



Clause 4.6 Variation Request

Clause 4.3 Height of Buildings of Ku-ring-gai Local
Environmental Plan 2015

10, 14 and 14a Stanhope Road, Killara

**Submitted to the Department of Planning, Housing and Infrastructure
on behalf of Stanhope Road Residence Holdings Pty Limited**

22 April 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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Contents

1.	Introduction.....	1
2.	Standard to be Varied	3
3.	Extent of Variation.....	5
3.1	Context	5
3.2	Extent of variation	6
4.	Unreasonable or Unnecessary.....	8
4.1	The objectives of the development standard are achieved notwithstanding non-compliance with the standard.....	8
4.2	The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	8
4.3	The underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore 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.	11
4.5	The zoning of the land is unreasonable or inappropriate.....	12
5.	Sufficient Environmental Planning Grounds.....	13
6.	Public interest.....	23
7.	Conclusion	24

Glossary and Abbreviations

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

1. Introduction

This is a formal request that has been prepared in accordance with Clause 4.6 of the *Ku-ring-gai Local Environmental Plan 2015* (Ku-ring-gai LEP) to justify a variation to Clause 4.3 Height of buildings of the LEP in a State Significant Development Application (SSDA) in relation to 10, 14 and 14a Stanhope Road, Killara (the subject site). The SSDA is submitted to the Department of Planning, Housing and Infrastructure (DPHI) seeking consent for a residential flat building development comprising 135 apartments, basement car parking and associated civil and landscaping works.

The SSDA is made subject to the provisions of Chapter 2 Affordable Housing and Chapter 5 Transport Oriented Development of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). Chapter 5 of the Housing SEPP provides the development standards that allow for higher density development in key locations that are supported by existing or planned public transport. Therefore, whilst Ku-ring-gai LEP is the primary environmental planning instrument (EPI) applying to the site, the proposed development is made pursuant to the provisions of the Housing SEPP. In addition, development for in-fill affordable housing provides opportunity for up to 30% additional building height and floor space for development that incorporates the minimum required floor space for affordable housing.

Clause 4.3 of Ku-ring-gai LEP requires that the height of buildings for the site does not exceed 9.5m when measured from existing ground level. As noted above, the proposal seeks consent for a development that relies on the provisions in Chapter 5 of the Housing SEPP, which permit a greater density than that envisaged under Ku-ring-gai LEP. The provisions in Chapter 5 of the Housing SEPP allow for a building height of up to 22m and a floor space ratio (FSR) of 2.5:1. With an additional 30% building height and FSR permitted under Chapter 2 of the Housing SEPP, the maximum permissible building height and FSR are 28.6m and 3.25:1 respectively. The proposed development seeks consent for a building up to 35m in height at its maximum and an FSR of 2.22:1. Therefore, the proposal exceeds the maximum permissible building height by 6.4m or 22.37% when measured from existing ground level. The departure from the standard is set out further in Section 3 (Extent of variation) of this request.

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

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

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

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

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

- The proposed variation enables the orderly and economic use and development of land through the redevelopment of an underutilised site for much needed housing in accordance with the transport oriented development program established by the NSW Government.
- The proposal will maximise the number of residential dwellings possible in response to the current housing crisis with little to no unacceptable, or adverse environmental impacts. Specifically, the areas above the height plane do not cause adverse amenity impacts.

- The proposed variation is a direct result of the redistribution of floor space within the development to avoid and minimise any adverse impacts on the heritage significance of the item at 12 Stanhope Road.
- The proposal will retain and expand the current residential land use through providing a total of 135 apartments within walking distance to Killara Railway Station.
- The proposal responds to the NSW Governments strategic and statutory planning initiatives to encourage private developers to provide additional housing, particularly through the provision of 2,988.4m² of gross floor area as affordable housing.
- The proposal will continue to achieve the objectives of Clause 4.3 including using the existing topography of the site to provide a development with an appropriate density, scale and intensity, and ensuring the buildings are compatible with the bulk and scale of the locality.

This Clause 4.6 Variation Request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Further, the proposal is consistent with the objectives of the zone for the site and the development standard itself and is, therefore, in the public interest.

2. Standard to be Varied

The primary EPI applying to the site is Ku-ring-gai LEP which prescribes a maximum building height for the subject site of 9.5m. This is commensurate with the R2 Low Density Residential zoning of the subject site. In April 2024, the NSW Government announced the introduction of Chapter 5 of the Housing SEPP, which commenced on 13 May 2024. Clause 155 in Chapter 5 of the Housing SEPP establishes a maximum building height of 22m and FSR of 2.5:1 for the subject site as follows:

155 Maximum building height and maximum floor space ratio

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

Note—

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

(2) The maximum building height for a residential flat building in a Transport Oriented Development Area is 22m.

(3) The maximum building height for a building containing an independent living unit or shop top housing in a Transport Oriented Development Area is 24m.

(4) The maximum floor space ratio for the following in a relevant residential zone or relevant employment zone in a Transport Oriented Development Area is 2:5:1—

- (a) a residential flat building,
- (b) a building containing an independent living unit or shop top housing.

(5) This section does not apply to the extent a provision of another chapter of this policy or another environmental planning instrument permits a greater maximum building height or floor space ratio for a residential flat building or building containing shop top housing on the land.

The proposed development seeks to also utilise the in-fill affordable housing provisions in Chapter 2, Part 2, Division 1 of the Housing SEPP which provide opportunity for up to 30% additional building height and FSR for developments that incorporate at least 10% affordable housing. Clause 16 in Chapter 2 of the Housing SEPP provides the following:

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 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—

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

(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 land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

Example—

Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.

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

Based on the above, the maximum permissible FSR for the development is 30% additional FSR on top of the maximum permissible FSR for development that includes residential development. The maximum permissible FSR for a building on the subject site is 2.5:1 and with an additional 30% FSR, the maximum permissible FSR on the site is 3.25:1. The proposal seeks consent for a development with an FSR of 2.22:1 and therefore does not rely on the additional floor space provided by clause 16.

