

EXCEPTION TO BUILDING HEIGHT DEVELOPMENT STANDARD PURSUANT TO  
CLAUSE 4.6 OF THE LANE COVE LOCAL ENVIRONMENTAL PLAN LAND TO WHICH  
THIS VARIATION APPLIES

1. LAND TO WHICH THIS VARIATION APPLIES

This request is provided in support of a Development Application for a residential flat building at 27 -43 Little Street, Lane Cove. The site comprises nine residential allotments (10 dwellings) which are listed as below:

- 1) 27 Little Street - Lot 39 D.P. 5922
- 2) 29 Little Street - Lot 38 D.P. 5922
- 3) 31 Little Street - Lot 37 D.P. 5922
- 4) 33 Little Street - Lot 36 D.P. 5922
- 5) 35 Little Street - Lot 35 D.P. 5922
- 6) 37A Little Street - Lot 2 D.P. 843377
- 7) 37 Little Street - Lot 1 D.P. 843377
- 8) 39 Little Street - Lot 33 D.P. 5922
- 9) 41 Little Street - Lot 32 D.P. 5922
- 10) 43 Little Street - Lot 31 D.P. 5922

The total site area is 6912 m<sup>2</sup>.

2. RELEVANT ENVIRONMENTAL PLANNING INSTRUMENT

The Environmental Planning Instrument to which this variation relates is the Lane Cove Local Environmental Plan, (LCLEP) 2009.

3. RELEVANT DEVELOPMENT STANDARD

The development standard to which this objection relates is Clause 4.3 Height of Buildings.

Clause 4.3 Height of buildings, relevant clauses include the following:

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

- (a) to minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet, and
- (b) to maximise sunlight for the public domain, and
- (c) to relate development to topography.

(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.

(2A) Despite subclause (2), the maximum height for multi dwelling housing on land in Zone R2 Low Density Residential is 5 metres".

The maximum height of buildings for the site is 12 metres as demonstrated in the Height Map extract in **Figure 1** below.



Figure 1: Height of Building Map (12m). Source: LCLEP 2009: Sheet HOB\_001

#### 4. PROPOSED VARIATION TO THE STANDARD

The proposed development seeks a partial variation to the maximum building height control of buildings A, B and C as follows;

|            | Northern Elevation           | Southern Elevation           | Eastern Elevation            | Western Elevation |
|------------|------------------------------|------------------------------|------------------------------|-------------------|
| Building A | Variation of 300mm to 620mm  | Complies                     | Variation of 300mm to 620mm  | Complies          |
| Building B | Variation of 600mm to 2300mm | Variation of 600mm to 2300mm | Variation of 600mm to 2300mm | Complies          |

|            |          |                             |                             |          |
|------------|----------|-----------------------------|-----------------------------|----------|
| Building C | Complies | Variation of 300mm to 385mm | Variation of 300mm to 385mm | Complies |
|------------|----------|-----------------------------|-----------------------------|----------|

It should be noted that the proposed development is fully compliant with all other Lane Cove LEP and DCP controls.

## 5. JUSTIFICATION FOR THE VARIATION OF THE STANDARD AND MATTERS FOR CONSIDERATION

The objectives of Clause 4.6 of the LCLEP, 2009 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".*

Consistent with those objectives, Clause 4.6(2) enables consent to be granted to a project that contravenes a development standard imposed by the Plan.

Subclause (3) provides that consent must not be granted by a consent authority to a project which contravenes a development standard unless the consent has considered a written request which justifies the circumstance by demonstrating:

- a) *"that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) *that there are sufficient environmental planning grounds to justify contravening the development standard".*

Subclause (4) further provides that consent must not be granted for development that contravenes a development standard unless:

- a) *the consent authority is satisfied that:*
  - i. *"the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- b) *the concurrence of the Director-General has been obtained".*

Subclause (5) provides that in deciding whether to grant concurrence, the Director-General must consider:

- a) *"whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- b) *the public benefit of maintaining the development standard, and*
- c) *any other matters required to be taken into consideration by the Director-General before granting concurrence".*

The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of a number of criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of material impacts on adjacent properties is of considerable merit.

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

Whilst the above test was established for a SEPP 1 Objection, it is considered equally applicable to Clause 4.6 Variations.

