



CLAUSE 4.6 REPORT Building Height

SHOP TOP HOUSING DEVELOPMENT
32-42 COOPER STREET STRATHFIELD

FEBRUARY 2026



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OVERVIEW OF CLAUSE 4.6 DEPARTURE – HEIGHT

Think Planners have prepared this Clause 4.6 variation request consistent with the *Guide to Varying Development Standards* (November 2023), published by the Department of Planning, Housing and Infrastructure.

The State Significant Development Application (SSDA), has been designed by DKO Architects, and assisted by numerous sub consultants. The SSDA is seeking consent for:

Shop Top Housing Tower comprising -

- *Site preparation works, including earthworks and tree removal*
- *Construction of the 21 storey mixed-use shop top housing tower including:*
 - o *Ground level commercial premises fronting Cooper Street and Clarence Street. These include 4 separate retail, 2 commercial premises and centre base child care facility.*
 - o *Residential units from level 1 through to level 20 consisting of 204 residential units.*
 - o *Residential access lobby from Cooper Street.*
 - o *7 level basement parking level accessed from Cooper Street.*
 - o *Service vehicle access from Cooper Street.*
 - o *Landscape works at ground level, level 9 communal level communal open space.*
 - o *Rooftop plant including solar panels and hot water system.*
 - o *Construction of public domain works.*
 - o *New footpaths.*
 - o *Hard and soft landscaping works.*
 - o *Subdivision.*

The application seeks to vary the Development Standard for maximum building height under Cl.4.3 Height of Buildings of *Canada Bay Local Environmental Plan 2013*. This Cl.4.6 Variation Request demonstrates that:

- It is unreasonable and unnecessary to comply with the development standard in this instance;
- environmental planning grounds demonstrate that it is reasonable to vary the development standard;
- The proposal meets the intent of the building height control;
- The proposal is consistent with the objectives of Cl.4.6 in that the facilitation of the variation will deliver better outcomes for and from the development through

the provision of much needed housing supply within an accessible location;
and

- The proposal is consistent with the established and desired future character within the Strathfield Triangle Precinct.

Despite the non-compliance with the height standard, the departure assists in the delivery of housing, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

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

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that the Department support the development proposal and apply the flexibility within Cl.4.6 of Canada Bay LEP 2013 to the building height standard, given a better outcome is achieved for and from the development.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

THE SITE

The subject site is located 32-42 Cooper Street, Stratfield and is located on the south eastern corner of the Homebush TOD precinct Area.

The subject site shown below, is in a prime location where Strathfield station is 800m walking distance. The site has an area of 3,116m², with its predominant frontage to Cooper Street to the east. To the west of the site is the T9 Northern Heavy Rail line and beyond that the Homebush Train Station. To the north of the site are high density developments and the North Strathfield Heavy Rail Station and the new Metro. To the south west of the site is the Strathfield Heavy Rail Station and the Strathfield Town Centre.

Figure 1: Aerial Map of Subject Site (Source: Six Map)



PLANNING INSTRUMENT TO BE VARIED

This Clause 4.6 Variation Request seeks to vary *Canada Bay Local Environmental Plan 2013*.

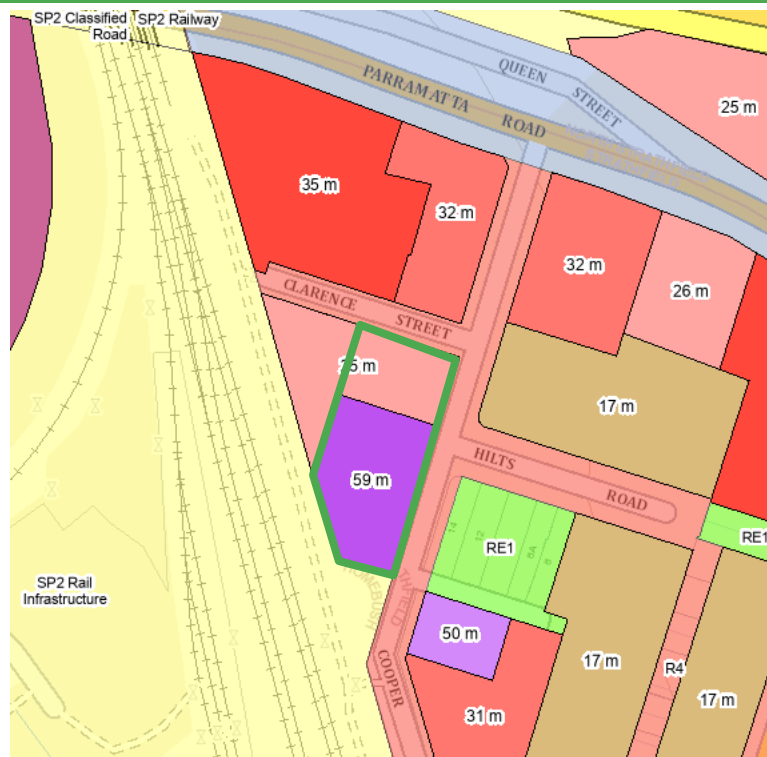
The site is zoned R4 High Density Residential under *Canada Bay Local Environmental Plan 2013*.