Clause 18 of the Housing SEPP provides the controls for where development involves a residential flat building or shop top housing but doesn't rely on the additional 30% floor space provided in clause 16. Clause 18 is as follows:

18 Affordable housing requirements for additional building height

(1) This section applies to development that includes residential development to which this division applies if the development—

- (a) includes residential flat buildings or shop top housing, and*
- (b) does not use the additional floor space ratio permitted under section 16.*

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

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

$$\text{affordable housing component} = \frac{\text{additional building height (as a percentage)}}{2}$$

In accordance with clause 18(2) the maximum building height for a building that is a residential flat building is the maximum permissible building height for the development on the land plus an additional building height of up to 30%. Therefore, an additional 30% on top of the maximum permissible building height of 22m results in an overall maximum permissible building height of 28.6m. The proposal seeks consent for a building with a height of up to **35m** measured from existing ground level, resulting in an exceedance of **6.4m** or **22.37%** of the development standard. Therefore, the standard that is proposed to be varied is the maximum height of building standard under clause 18(2) of the Housing SEPP.

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

3. Extent of Variation

3.1 Context

The site has an area of 7,864sqm and is located at 10-14a Stanhope Road, Killara, within the Ku-ring-gai Local Government Area (LGA). The site is legally described as Lot B in DP 326483 and Lots 1 and 2 in DP 224907 and has frontage to Stanhope Road.

An aerial view of the site is provided in Figure 1 below.



Figure 1: Aerial view, subject site outlined in red (Source: NearMap)

The site is located on the northern side of Stanhope Road and has frontage at two points as illustrated in Figure 1. An important aspect of the proposed modification is the topography of the site which has a substantial fall from the front boundary at Stanhope Road to the rear boundary. This is a contributing factor to the variation to the building height.

The site is zoned R2 Low Density Residential pursuant to Ku-ring-gai LEP and the context of the site is varied with high density residential flat buildings immediately adjoining the subject site to the north and east, and low density residential dwellings to the south and west. Adjoining the site to the east are two dwelling houses surrounded by residential flat buildings. The site adjoins Stanhope Road to the south and existing dwellings to the west. North of the site are several residential flat buildings with frontage to Marian Street. As can be seen in Figure 1, there are two dwellings fronting Stanhope Road which are also in front of the battle-axe portion of the site. The dwelling at 12 Stanhope Road contains a local heritage item which is a contributing factor to the proposed variation which is discussed in this report.

3.2 Extent of variation

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

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

In accordance with clause 18(2) of Housing SEPP and as discussed in section 2, a maximum building height of 28.6m is prescribed for the site. The proposal seeks consent for a development that breaches the maximum height of buildings development standard by 6.4m at the greatest extent, as illustrated in Figure 2 below.



Figure 2: Building height plane (Source: PBD Architects)



Figure 3: Building height plane (Source: PBD Architects)

The proposed development is separated into three distinct buildings to accommodate compliance with the requirements of the Apartment Design Guide, such as building separation, solar access and natural

ventilation. As illustrated in Figure 2 and 3 above, the two buildings at the rear of the site exceed the maximum building height at various points to a maximum of 6.4m of 22.37%.

In evaluating the redevelopment of the site, various options were considered. Leaving the site undeveloped (i.e., doing nothing) was considered, yet discounted as an option. The site is in a prominent and accessible location, is well orientated and has the capability of providing a mix of compatible land uses that benefit from the topography of the site which falls away from the site and provides a natural improvement to the visual impact from Stanhope Road.

Redevelopment in compliance with the maximum building height was also not considered to be appropriate in the circumstances of the site given compliance, as demonstrated in this request, would result in potential impacts on the local heritage item at 12 Stanhope Road and the heritage conservation area (HCA). Compliance with the maximum building height would not result in a reduction in FSR or the number of units proposed and would result in a larger building with frontage to Stanhope Road. The proposed variation results in a built form outcome that is a significant improvement from a streetscape and heritage impact perspective which is discussed further in section 4.

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 18(2) of the Housing SEPP.

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 18(2) sets the maximum permissible building height for development on the site where development includes affordable housing. There are no objectives for the development standard, therefore this test is not applicable to the proposed development.

4.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

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

4.3 The underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

As noted above, there is no objective of the development standard in clause 18 of the Housing SEPP. This clause 4.6 request has therefore been prepared with consideration of the underlying object or purpose of the standard, and if compliance was required with the standard, then the object or purpose would be defeated or thwarted. The variation relates to areas of the proposed development at the rear of the site that are primarily a result of the topography of the site, and the emphasis placed on protecting the heritage significance of 12 Stanhope Road and the HCA as much as possible.

The Ku-ring-gai area is experiencing significant growth as a result of the NSW Government's incentives for transport oriented development and low and mid rise housing reforms. The objective of Division 1 in Part 2 in Chapter 2 of the Housing SEPP states the following:

15A 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 directly achieves the intent of the division through the development of three underutilised, single dwellings into a residential development that incorporates 17% affordable housing. The subject site is located within an identified TOD precinct and provides significant opportunity for the changing demographic within the Ku-ring-gai LGA.

Important to the proposal is also the current and future resident population, and the demographic makeup of the population. The recent housing reforms initiated by the NSW Government is particularly important in the Ku-ring-gai LGA which is experiencing a significant growth in persons over 65, increasing by 11.05% between the 2016 and 2021 based on Census data from the Australian Bureau of Statistics. Further, Ku-ring-gai Council prepared a summary of the 2021 ABS Census data and noted that *"The smaller household types when broken down by age show overwhelmingly that Ku-ring-gai houses older couples and lone persons, and most of the increase has been in this category, but some increase in the young couples and lone persons as well"*¹. This demonstrates a significant shift in the household types and requirements within the LGA, where older couples or individuals seek to stay within the LGA but downsize to a more suitable development, such as an apartment, where maintenance and upkeep is significantly reduced as was have seen with the Mirvac development directly adjoining the subject site to the north. This is also applicable to young couples and lone persons, where apartments are an affordable form of housing particularly in the Ku-ring-gai LGA, where Council's presentation also states the population is typically mature family age structure, with very few in their 20s, as when they leave home, children cannot afford to live in Ku-ring-gai. This reinforces the need to provide development that utilises the intended outcomes envisaged by the NSW Government to provide high quality, affordable housing in key locations.