### 5.1 *Wehbe v Pittwater Council* [2007] NSW LEC 827

In his decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827 (whilst relating to SEPP 1), Chief Justice Preston expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. The tests are reasonable to consider for Clause 4.6. We provide the following responses to these ways:-

**i. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**

The objectives underpinning the building height control are identified in Clause 4.3 of the LCLEP, 2009 and are discussed below. Consistency with those objectives, and the absence of any environmental impacts, would demonstrate that strict compliance with the height standard would be both unreasonable and unnecessary in this instance. The contentions below demonstrate how this proposal is consistent with the objectives in Clause 4.3 above:

*(a) to minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particularly where zones meet, and*

The proposed variation in height is considered below in terms of the impact on surrounding properties specifically with regard to overshadowing, loss of privacy and visual impact and with reference to the interface of zones. The subject site shares a boundary with nine separate properties.

#### **Overshadowing**

Given the topography, and the dominant orientation of the site and buildings (in an east west orientation), the impact of the proposed development in terms of overshadowing on neighbouring properties is as follows;

| Orientation         | Impact                                                                                                                                                             |
|---------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Northerly direction | The adjoining northern site is No. 2 Central Avenue and given the orientation of the buildings there is no overshadowing associated with the proposed development. |
| Southern direction  | No. 45 Little Street is a single storey town house development south of the site and                                                                               |

thus and will be impacted in terms of overshadowing from the proposed development. As a consequence the proposal is setback 9m from the common boundary, 30% greater than required. On the 21 June, No 45 Little Street is still able to receive more than 3 hours of sunlight. Refer to the following shadow diagram below for confirmation of the above. At the boundary the proposal is compliant with the 12m control and therefore the breach of height impact has no impact on overshadowing.



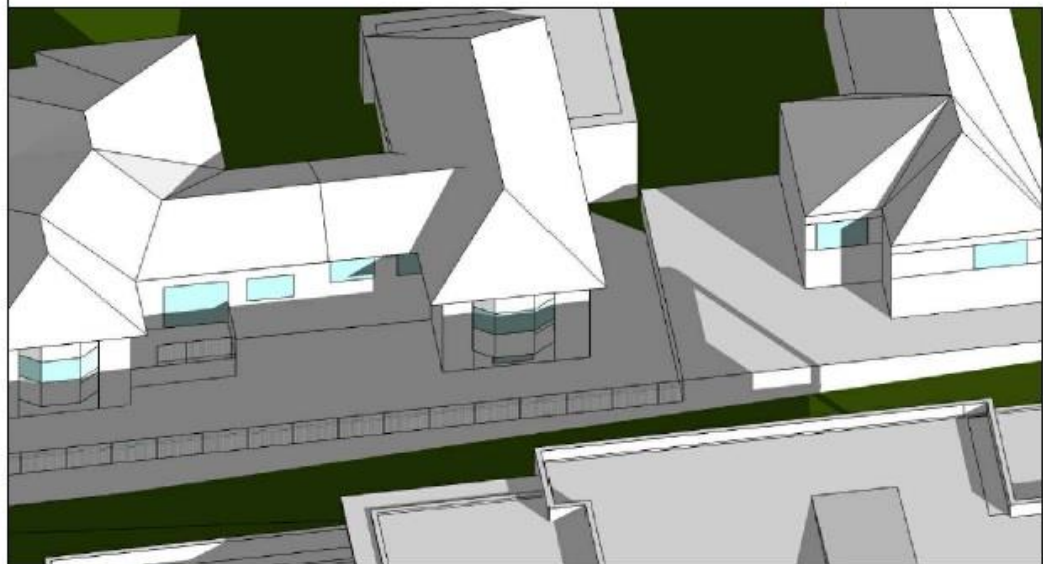


Figure 2: Impact of overshadowing on No. 45 Little Street, neighbouring site to the south.

|                    |                                                                                                                                                                                     |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Easterly direction | There will be no impact on neighbouring properties given that there is a 30m separation between the proposed buildings and existing dwellings.                                      |
| Westerly direction | Given the building separation to the rear and the orientation of the site, there is no overshadowing cast from the proposed development onto the buildings to the rear of the site. |

Therefore the proposed height variation will have no impact on access to sunlight.