Shop top housing, residential flat buildings and centre-based child care facilities are permitted with consent in the R4 High Density Residential Zone.

DEVELOPMENT STANDARD TO BE VARIED

The Clause 4.6 Variation Request relates to the maximum building height requirement of Cl.4.3 (2) of *Canada Local Environmental Plan 2013*. This is a numeric development standard that stipulates that the maximum building height is that shown on the height of buildings map, being Part 25m and Part 59m.

Figure 2: Height of Building Plan (Source: Planning Spatial Viewer)



An extract of the relevant parts of Cl.4.3 Height of Buildings is below:

(1) *The objectives of this clause are as follows—*

- (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,*
 - (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,*
 - (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,*
 - (d) to ensure that buildings respond to the natural topography of the area.*
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

THE VARIATION

The maximum building height in the Canada Bay LEP 2013 applicable to the site is Part 25m and Part 59m.

For area of site mapped 25m the proposal is maximum 32.6m in height. 30.4% variation.

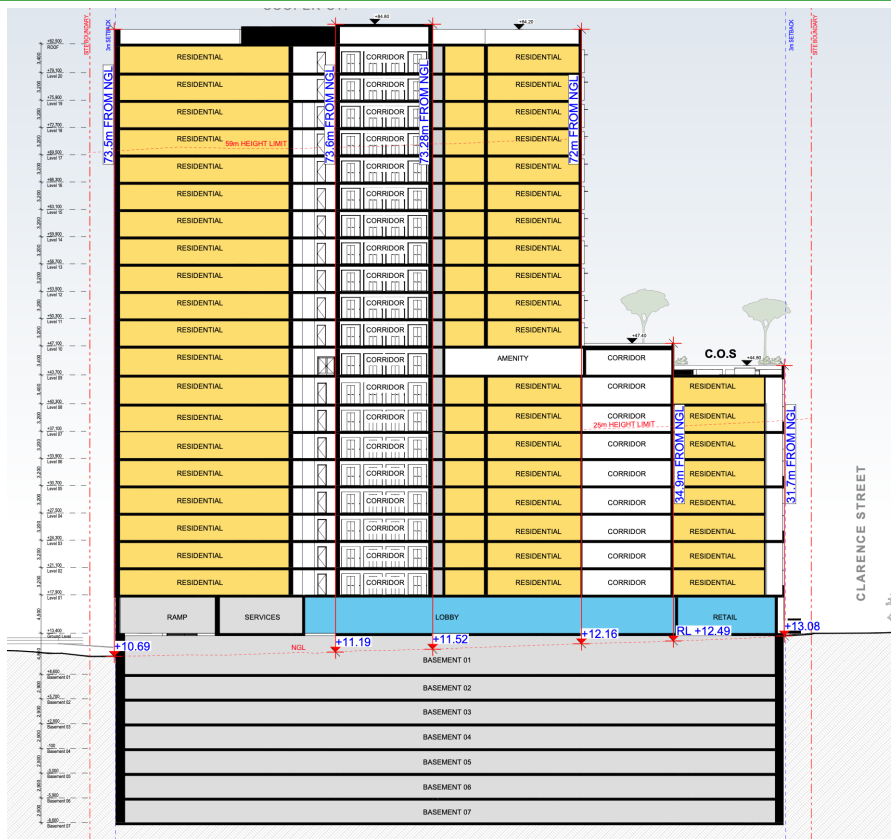
For area of site mapped 59m the proposal is maximum 74.2m in height. 25.7% variation.

It is noted that pursuant to the Canada Bay LEP, subject to amalgamation of Area 61 a height of building of 75m is permitted on the land.