With consideration of the above and the building height variation, the proposed development incorporates substantial consideration of the current context but also requires consideration of the likely future context of the site and broader area, surrounding landforms and the visual setting. The proposal will result in a development that is appropriate in the context of existing development whilst resulting in a built form that is compatible with the desired future character of the locality including other likely future development. While there are some limited areas of the development that sit above the 28.6m height plane, these will not cause any issues in terms of compatibility with the future character of the area. With reference to *Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*, compatibility is different from sameness. Buildings can exist in harmony together without having the same density, scale or appearance. This is particular noteworthy with the retention of the existing dwellings at 6A, 8, 12 16 and 16A Stanhope Road which will remain as single dwellings unless otherwise developed under the same provisions that apply to those sites.

The landform of the subject site and surrounding sites is an important factor in considering the proposed variation. Stanhope Road is located at the crest of a hill and the subject site falls to the rear. The development has been carefully designed to ensure no adverse impact on views, visual privacy, solar access and overshadowing is experienced.

The visual setting of the proposed development has also been considered, ensuring any views to the surrounding areas from adjoining developments are not impacted by the proposed development. The proposal incorporates a range of colours, finishes, materials and landscaping (deep soil as well as planting

¹ <https://www.krg.nsw.gov.au/files/assets/public/hptrim/information-management-publications-public-website-ku-ring-gai-council-website-community/ku-ring-gai-census-2021-presentation.pdf>

on structures/balconies) to ensure the visual setting is not adversely impacted, but rather improved, as a result of the new development on the site.

In further consideration to the matter of visual setting, as demonstrated in the height plane map, the majority of the development sits well below the maximum height of buildings standard. Particularly, the entire street facing elevation of the development is approximately **18.8m below the maximum permissible building height**. The significantly lower building height at this location is driven by the desire to retain and protect the heritage significance of the dwelling at 12 Stanhope Road and the HCA and minimise the visual impact of the development from Stanhope Road.

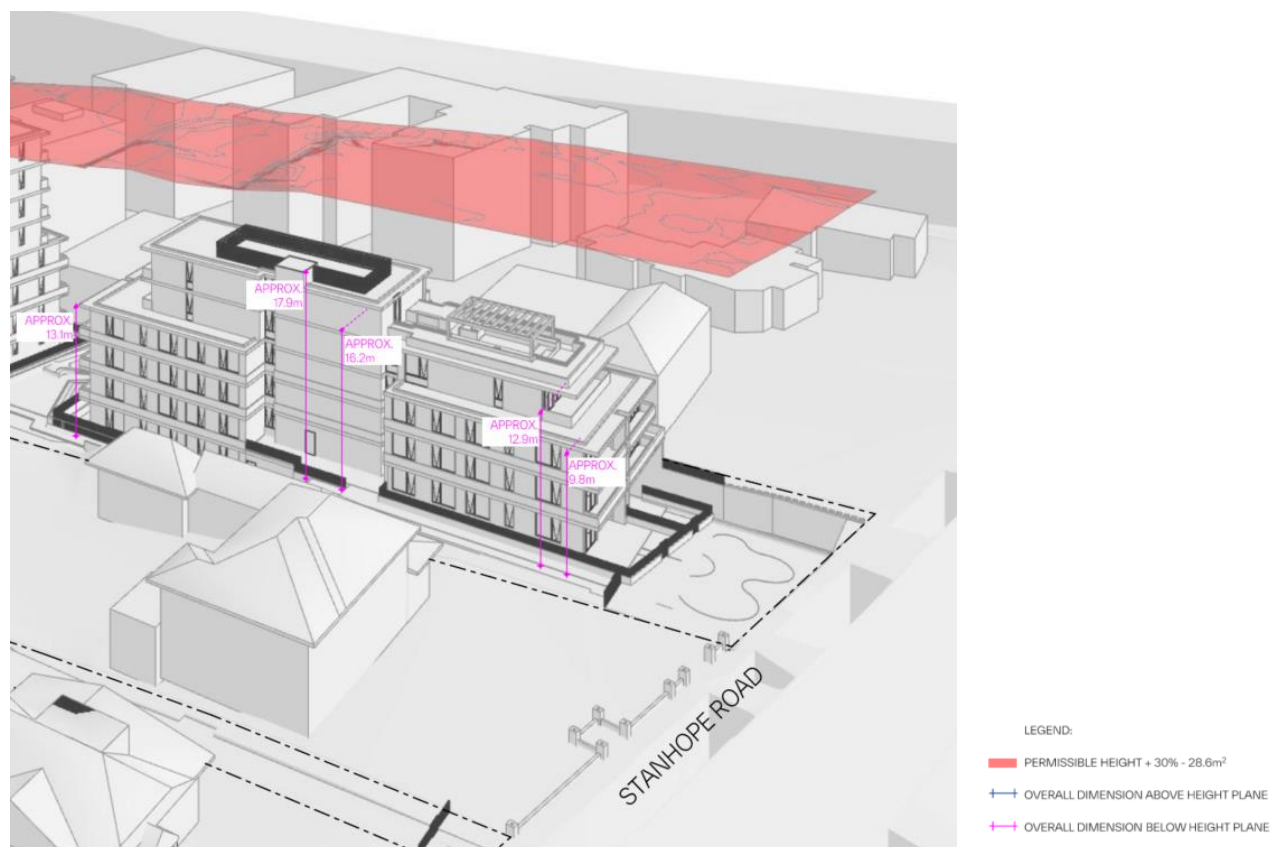


Figure 4: Building height plane (Source: PBD Architects)

The visual minimisation of the development at the Stanhope Road frontage seeks to ensure a consistent built form outcome for the locality with developments that present to the street as 4-6 storey developments screened by retained vegetation in Stanhope Road and adjoining boundaries. As illustrated in Figure 5 below, the proposal presents as a 4-storey building at Stanhope Road.