### **Loss of privacy**

The buildings have been designed in consideration of the context and in accordance with the SEPP 65 building separation requirements. The building separation guidelines ensure that the proposed development does not unduly impact on neighbouring properties by providing sufficient distance between buildings to reduce direct overlooking and associated loss of privacy. In addition, the topography of the site acts to protect neighbouring properties from direct overlooking and provides filtered outlooks due to the varying interface of the buildings. The building separation proposed is discussed overleaf .

## Loss of Privacy

The northern building separation is 12m between the proposed RFB and the existing RFB, at No 2 Central Avenue. This is a substantial setback and greater than the shared requirements of 6m under the 'Rule of Thumb'. Balconies will be screened with privacy screens, further the slope between the two buildings and vegetation will reduce any direct overlooking and loss of privacy. Refer to **Figure 3**.

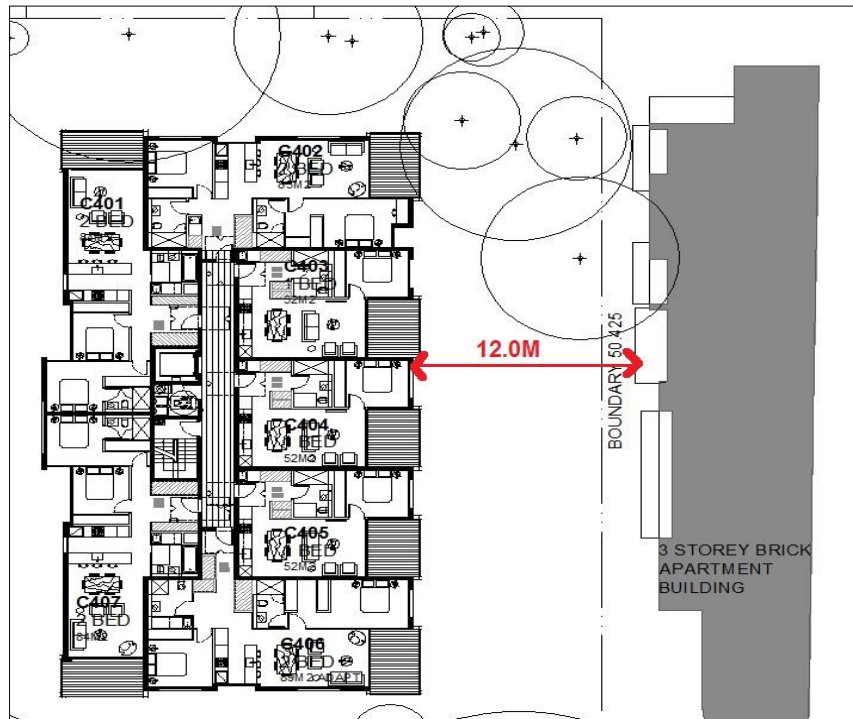


Figure 3: Northern separation and privacy

The southern building separation is the zone interface between the R4 zone and the R2 zone. Therefore any development on the R2 will be of a low density residential nature. In the Planning Principle Seaside Property Development Pty Ltd v Wyong Shire Council it was established that *"any development proposal in one zone needs to recognise and take into account the form of the existing and/or likely development to occur in an adjoining zone."*

No 43 Little Street, zoned R4 High Density Residential adjoins the R2 zone at No. 45 - 47 Little Street. This is the only zone interface area associated with the development. The side setback provided between the southern wall of the subject site and the site boundary is 9m, 30% greater than the "Rule of thumb" required. This is generous given that No. 45 - 47 Little Street has a R2 zoning and has the potential to be utilised for the following uses;

*"Bed and breakfast accommodation; Boarding houses; Child care centres; Community facilities; Dual occupancies; Dwelling houses; Group homes; Health consulting rooms; Home businesses; Home industries; Hospitals; Multi dwelling housing; Places of public worship; Respite day care centres; Roads; Signage"*

The proposed residential flat building does not limit the potential of No.45 -47 Little Street to develop their site for any of the uses listed above.