Accordingly, this Clause 4.6 seeks a height of building variation up to 30.4%.

The Variation is illustrated in the Section in the figure below.

Figure 3: Building Section showing departure from Part 25m and Part 59m height of building control



CLAUSE 4.6 OF CANADA BAY LEP 2013

Clause 4.6 of Canada Bay LEP 2013 provides that development consent may be granted for development even though the development would contravene a development standard. The objectives of clause 4.6 are:

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

The operative provisions of the clause are as follows:

- 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, and*
 - b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

This document has been prepared in accordance with section 35B of the *Environmental Planning and Assessment Regulation 2021* to address the above requirements.

RELEVANT CASE LAW

Clause 4.6(3)(a) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances. The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6. Further, in *Initial Action* the Court confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure. The five common methods for demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are:

- 1) Demonstrating that the objectives of the development standard is achieved, despite the non-compliance [42]
- 2) Establishing that the underlying objective or purpose is not relevant and compliance is therefore unnecessary [45]
- 3) Showing that the underlying objective or purpose would be defeated or thwarted if compliance required, confirming that compliance is unreasonable [46]
- 4) Establishing that the standard has been virtually abandoned or destroyed through council’s own actions. Therefore given council’s granting of consents that depart from the standard, compliance is unnecessary and unreasonable [47]
- 5) Demonstrating that the zoning of the land is unreasonable or inappropriate, meaning that compliance with the development standard is also unreasonable or unnecessary [48]

Of the five common methods above, this Cl.4.6 applies Method 1 of *Wehbe*.

ASSESSMENT

CL.4.6 (3) (A) COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES

In accordance with the provisions of Cl.4.6(3)(a) it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as:

The objectives of the development standard are achieved

In Wehbe it was set out that compliance can be considered unreasonable or unnecessary where:

the objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposal, despite the numerical non-compliance identified, achieves the objectives as set out below:

Objective	Discussion
<p>(a) <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></p>	<p>Several Land and Environment Court decisions have considered 'desired future character' and concluded that height standards alone are not a relevant determinant of character. Rather, the context surrounding the development sets an understanding of existing and future character.</p> <p><i>In Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161, Commissioner O'Neil established that development standards for height and FSR cannot in isolation determine what the desired future character of an area is. Commissioner O'Neil notes that LEP standards like height As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that incentivise particular development with GFA bonuses or other mechanisms that intensify development.</i></p> <p>The test of desired future character therefore relevantly includes the context that surrounds the site, which sets the built form and character, with Commissioner O'Neil further noting:</p>

The desired future character of an area is not defined and fixed by development standards for height of buildings and FSR. For the reasons set out above, development standards for height of buildings and FSR do not envisage the desired future character of a locality because they do not, alone, determine the realised building envelopes for that locality.

In *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 Chief Justice Preston upheld a decision by Commissioner Clay. In this decision, Chief Justice Preston noted that if ‘desired future character was confined and fixed by a height and FSR development standard, then it would be impossible to vary them as it could not be consistent with the character fixed by the development standard. Chief Justice Preston concluded that desired future character is formed not only by the LEP, but also other matters, for example, approved developments that depart from the development standard:

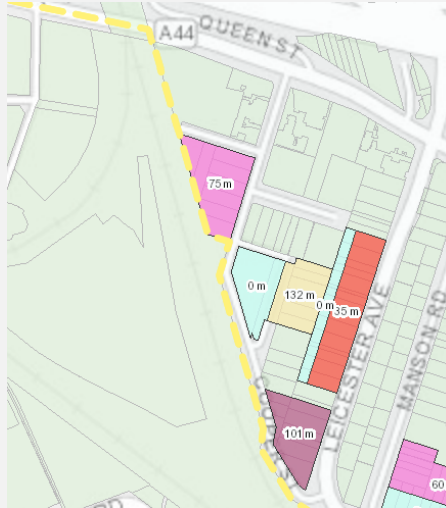
This circularity is avoided if the term “desired future character” is construed as permitting regard to be had to matters other than only the development standard. On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

Likewise, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097 Commissioner O’Neil when considering a height exceedance confirmed that a proposal that was above the height standard, but of comparable scale to surrounding buildings was appropriate as it is consistent with the desired future character of the neighbourhood.