Figure 5: Proposed built form outcome once completed (Source: PBD Architects)

Further to the above, Clause 4.6 exists as a legal mechanism to enable the established maximum “density” (in the form of a building height control) to be flexibly applied in appropriate circumstances. While there are some areas of the development that project above the 28.6m height plane, equally, there are considerable areas of the development that sit **well below** this maximum height. This is evident in the proposal’s FSR, which does not seek to fully utilise the FSR available under the TOD provisions at 2.2:1 and without relying on the additional 30% uplift provided by the in-fill affordable housing provisions. This request demonstrates the circumstances relevant to the site and development are appropriate.

If flexibility is not exercised in the application of the height of buildings standard in this instance, the economic viability of the proposal would be significantly undermined, as the maximum development density and intensity that the site can reasonably accommodate will not be able to be realised. If compliance with the height of buildings development standard was required, the objectives of the in-fill affordable housing provisions would be compromised, as the number of affordable housing units would be substantially reduced and likely result in a taller building at the Stanhope Road frontage. As demonstrated in the application, the site is capable of absorbing a development of the proposed scale, density and intensity.

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.

Given the recent commencement of the TOD and in-fill affordable housing provisions, there are no examples where consent has been granted to a variation to the building height development standard. A review of Council’s clause 4.6 variations register identifies consent has been granted to variations to clause 4.3 under Ku-ring-gai LEP (which in this case is relevant to the proposed development as both clause 4.3 of Ku-ring-gai LEP and clause 18(2) of the Housing SEPP establish the maximum building height), which therefore demonstrates that the standard has been abandoned or destroyed. A recent example is DA0466/22 at 186 Pacific Highway, Roseville where consent was granted to a residential flat building development which breached the maximum building height development standard by 9.74%. The variation related to the existing

site topography and the noncompliance represents a small portion of the top storey at the rear which does not result in any material impacts by way of overshadowing, visual impact or view loss to neighbouring properties. The minor breach of the building height resulted in a better planning outcome in that less excavation and changes to site levels was required.

It is not evident that Council's control has virtually been abandoned or destroyed but the development standard has certainly been varied by granting consent to other similar developments in the locality. It is therefore considered that demonstrating compliance with the development standard is unreasonable and unnecessary in this instance.

4.5 The zoning of the land is unreasonable or inappropriate.

The zoning of the land is not relevant in this case as the proposal relies on the TOD provisions in Chapter 5 of the Housing SEPP, which prevail over the land zoning and relevant development standards established in Ku-ring-gai LEP.

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:

- **Objects of the EP&A Act**

The proposed development directly responds to the Objects of the Act, particularly those outlined below:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

The proposed development provides additional housing opportunities which will ultimately benefit the Killara and broader Ku-ring-gai community which is expected to reach a population of 154,500 people by 2036 – an increase of approximately 25% from 2016². As noted above, a significant portion of the Ku-ring-gai population will be aged 65 and older with DPHI estimating that this population cohort will grow by 40% by 2036³. The proposal will ensure the natural environment is maintained and protected through implementation of contemporary protection and management procedures such as erosion and sediment control, stormwater management and the like. We note that the proposed development proposes an FSR significantly below that which is permitted on the site and note that this approach has been taken to ensure the land within the north west corner of the site is able to be maintained and the blue gum high forest which is located in this position will be protected from the proposed development. There was a design decision to respect the constraints of the site, being biodiversity and heritage and adopt a first principle approach to design. The result is a development which does not maximum GFA and redistributes height from more sensitive to less sensitive locations on the site.

(c) to promote the orderly and economic use and development of land,

The proposal will provide a significant contribution to the local economy through the orderly development of the land. As outlined in the Environmental Impact Statement and the accompanying consultant reports, the proposal does not result in any impacts that cannot be managed throughout the construction or operational phases of the development. The granting of consent for this development notwithstanding the proposed variation would set an example of promoting orderly and economic development.

(g) to promote good design and amenity of the built environment,

The Architectural Plans prepared by PBD Architects demonstrates merit in the design from the use of a range of colours, finishes and materials, and articulation in the façade treatment to ensure the development is unique but cohesive with the established character of the area. The proposal promotes good design and amenity of the built environment through the careful planning and design of the development using the sites topography and features and considering the immediately surrounding development to ensure there are no adverse impacts on the built environment.

The development generally is consistent with all Objects of the Act, and the granting of consent with consideration of each would not set an undesirable precedent for future development of the same standard.

² Page 41 of LSPS - <https://www.krg.nsw.gov.au/files/assets/public/v/1/hprim/information-management-publications-public-website-ku-ring-gai-council-website-planning-and-development/ku-ring-gai-council-local-strategic-planning-statement-2020-part-2-liveability-a.pdf>

³ Page 40 of LSPS – link above.

- Site constraints**

The subject site is environmentally constrained, particularly by biodiversity, heritage and topography. The architect has utilised the topography of the site as much as practicable to create a built form that is consistent with the character of the area and existing development that are constructed on similarly constrained land, such as the adjoining development at the rear which has smaller buildings at the street frontage which increase in height in conjunction with the slope of the land toward the rear boundary.

The subject site has a substantial fall to the rear, with the highest part of the site at Stanhope Road and the lowest accessible part of the site at the rear boundary, resulting in fall of approximately 10 metres or a gradient of approximately 7.6 percent which is significant in the context of the proposed development particularly noting the majority of the slope is at the rear of the site. The impact of the site's slope is evident with the breaching elements located at the northern elevation of the residential flat buildings at the rear of the site.