The distance between the proposed development and the existing building varies from 12m to 14.6m. This is a generous setback and will ensure that there is no loss of privacy from overlooking. Further, there are no balconies which are directly orientated to the south. There are only two balconies proposed on this elevation and they are both orientated primarily in an east west direction. In addition there will be landscaping and tree planting to further soften any overlooking and loss of privacy issues. Refer to **Figure 4**.

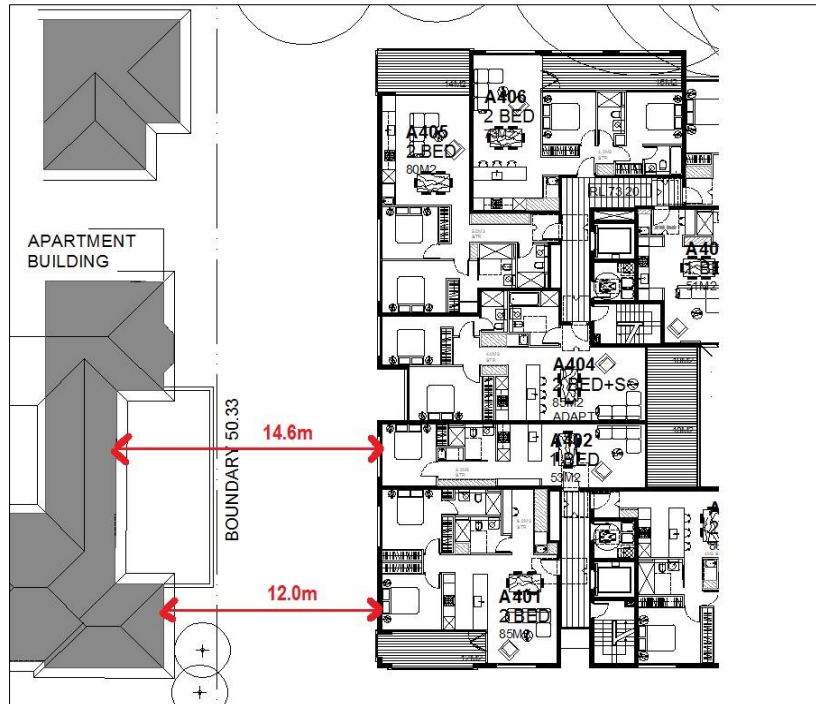


Figure 4: Southern separation and privacy

The building separation to the east is separated by Little Street and has a distance of approx. 30.0m between the proposed development and the existing dwellings. There will no loss of privacy to the existing dwellings given the setback distance and separation by Little Street. In addition, the change in gradient contributes to obscured outlooks which further enhances privacy for the existing dwellings by reducing direct overlooking.

The western building separation, to the rear of the proposed development varies in response to the existing RFB's. A 7.5m rear setback is provided to the boundary from the proposed development thereafter the building distances vary from 13.0 to 26.8m. Further the site slopes steeply between the sites to the rear and the subject site which ensures that there is minimal direct overlooking. Refer to **Figure 5**.

For example No. 188 Longueville has a ground level garage and in association with the slope of the site, the first and only level of interface between the two buildings is level 1 of 188 Longueville Road and Level 4 of Little Street. Refer to **Figure 6**. This level of interface is typical of the western boundary. Where possible, balconies are not orientated to directly overlook the rear and privacy screens are proposed.

Therefore given the generous setbacks, topography of the site and tree planting the surrounding building will not be negatively impacted by the height variation in terms of loss of privacy.