Strathfield Triangle Circumstances

Relevantly for the subject site, the LEP provides an “Incentive Height of Building Map”. As is evident in the extract from the map below, the incentive height is 75m for the site and up to 101m for nearby land parcels. Having regard to the above discussion arising from decisions of the Court, this clarifies that the Desired Future Character of the site and surrounds is greater than the base height of

building provisions of 25m and 59m. The proposed height is compatible with the height of the desired future character.



State Led Rezoning

On 27 January 2026 the State Significant Rezoning Evaluation Panel endorsed a State-assessed rezoning proposal under the State Significant Rezoning Policy that relates to the site and other land parcels in the precinct.

The State led rezoning relates to –

- 32-42 Cooper Street Strathfield
- 2-21 Chapman Road Strathfield
- 2-12 Leicester Avenue Strathfield

The State led rezoning proposes to amend the controls for 32-42 Cooper Street from the TOD endorsed controls of 4:1 FSR and 75m height of building to 10:1 FSR and height of building of 132m.

It is acknowledged that this Planning Proposal process has only just commenced, but it is apparent that there is a willingness by the State Evaluation Panel to consider increasing the height of building control on the site from the current incentivised 75m to 132m, confirming that the Desired Future Character for the site is retention of the tall tower built form, which the proposal is consistent with.

We note that the character of the site is informed by the Homebush Transport Oriented Development Precinct Design Guide, in particular Chapter 3 entitled “Places and desired future character”. The site is within the High Rise Living precinct and relevant commentary in relation to desired future character includes (emphasis added) –

The High Rise Living character area will feature mid to high-rise residential developments, creating a high-quality built environment that utilises materiality, setbacks, and thoughtful building articulation.

Key sites within the Precinct will contribute significantly to public benefit by achieving iconic architecture, offering vibrant open spaces, and providing community facilities and educational opportunities. These tall buildings will shape a varied and recognizable skyline.

The desired future character for the precinct and site includes high rise residential development and tall buildings.

Importantly the proposal is consistent with the rationale established by the DPHI when preparing the planning controls for the Homebush TOD Precinct and so too the recent decision to proceed with a State Led Rezoning for the subject site that increases the height of building to 132m.

Therefore, the proposed building height is consistent with the height, bulk and scale of the existing and desired future character of the locality and positively contributes to the streetscape and public spaces and accordingly, objective (a) is achieved.

(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,***

- (i) The proposal complies with the ADG objectives in terms of building separation, meaning that visual and acoustic privacy is achieved within and external to the site. The precinct is characterised by tall high density towers and no visual impacts arise that are unacceptable in the context of the character of the precinct, or indeed to nearby development.

	<p>(ii) Shadow diagrams are provided which confirms that appropriate solar access is maintained to neighbouring properties and communal open space.</p>
<p>(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,</p>	<p>The site is within a TOD precinct, and the relevant Guide confirms that:</p> <p><i>The Homebush Precinct spans a large area that encompasses many different land uses, built form, landscapes, and social and economic activities. This diversity is reinforced by the establishment of character areas, which broadly group together zones and activities that exhibit similar characteristics.</i></p> <p>The subject site is in the “High Rise Living” precinct and the scale intended for the site and precinct is that of high rise living, characterised by apartment towers. As a result, this site is recognised in planning practice and statute as being characterised and not a low density centre. Therefore, in response to objective (c) the proposal is instrumental in “establishing a transition in scale” as it is land purposefully zoned for high density, separate from lower density and open space zones.</p> <p>There is no low density residential zones adjacent to the subject site. The height of the proposal responds to the existing and future character of the area, which is high density apartment buildings.</p>
<p>(d) to ensure that buildings respond to the natural topography of the area.</p>	<p>As shown in the architectural plans, and clearly evident in the Section at Figure 3 above, the site is does not contain significant slope and the proposal represents a built form that responds to the natural topography.</p>

