518	2- 8 Highgate Road, Lindfield	Residential flat building comprising 84 apartments, including infill affordable housing.	5.94% exceedance of maximum building height.	Response to Submissions
SSD-79261463	1-3 Reid Street and 2-4 Woodside Avenue, Lindfield	Residential flat building comprising 89 apartments, including infill affordable housing.	6.1% exceedance of maximum building height.	Response to Submissions
MP08_0244	23-27 Lindfield Avenue, Lindfield	Mixed use development including retail floorspace and 102 residential apartments across	The overall building height resulted in a 12.6% exceedance of maximum building height.	Approved

		two residential towers.		
SSD-82709458	19-25 Balfour Street, Lindfield	Residential flat building comprising approximately 98 apartments, including infill affordable housing.	14.34% exceedance of maximum building height	Response to Submissions

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is reasonable and appropriate and therefore 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:

Desired future character of the locality

- The proposed development is of an appropriate scale, notwithstanding the proposed minor non-compliance, and is compatible with the future desired character of Lindfield.
- Over the next 20 years, many surrounding sites are likely to be redeveloped in accordance with the Station Precincts SEPP, resulting in greater height and density surrounding the site, including the site immediately to the west which has a maximum HoB of 29m, significantly increasing the density of this area and would result in the minor variations appearing insignificant within the surrounding context.

Visual impacts

- The portions of the lift overruns and mechanical fans that exceed the height of buildings standard do not result in additional adverse visual impacts. No habitable floor space is located above the maximum building height.
- The proposed non-complaint portions of the building have been strategically located centrally within the rooftop footprint and will not be discernible from the street or public domain.
- Notwithstanding the minor variation, the key features of the existing and desired future character of the locality, will not be diminished by the proposed variations of the building height standard.

Overshadowing

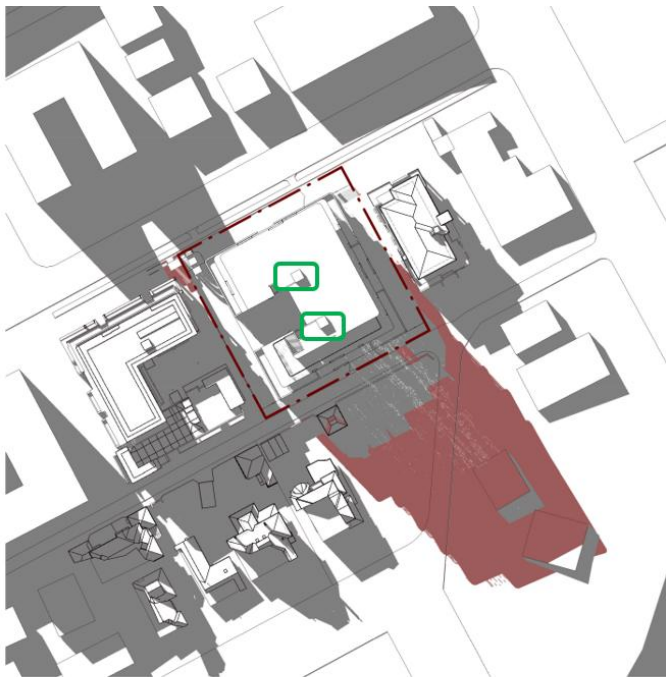
- As demonstrated in the shadow diagrams prepared by PTW in Appendix C of the RtS and Amendment Report, the minor variations (solely relating to lift overruns and mechanical fans required to service the proposed car park) do not result in any additional overshadowing impacts to adjoining development or open space.
- For clarity, extracts of the shadow diagrams are provided below, with the extent of shadows cast by the non-compliant portions of the lift overruns and mechanical exhaust (outlined in green). The shadows cast by the non-compliant portions fall only to the roof of the proposed building itself only.



21 JUNE 0900 HRS



21 JUNE 1200 HRS



21 JUNE 1500 HRS

Figure 5: Proposed shadows - extent of variation identified in green (Source: PTW annotated by Gyde)

Compliance and function

- The elements of the non-compliant portions which relate to the lift overruns are minor in nature to improve the services discharge related to the functioning of the lift and provide access to the roof top communal open space.
- The elements of the non-complaint portions which relate to the mechanical fan are required to service the proposed basement car park.

- The proposed lift height and size have been determined through technical coordination with a lift manufacturer. This included consideration of building height, lift speed, quantum of units and relevant operational requirement and considered to be the most appropriate size to service this scale of building.
- Technical coordination with the relevant mechanical consultant has determined that mechanical outlets are to be located at least 2 metres above trafficable areas and at least 6 metres from any façade openings. As such, alternative options were considered in the location of the mechanical fans, including within the central courtyard. It was ultimately determined that this option would result in a sub-optimal design outcome located within the main residential entryway and resulting in additional impacts to amenity and overall design outcome. The proposed location, centrally within the rooftop footprint, is more suitable in terms of future amenity for residents.

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

This Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- The variation achieves the inferred objectives of the development standard.
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

In summary, the proposed non-compliance relates solely to a portion of the lift overruns and mechanical exhaust. All habitable floor space remains below the maximum building height. It is concluded that the proposal minor variations do not result in any additional impacts.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.