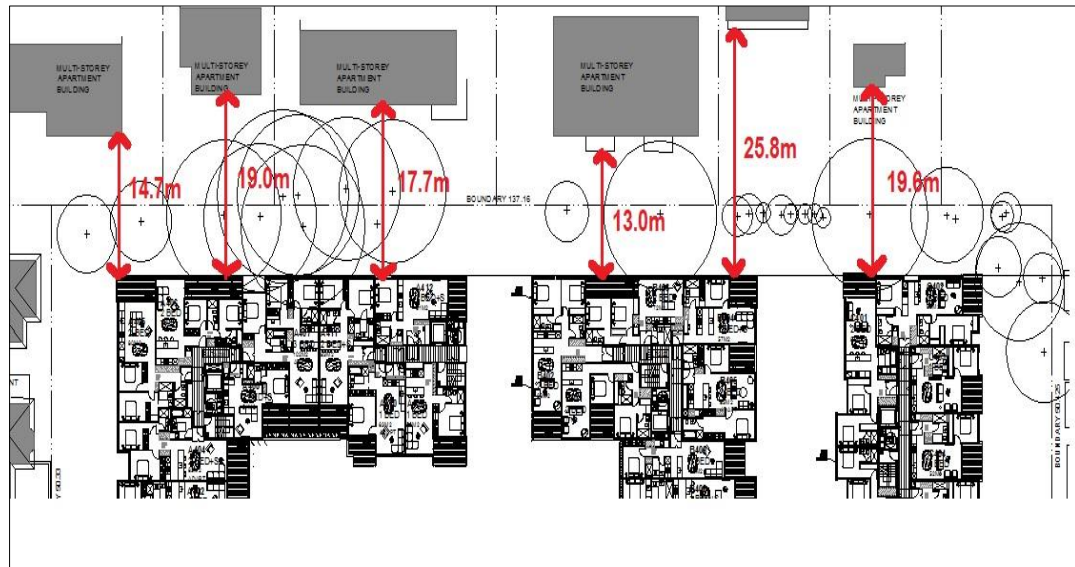


Figure 5: Western separation and privacy

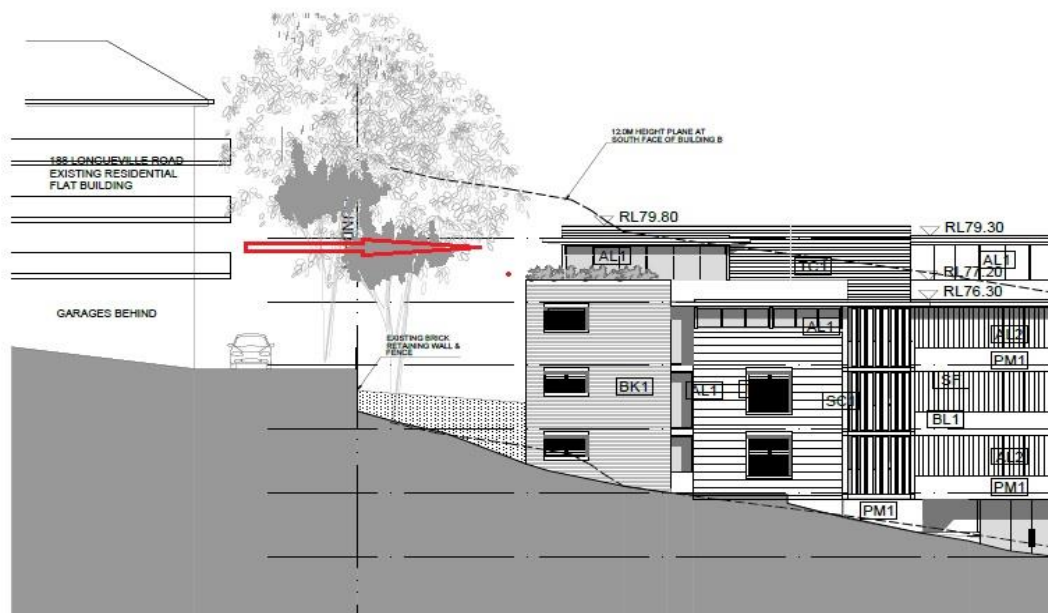


Figure 6: Western Interface between Building B and 188 Longueville Road.

## Visual Impacts

The visual impact of the additional height on the surrounding neighbours is minimal mentioned, due to the natural topography of the site. The land slopes from Longueville Road down to Little Street and within Little Street it is "valley" shaped with the lowest point being to the centre of the subject site. The building steps down the slope which ensures that at no point on the site

does the building exceed four storeys (with the exception of the lift shaft). Therefore where there are minor protrusions above the height limit, this is primarily a function of topography. There are a number of elevations in which the proposed development is significantly lower than the 12m height limit, as demonstrated below.

#### Visual Impact - Building A: Area below the 12 height control



Building A South elevation indicating extent below the height plane. Between 1.2 – 2.9m



Building A West elevation indicating extent below height plane. Between 1.2 – 4.4m

#### Visual Impact - Building B: Area below the 12 height control



Building B West elevation indicating extent below height plane. Between 1.2 - 2.16m.