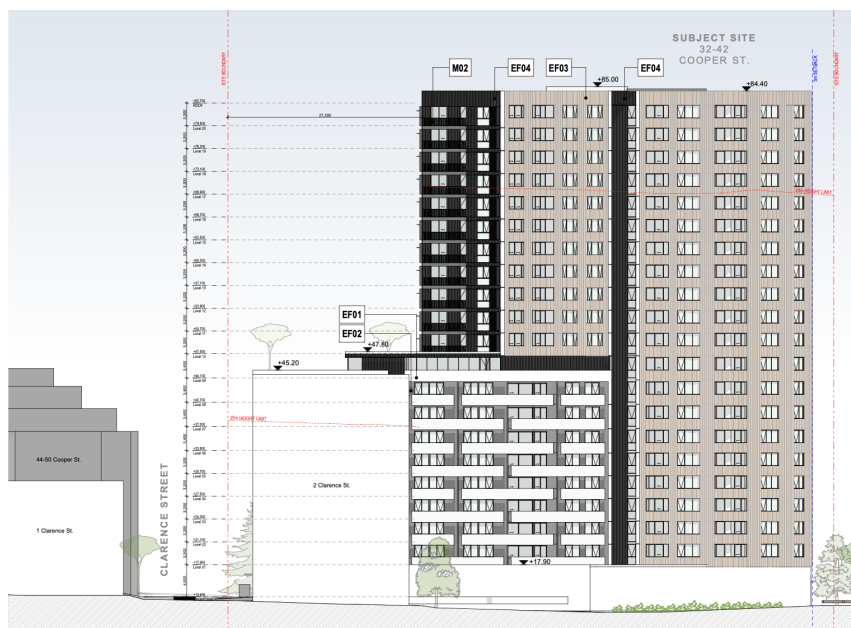
CLAUSE 4.6 (3) (B) ENVIRONMENTAL PLANNING GROUNDS

In Initial Action, 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.

The following points demonstrate that sufficient environmental planning grounds exist to justify contravening the height of buildings development standard and that the proposal is an appropriate design response for the subject site:

- The proposal is consistent with the existing and future character of the area. The area is undergoing urban renewal as low density buildings are replaced with high density buildings. That part of the site that is seeking the 30.4% variation is generally aligned with the height of building immediately opposite the site at 44-50 Cooper Street (see image below), demonstrating that the contravention of the development standard will lead to a built form that is consistent with the established height fronting Clarence Street to the north of the site.

Figure 4: 44-50 Cooper St Height aligns with north part of 32-42 Cooper St proposed



- The development proposal responds to the desire of the local contributions plan for road widening along Cooper Street. The proposal intentionally sets back the built form from Cooper Street, which leads to a reduced footprint for the building. The reduced building footprint reduces the tower plate size and as

such has a logical consequential constraining design impact upon design of apartments in the podium and tower. The constraining of the plate size, leads to the anticipated yield being moved to additional storeys.

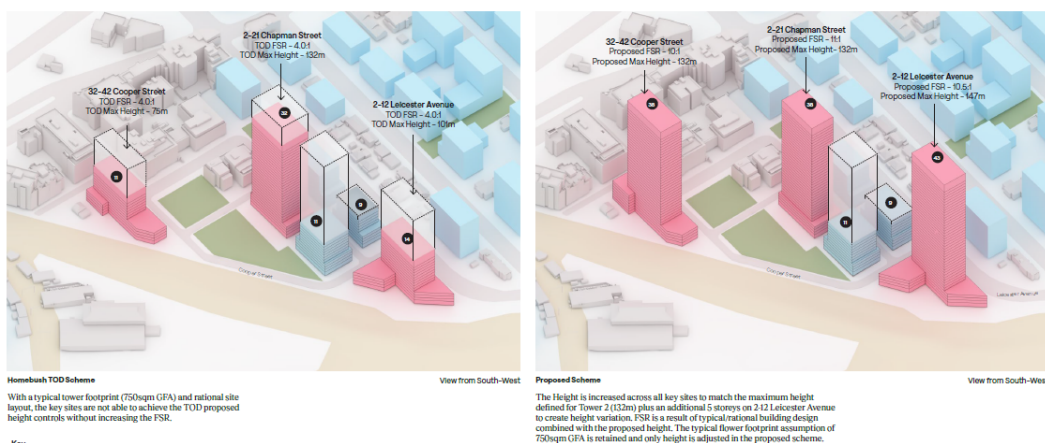
- It is noted that the subject site benefits from an incentivised maximum building height of 75 m under the Homebush Transport Oriented Precinct Design Guide, which is based on an identified amalgamation pattern. The Department of Planning has acknowledged that the current amalgamation pattern for Area 61 is illogical, as it includes lots that are separated by roads, and is therefore progressing a formal rezoning process to address this issue. Once implemented, the rezoning will confirm a maximum building height of 132m rather than the original 75 m for the subject site. Importantly achievement of the 132m height is not subject to an amalgamation pattern beyond the site area of this proposal.