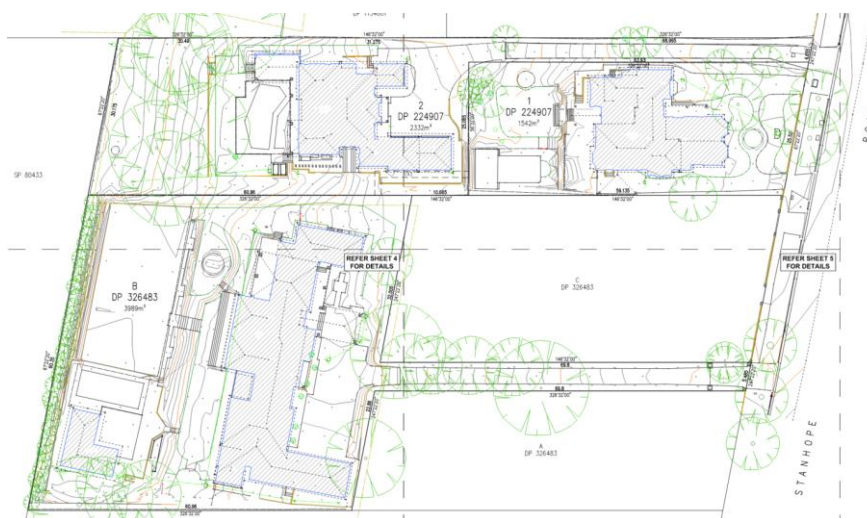


Figure 6: Survey plan illustrating the slope of the site (Source: TSS)



Figure 7: East elevation demonstrating the slope of the site and built form (Source: PBD Architects)

The buildings have been sited in response to the topography of the site. Shifting the buildings or lowering site levels to ensure compliance would require a greater degree of excavation, resulting in a development that is less responsive to site constraints and adversely impacting adjoining properties through compromised building separation distances. The upper levels of the buildings at the rear of the site have been appropriately designed to minimise any potential adverse impacts by applying substantially increased building separation distances to the residential flat buildings adjoining the site at

the rear, further aided by the retention of existing trees in the north western corner of the site as depicted in the following figure.



Figure 8: Floor plan of Buildings B and C showing established trees to be retained (Source: PBD Architects)

The proposed breach will result in a high-quality built form and will provide good amenity for existing and future residents with the building separation and vegetation retained on the site. This is considered a desirable planning outcome.

- **Desired future character of the locality**

The proposed redevelopment of the site will result in a built form that follows the existing topography of the site to minimise bulk and scale when viewed from Stanhope Road, whilst ensuring the architectural merits are emphasised through the design of the buildings. The site has a slope to the north which allows for the rear buildings to be inset behind the building and existing dwellings fronting the street and have therefore been purposely designed to be obscured from the public domain to minimise the bulk and scale of the proposal.

The visual appearance of the development has been refined as part of the design process to minimise the bulk and scale of the development when viewed from the street. The rear buildings of the proposed development will be substantially obscured from both Stanhope Road and Marian Street as a result of existing or proposed buildings and vegetation. This is particularly evident in the Design Report submitted with the application and key points illustrated below.



Figure 9: Visual impact analysis when viewed from Stanhope Road (Source: Modata)



Figure 10: Visual impact analysis when viewed from Marian Street (Source: Modata)

The façade of the development provides a high level of articulation and landscaping to soften the built form, which complies with the maximum building height at the front of the site. The view from the street to the buildings at the rear are almost entirely obscured, as illustrated in the figures above and in the design report, and combined with the topography of the site, the breaches to the maximum building height development standard are not visible from the street.

The proposed development indicates a significant investment in the Ku-ring-gai LGA and the growing need for additional housing in locations of high amenity such as Killara. The layout and design of the development has been carefully curated to ensure the built form presents as unique structures, responsive in architectural style to their intended end use, whilst ensuring the buildings are cohesive with the existing buildings in the locality. The proposal utilises a range of colours, finishes and materials that respect the established character of the locality whilst utilising design features to enhance the modern interpretation of the development.

The desired future character of the locality has also been considered within the Ku-ring-gai Local Strategic Planning Statement (LSPS). The LSPS makes specific reference to areas of key concern relating to housing being housing diversity and choice, housing affordability, and housing accessibility and adaptability. The proposal will directly address each of these concerns through provision of additional housing with a mix of apartments at varying price points, in an accessible location and meeting the minimum adaptability standards for apartments.

The LSPS identifies Ku-ring-gai's strategic response is to "forward plan to deliver dwellings in a way that supports the area's intrinsic character and growth of sustainable communities through examining opportunities and challenges to provision in, and around, existing centres across the local government area, including alignment with transport and infrastructure". The proposal aligns with this through provision of a development that is located close to the Killara town centre and is less than 450m walking distance to Killara Railway Station. With the LSPS identifying Killara as being an area for investigation with capacity for additional dwellings within 800m of the local centre (less than 10-minute walk), the proposal achieves this as well as the intended outcomes for the TOD provisions, as illustrated in the figure below.