#### Visual Impact - Building C: Area below the 12 height control



Building C North elevation indicating extent below height plane. Between 0.36 - 1.56m.



Building C North elevation indicating extent below height plane. Between 0.0 - 2.11m.

As is demonstrated above there are areas in which the proposed development could extend and provide additional height, however in response to the topography and with reference to the aesthetics of the building this legitimate option has not been pursued.

The areas of the proposed development which exceed the 12m height control are minimal and visually negligible. Refer to the height planes diagrams overleaf, **Figures 7, 8, 9 and 10**. Note figures are measured in millimetres.

### Visual Impact



Figure 7: Overview of height variation re: 12m height plane.

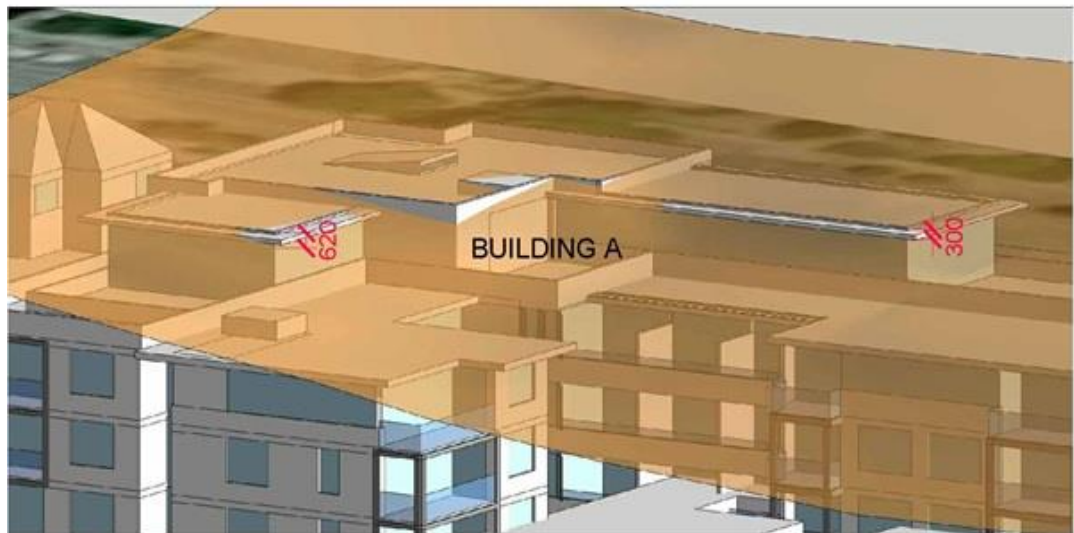


Figure 8: Building A - Extent of visual impact of 12m height variation .300mm - 620mm.



Figure 9: Building B - Extent of visual impact of 12m height variation. 2300mm - 600mm.