The proposed height:

- 74.2m maximum height is consistent with the anticipated future scale and intensity of development on the site under existing incentivised control.
- Is consistent with the future anticipated height controls of 132m, which is being 57.8m lower than the future standard.

Therefore, noting the above the proposal being consistent with future planning controls would not require a Clause 4.6 variation. Furthermore, we note that the height variation is a technical anomaly as it is within the incentivised building height which would apply but for an unworkable amalgamation pattern which is now being corrected by the Department of Planning. Please refer to the below figure for reference.

Figure 4: Homebush TOD Scheme amendments currently being considered by Department of Planning



Existing incentivised height

Proposed Future Height (not reliant on the site amalgamation with land to the east of Cooper St)

- The height exceedance is consistent with the policy outcome of the amalgamation bonus. The proposed maximum height of 74.2m is substantially consistent with the height envelope (75 m) that the LEP envisages for an amalgamated site — the proposal therefore does not produce a scale beyond what the local planning framework anticipates.
- While there is a numerical exceedance, the proposal does not set a new precedent of scale. While the numeric departure is up to 30.4%, the absolute height proposed sits within the scale of development already contemplated by the LEP (amalgamation outcome), so the development does not undermine the long-term intended character.
- The proposal does meet the objectives of the height control. The proposal achieves the stated objectives — compatibility with desired future character, protection of amenity, appropriate transition to lower-scale neighbours — through built form responses such as a podium/tower design, generous setbacks, articulation and materiality.
- As demonstrated in the assessment in this Cl.4.6 and the architectural plans, the height exceedance does not give rise to any unreasonable or unacceptable environmental impacts, with the proposal providing appropriate building separation and features to ensure that privacy to adjoining neighbours is maintained, along with solar access and sharing of views.
- Having regard to the context of the area and the desired future character of the locality, a proposed development that is compliant with the height standard would result in a height that is incongruous with the future character anticipated in the planning controls of built form of up to 75m on the site and up to 100m on nearby land.
- The height exceedance of the standard avoids greater adverse impacts than a compliant alternative that was not designed to provide a setback for road widening to Cooper Street. There is no statutory requirement, such as a road reserve or acquisition overlay to require the setback or dedication of land for road widening of Cooper Street. To meet the same housing yield at a lower height would require a larger footprint or greater envelope intrusion that could produce worse outcomes in relation to the setback to accommodate road widening.
- The proponent has taken documented, reasonable steps to secure adjoining parcels but has been unable to amalgamate the land and therefore the inability to benefit from the bonus height of 75m is not self created.
- The height of the proposed development, in the context of the subject site and locality, will achieve objects of the Environmental Planning and Assessment Act 1979, namely, to promote the orderly and economic use and development of land and promote good design and amenity of the built environment.

Therefore, the proposed development is a preferred outcome from an environmental planning perspective and there is merit in varying the height control to achieve a better design response on the site.

HEIGHT VARIATION CONCLUSION

This variation request establishes the reasons under Cl.4.6 (3) of *Canada Bay LEP 2013* where strict compliance with Cl.4.3 height of buildings of *Canada Bay LEP 2013* is unreasonable and unnecessary. Specifically:

- the proposal is consistent with the height of buildings objectives set out in Cl.4.3 (1) (a) through to (d), despite the variation in height.
- there are sufficient environmental planning grounds to justify the non-compliant height.
- The height exceedance is an outcome resulting from the floor plate of the podium and tower being constrained by the setting back of the building to deliver the public benefit of road widening of Cooper Street.
- There are no amenity impacts to neighbouring properties.
- A proposed development that is compliant with the height standard would result in a height that is incongruous with the existing and future streetscape and result in a poor planning outcome.
- The height of the proposed development, in the context of the subject site and locality, achieves the objects of the Environmental Planning and Assessment Act 1979, namely, to promote the orderly and economic use and development of land and promote good design and amenity of the built environment.

Accordingly, the justification for this contravention is based on there being no impact arising from the additional building height as it is consistent with context and will result in no amenity impacts to either the public domain or surrounding residential properties.

For the reasons outlined above, this clause 4.6 request is well founded and compliance with the height standard is unnecessary and unreasonable, with sufficient environmental planning grounds that justify breaching the standard having been demonstrated. Accordingly, in this instance, flexibility in the application of the height standard should be applied.