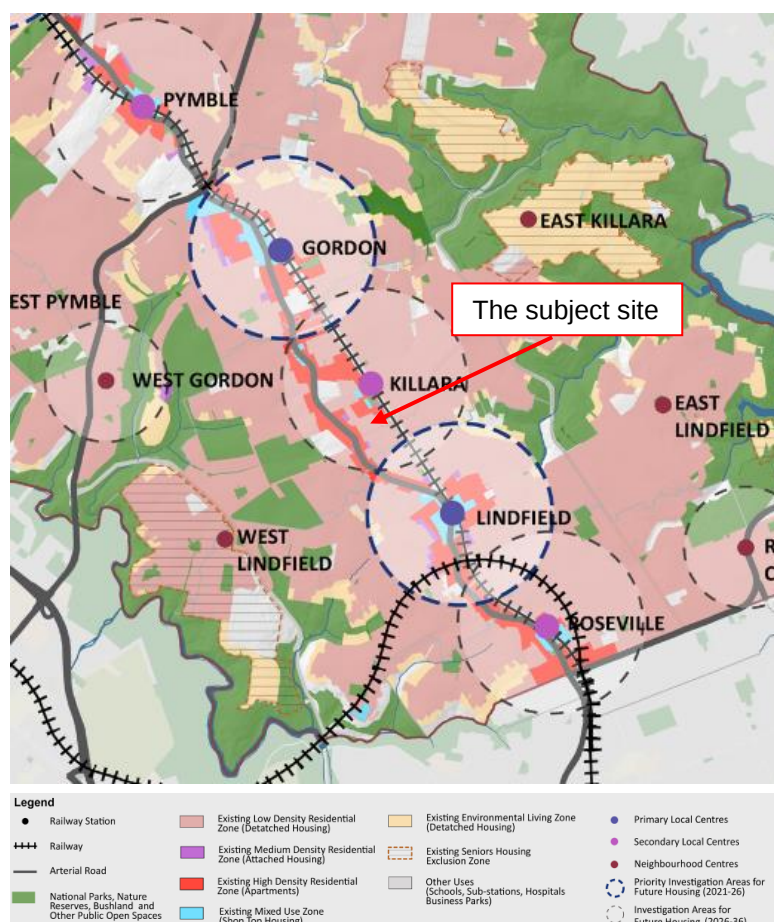


Figure 11: Housing Supply Map identifying the subject site and areas for investigation for additional housing (Source: Ku-ring-gai LSPS with markups by Gyde)

The site benefits from an irregular shape and considerable slope from the front boundary to the rear, which enables the built form/density to be distributed across the site (both on the ground plane and vertically) to ensure adequate on-site and external amenity.

Notwithstanding the numerical departure from the applicable maximum height of buildings standard, the proposed development utilises these characteristics of the site to ensure the bulk and scale, and streetscape presentation of the development are compatible with the existing and envisaged character of the locality.

Residential amenity is maintained with the proposed variation, as the breach of the maximum building height is located at the northern portion of the site. Buildings B and C have been separated from adjoining buildings in accordance with the ADG, with any views towards the existing surrounding dwellings restricted by the strategic location of windows, walls and balconies to not face areas where there may be a perceived impact.

The amenity of the adjoining residential dwellings, particularly at 8 and 12 Stanhope Road, are also maintained and protected through the design of the buildings. As a result of the scale of the buildings, the overshadowing created by the proposed building height exceedance is shared amongst the properties with each discussed below:

- 6 Stanhope Road – A shadow is cast by the proposed exceedance on the private open space of the dwelling at 9am only. The remainder of the overshadowing is caused by the compliant components of the development, which are considered minor and only impact a small area of private open space until 12pm with no impact for the remainder of the day.
- 6A Stanhope Road – This area of this lot is substantial and has a large area of private open space. The compliant components of the proposed development cast a shadow from 9am to 11am on the dwelling and private open space. Shadows cast at midday occurs over the driveway and battleaxe handle with the remainder of the day not being affected by the proposed development.
- 8 Stanhope Road – Parts of the private open space of the dwelling are affected throughout the day, however at least 50% of the private open space of the dwelling receives sunlight at all times during the day with the exception of 1pm and 2pm. The component of the buildings breaching the building height development standard are limited to 10am and 11am, with any other overshadowing limited to the rear portion of the POS and only by the compliant components of the development.
- 12 Stanhope Road – similar to 8 Stanhope Road, a shadow is cast on the property throughout the day, however the reduced building height of Building A ensures adequate solar access is provided to the dwelling and POS throughout the day. The exceedance in building height for Buildings B and C result in additional shadows cast from 11am to 1pm, with the remainder being shadows from compliant components of the development.

Each of the above dwellings benefit from being on substantially large lots ranging from 1,548m² to 2,358m² in area. As a result, the area of overshadowing created by the proposed development is limited to parts of the private open space and in each case, there is a portion of the private open space that receives sufficient solar access at all times during the day. On this basis, the impact of overshadowing is reasonable given the development type that is envisaged under the TOD and infill affordable housing reforms.

The overshadowing caused by the proposed development is illustrated in Figure 10 below.