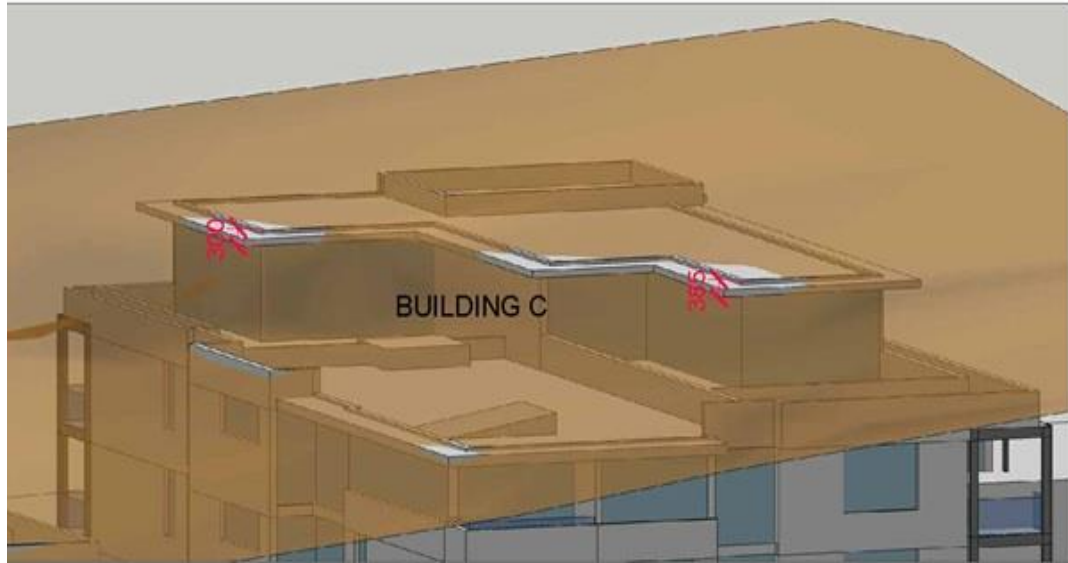


Figure 10: Building C - Extent of visual impact of 12m height variation. 300mm - 355mm.

*(b) to maximise sunlight for the public domain, and*

The 'public domain' in this instance is Little Street. Given that the front setback of the buildings is 7.5m from the boundary, the proposed development and the associated variation in height does not impact nor to reduce access to sunlight to the street.

*(c) to relate development to topography.*

The topography is a key determinant in the development of the proposed design and the need for a partial variation in the 12m height plane. The site covers a valley that slopes from the northern, southern and western boundaries (RL 68.5 to RL 73.0) toward the lowest point of the site in the front yard (eastern side) of 35 Little Street (RL 62.0) generally at gradients of 5° to 15°. The proposed development has been intentionally designed to be terraced or stepped in response to the natural slope. The building is 4 storeys in height (the only portion of the building which exceeds 4 storeys is the lift overrun).

On balance, it is clear that the additional height proposed is largely in response to the topography of the site and that the variation has no impact in terms of overshadowing, loss of privacy and visual impacts of height on neighbouring properties and sunlight into the public domain.

For the reasons outlined above, the objectives of the standard are achieved notwithstanding the non-compliance and therefore, i) of the Wehbe test is satisfied.

- i. **the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above. We rely on this test.

- ii. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**

Not applicable. The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.

- iii. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and**

Not applicable to the site.

- iv. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Not applicable. The zoning of the site is appropriate.

## **5.2 Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46**

The proposed variation from the development standard is further assessed below against the accepted test for the assessment of development standard variation established by *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.

### **A. Is the planning control in question a development standard?**

Yes, the development standard to which this objection relates is Clause 4.3 of the LCLEP, 2009.

### **B. What is the underlying object or purpose of the standard?**

The underlying objectives of the standard are set out in Section 5.1(i).

### **C. Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?**

The contentions in Section 5.1(i) demonstrate how the proposal is consistent with the objectives of the development standard.

Further to the discussion in Section 5.1(i), the following contentions are provided in support of this submission to vary the height control in this particular instance:

- The desired future character of the area is achieved, which is for a higher density residential development, within the Lane Cove context;
- Council have specifically nominated these sites for R4 high density residential development. Therefore the proposed RFB is consistent with the zoning of the sites and is in fulfilment of Councils land use intention;
- The proposed development has been designed to incorporate adequate building separation and side setbacks, and to ensure future development of surrounding sites are not compromised, whilst maintaining the amenity to existing development in the area;

- Amenity is not compromised for the surrounding residential sites as a result of the non-compliance with the height standard; and
- The objectives of the height standard, and the zone objectives ( as addressed in 5.3), are achieved.

Moreover, the various technical reports and plans accompanying the development application provide a comprehensive assessment of potential environmental and amenity impacts associated with this project. Notwithstanding the height variation, the proposed development will not result in an adverse environmental or amenity outcomes for the adjoining sites, or the wider locality. Therefore strict compliance with the development standard would be unreasonable and unnecessary. Strict compliance would not result in any tangible benefits.

**D. Is compliance with the development standard consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?**

The arguments contained in this Clause 4.6 variation, support the case to allow flexibility in the application of the standard.

The non-compliance with the development standard allows for an orderly use of the land and has been designed with consideration to the desired future character of the area.

Moreover, the Objects of the Act are satisfied because: -

- The departures from the height control within the LCLEP, 2009 will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and
- The departure from the height control within the LCLEP, 2009 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.

**E. Is the objection well founded?**

In his decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. These matters have been addressed in Section 5.1 of this Clause 4.6 variation and we contend that the proposed variation is well founded on the basis of the following:

- the objectives of the standard are achieved notwithstanding non-compliance with the standard.*

Refer to the detailed discussion in Section 5.1 above.

Therefore the *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 test has been addressed.

### 5.3 Is the proposal in the public interest?

Pursuant to case law of *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is *"Whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"*.

This Clause 4.6 variation and the accompanying plans and technical reports demonstrate the public advantages of providing a new, high quality residential flat building on this site. No public disadvantages have been identified as it has been demonstrated that any environmental or other impacts associated with the development are minimal.

Further to the above, subclause (4) of Clause 4.6 of the LCLEP, 2009 requires consideration of the proposal's consistency with the objectives of the standard which apply to the site. Consideration of these objectives is required to demonstrate that the proposal will be in the "public interest".

The assessment of consistency with the objectives underpinning the standard is provided at Section 5.1(i). Consideration of consistency with the objectives for the R4 High Density Residential pursuant to the LCLEP 2009 are provided below:

*a) To provide for the housing needs of the community within a high density residential environment.*

The development proposal contributes 94 apartments within residential flat building. There are currently 10 dwellings which currently occupy the site. Therefore the proposal contributes 84 additional dwellings to the area.

*b) To provide a variety of housing types within a high density residential environment.*

The proposed residential flat building is an appropriate housing type within a high density residential environment. It is also a use which is not currently in use on the site.

*c) To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Not applicable to this application.

*d) To provide for a high concentration of housing with good access to transport, services and facilities.*

The site is exceptionally well located in terms of access to Lane Cove town centre. The Lane Cove town centre and associated community amenities are within walking distance from the site.

*e) To ensure that the existing amenity of residences in the neighbourhood is respected.*

The impact of the RFB on the surrounding uses has been fully assessed above and it is demonstrated that the impact of the additional height is negligible in terms of impacting on overshadowing, privacy and visual amenity.

*f) To avoid the isolation of sites resulting from site amalgamation.*

No sites will be left "isolated" as a result of the site amalgamation.

### 5.4 Matters of State or Regional Significance

We have not identified any outcome which would be prejudicial to planning matters of a State or Regional significance that would result as a consequence of varying the development standard as proposed by this application.

## **5.5 The public benefit of maintaining the standard**

There is no public benefit in maintaining the height control within LCLEP, 2009. There will be no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.

The departure from the height control within the LCLEP, 2009 allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls. The departure from the height control within the LCLEP, 2009 allows for the critical mass to be achieved for the site.

## **6. CONCLUSION**

The proposal does not strictly comply with the maximum height standard prescribed by Clause 4.3 of the LCLEP, 2009.

Having reviewed the possible effects arising from this non-compliance in height, we are satisfied that the objectives of Clause 4.6 of the LCLEP, 2009 are satisfied because the non-compliant portions of the height of the building on the site, are minor and do not in itself create any adverse environmental impacts. The purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying development standards to particular development, and to achieve a better planning outcome for, and from development, by allowing flexibility in particular circumstances.

The possible effects arising from this non-compliance have been evaluated against all planning controls and objectives applying to the site and that analysis concludes this proposal will not result in any adverse built form, public domain, amenity or environmental outcomes.

Consequently strict compliance with this development standard is unreasonable and unnecessary in this particular case and that the use of Clause 4.6 of the LCLEP, 2009 to vary this development control is appropriate in this instance and that there are significant environmental planning ground to justify the proposed variation.

The identified breaches of the height standard, with no identifiable environmental planning outcomes, must be balanced against the importance of meeting housing targets and the benefits that arise from providing a contemporary Architect designed residential flat building within the Lane Cove locale.

Therefore it is reasonable to conclude that more adverse outcomes would actually accrue from strict compliance with the height standard, or conversely in the terms of clause 4.6(1) (b), a better outcome will be achieved for this development by allowing flexibility in the application the height standard in this particular instance.

The proposed residential flat building proposes 94 apartments, no other land uses are proposed, in association with this particular application. Therefore the issue of public interest has been addressed pursuant to case law of *Ex Gratia P/L v Dungog Council* (NSWLEC 148).