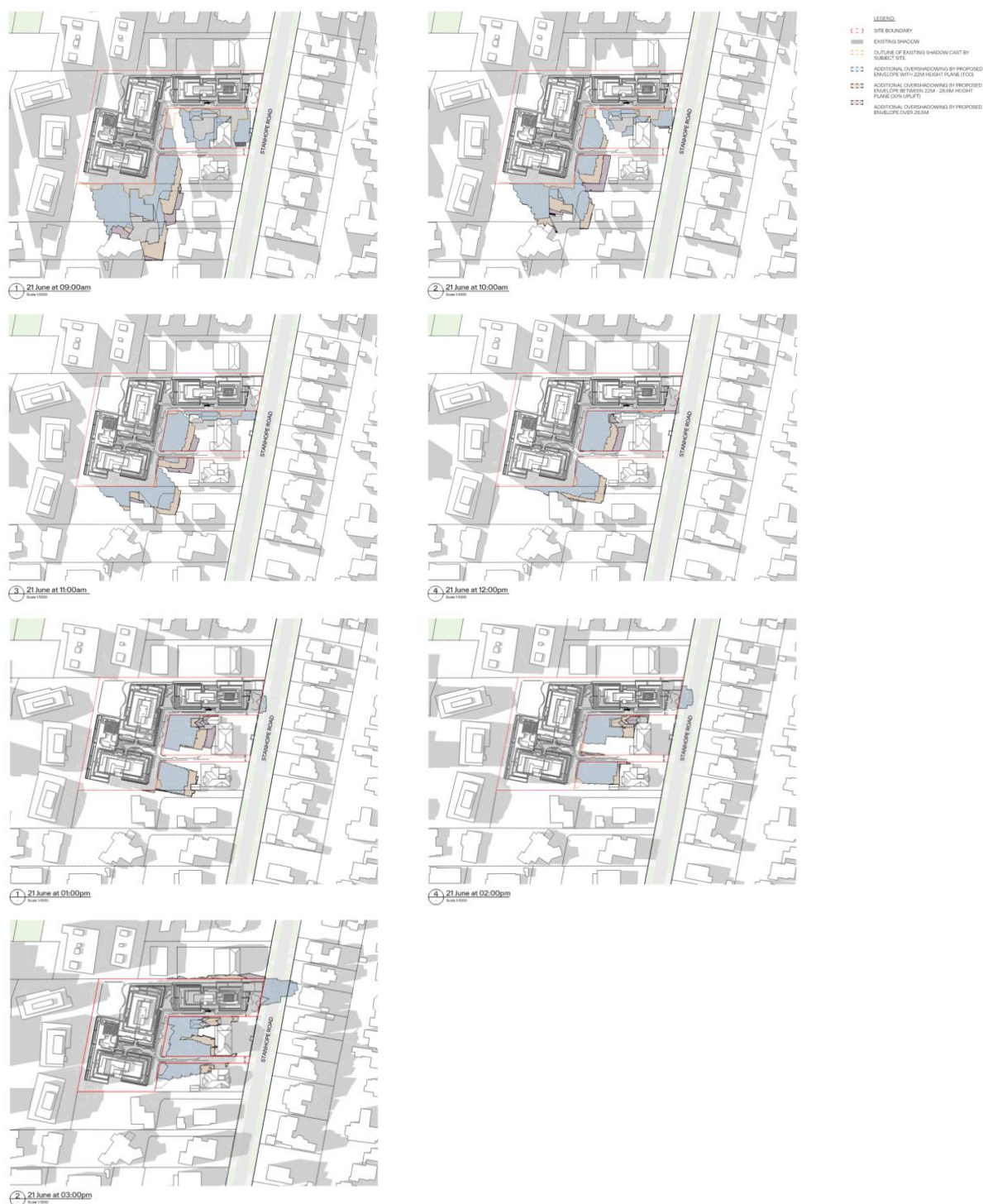


Figure 12: Shadow diagrams of the proposed development (Source: PBD Architects)

When considering the **views** to and from the subject site, the design components incorporated by the architect will reduce the massing and bulk of the development when viewed from the public domain which ensures an adequate level of visual amenity for adjoining properties. The development as a whole, but specifically, the built form that exceeds the maximum height of buildings will not result in any view loss.

Similar to residential amenity, the **privacy** of adjoining properties is maintained with the proposed development. The site currently adjoins residential flat buildings to the northwest and the proposal

seeks to provide a use consistent and compatible with that use adjoining the site. The built form has been designed to maximise tree retention on the site and minimise the number and extent of openings toward adjoining properties in order to protect visual privacy wherever possible.

To the northeast, southeast and southwest, the proposed development minimises the number of openings to ensure **visual privacy** is maintained to the adjoining dwelling houses. The proposed development has also been sufficiently setback to allow for adequate building separation between buildings in accordance with the ADG. The proposed setbacks provide sufficient separation to ensure visual and acoustic privacy is protected and is therefore considered a suitable outcome.

When considering **solar access**, the proposed dwellings within the development achieve the minimum required solar access to living areas and private open space in accordance with ADG requirements. The shadows cast by the proposed buildings will not result in any significant or detrimental (internal) impact on the adjoining dwellings. The detailed shadow analysis provided as part of the plan set demonstrates the extent of overshadowing caused by the development and confirms the proposed development will not result in any significant adverse impacts.

- **Heritage impacts**

One of the key drivers behind the height breach is the redistribution of floor space within the proposed development to minimise the impact on the heritage item at 12 Stanhope Road and HCA along Stanhope Road. With the TOD and in-fill affordable housing provisions, the subject site has redevelopment potential for buildings with a maximum height of 28.6m. It is acknowledged that the impact of a building of this height would likely impact the significance of the heritage item at 12 Stanhope Road, which is listed as a dwelling house with local heritage significance under Schedule 5 of Ku-ring-gai LEP.

The dwelling at 14 Stanhope Road within the subject site is located within the 'Stanhope Road Conservation Area' which has been assessed as part of the Heritage Impact Statement (HIS) prepared by Urbis and submitted with this application as having limited integrity due to successive and extensive contemporary alterations to the façade, which highly compromise the dwellings' ability to contribute to the local HCA. The HIS identifies 12 Stanhope Road as being of local significance due to its historical, aesthetic and representative value.

The HIS makes particular reference to the impact of the proposed development being mitigated largely by the topography of the site and the reduced built form adjacent to 12 Stanhope Road. This supports the request to vary the development standard by demonstrating that the massing of the proposal considers the sloping gradient of the site which is higher at the front boundary before sloping to the rear and integrating lower levels of the scheme within the landform that may be subject to visual prominence from the public domain.

Further, the HIS acknowledges and supports the overall scale of the proposed development, respecting the heritage significance of the heritage item at 12 Stanhope Road, by reducing the envelope of Building A at the front of the site, including the stepping of the upper storey. Further, the HIS notes the upper levels of Building B also being setback to create a considered modulated façade response in reference to the heritage item and HCA.

Based on the above, the proposal is considered to have adequately addressed the potential heritage impacts by redistributing floor space within the proposed development from Building A to Buildings B and C at the rear of the site, which significantly reduces the potential impact on the heritage significance of the item at 12 Stanhope Road and the HCA. Therefore, the resulting variation to building height is justifiable on the grounds of protecting the local heritage significance within Killara.

- **Environmental impacts**

The proposal has been carefully designed to minimise adverse impacts on the amenity of the neighbouring properties. The exceedance of the height of buildings standard does not result in any detrimental impacts in terms of visual impact, overshadowing, privacy and view loss. In particular, the

visual impact of the proposed development has been mitigated through the separation of buildings internally within the site and incorporating varied setbacks to each of the respective boundaries. The topography of the site has allowed for the built form to be stepped to the north, minimising the bulk of visual impact from the streetscape. Landscaping has been incorporated to enhance the perimeter of the site and biodiversity has been protected in the north eastern corner of the site.

The shadows cast by the proposed development demonstrate that the private open space areas of the dwellings to the east and west of the site are still able to achieve a minimum of 3 hours of solar access to 50% of the private open space on 21 June. Drawings DA610 and DA611 prepared by PBD Architects provide a clear distinction between the shadows cast by (1) a building under the 22m height permitted under the TOD provisions, (2) a maximised building envelope using the 28.6m uplift from the 30% affordable housing, and (3) the proposed development.

The shadow modelling demonstrates that the uplift provided to the site as a result of the TOD and infill-affordable housing provisions result in a development that will ensure solar access is achieved to the surrounding dwellings at 6, 6A, 8 and 14 Stanhope Road and their private open space areas. The proposed buildings have been strategically located and separated to ensure solar access is able to be directed into specific areas of the adjoining properties and their private open space. For example, the proposed buildings at the rear of the subject site have intentionally been located away from the boundary and separated to provide 8 and 12 Stanhope Road with sufficient solar access. Based on the modelling undertaken, the additional impact is considered minor and will not result in adjoining developments being impacted by overshadowing that would result in an inconsistency with the minimum solar access requirements in Council's DCP.

Privacy of nearby and adjoining properties has also been maintained with the proposed development. The building separation to adjoining properties and internally within the site ensures there are a minimal number of windows, balconies and openings to avoid any opportunities for overlooking to adjoining properties.

The components of the development that exceed the maximum building height are visually subservient when the development is viewed from Stanhope Road. The buildings have been sited and designed to be well setback from the sites boundaries and internally from the other proposed buildings, ensuring the streetscape and presentation is consistent with the established character and context. The areas that breach the height control are located at the rear of the buildings where the site slopes away therefore creating the non-compliance. The environmental impact as a result of the proposed variation is negligible in the context of the site and can be supported.

For completeness, as noted earlier, 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]*.

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386*, the Land and Environment Court approved a residential flat building in Randwick with a 55 per cent exceedance of the height limit (at its highest point) and a 20 per cent exceedance of the floor space ratio control.

- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).
- In *Merman No.1*, the Court granted a development consent for a residential flat building. In this decision, the Court approved a floor space ratio variation of 85 percent (from 0.65:1 to 1.21:1).
- In *Merman No.2*, the Court granted a development consent for alterations and additions to an approved residential flat building. In this decision, the Court approved a floor space ratio variation of 144 percent (from 1.12:1 to 1.58:1) and a height variation of 114 percent (from 10.5m to 22.45m).

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. Public interest

The proposed development is in the public interest because it is consistent with the objectives of the intended outcomes for transport oriented development and in-fill affordable housing. The particular standards and the objectives of those standards applying to development for which is proposed to be carried out are achieved notwithstanding the non-compliance.

The proposed development provides a total of 135 apartments, 26 of which will be allocated as affordable housing – 25 for 15 years and 1 in perpetuity. This is directly consistent with the LSPS prepared by Ku-ring-gai Council which aims to provide greater opportunities for housing diversity and affordability in suitable locations. The subject site is well located and will provide greater opportunities within the Ku-ring-gai LGA, meeting the intent of the TOD and in-fill affordable housing provisions, as well as Council's strategic planning for the LGA. The form of the development is consistent with that envisaged within the locality, through provision of compact yet spacious dwellings that provide for the housing needs of the community.

A review of the housing types in the locality confirms there is a significantly larger number of detached, single dwellings on large, underutilised lots in the immediate and broader context of the subject site. The proposed development will provide a contribution to a greater variety of housing types in a high density residential setting.

The proposal continues and expands on the existing residential use of the site by providing opportunity for a greater number of residents to benefit from the high level of amenity afforded to the site with its proximity to Killara town centre and railway station. The current three dwellings represent an inefficient and uneconomical use of valuable residential land. The development provides greater social and economic opportunities for the locality through provision of additional floor space for affordable housing which aims to increase housing affordability and supply in an LGA that is acknowledged by Council as being unaffordable. The proposal aims to assist Council in achieving their housing targets through providing high quality housing in areas close to employment opportunities.

Based on the above, the proposal is considered to be in the public interest.

7. Conclusion

This request for variation to the height of buildings development standard is made pursuant to Clause 4.6 of Ku-ring-gai LEP and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of the proposed development; and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The proposal satisfies the relevant requirements in Ku-ring-gai LEP such that the proposal is consistent with the objectives of Chapter 5 of the Housing SEPP despite the numerical non-compliance. The proposal represents a well-considered design scheme with an appropriate scale and form that respects the charm and character envisaged for Killara. The design of the development has utilised the topography of the site to minimise unreasonable visual impacts associated with the proposal, ensuring the development results in a cohesive but unique development that is compatible with its surrounds. Buildings B and C, which contain the bulk of the height exceeding the control, are visually subservient when viewed from Stanhope Road and Marian Street, ensuring the streetscape and presentation is consistent with the established character and context. The extent of height breach is primarily as a result of the topography at the rear of the site, and the direct intention to preserve the local heritage significance of 12 Stanhope Road and the Stanhope Road Conservation Area.

The proposal promotes the objectives of the in-fill affordable housing provisions through providing much needed affordable housing in the area, whilst expanding on the need for greater diversity in housing typologies in Ku-ring-gai LGA more broadly. This also provides local employment opportunities in an area that has been gentrified and subject to significant growth.

The intensity of the proposed development would not result in detrimental impacts on the amenity of the locality. On the above basis, it is appropriate for the Department of Planning, Housing and Infrastructure, as the consent authority, to exercise the flexibility conferred by Clause 4.6 of the Ku-ring-gai LEP to support the proposed variation.