



Clause 4.6 – Exceptions to Development Standards – Height of Buildings (cl 4.3)

Address: 17-37 Wollongong Road, Arncliffe

Proposal: The proposal seeks development consent for the demolition of all existing structures and erection of a residential flat building containing 166 dwellings with basement car parking.

1.0 Introduction

This is a written request to seek an exception to a development standard under clause 4.6 – Exceptions to Development Standards of the Rockdale Local Environmental Plan 2011 (RLEP 2011).

The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the RLEP.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011, and has incorporated as relevant the latest authority on clause 4.6, contained in the following judgements:

1. *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* ('Four2Five No 1')
4. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* ('Four2Five No 2')
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248* ('Four2Five No 3')

The principles that stem from the relevant authorities may be summarised as follows:

- (a) *The relevant objectives are those stated in the controls not unidentified underlying objectives at [57] in Four2Five No. 1;*
- (b) *That the sufficient environmental planning grounds have to be particular to the circumstances of the proposed development to the site at [60] in Four2Five No. 1; and*
- (c) *The five methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in Wehbe remain relevant however you need something more than 1 in Wehbe to satisfy the unreasonable and unnecessary test in clause 4.6(3)(a) as that test is now encompassed in clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.*

Method 1 in *Wehbe* requires a demonstration that the objectives of the relevant development standard are achieved notwithstanding non-compliance with the numerical standard. As a result of *Four2Five*, it is now necessary to demonstrate something more than achieving the objective of the standard. A development that contravenes the development standard, and as a result achieves the object of the development standard to a greater degree than a development that complied with the standard, would suffice.

2.0 Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Rockdale Local Environmental Plan 2011 (RLEP2011).

2.2 What is the zoning of the land?

The land is zoned R4 High Density Residential

2.3 What are the Objectives of the zone?

The objectives of the R4 High Density Residential zone are as follows:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

2.4 What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

2.5 Is the development standard a performance based control? Give details.

No. The height of buildings development standard is a numerical control.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the RLEP 2011.

2.7 What are the objectives of the development standard?

The objectives of the development standard is contained in subclause 4.3(1)(a) to (e), and are reproduced below:

- (a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,
- (b) to permit building heights that encourage high quality urban form,
- (c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) establishes a maximum height of buildings for the site. The site the subject of variation has a maximum permissible height of buildings of 24.0m, 21.0m and 15.0m in accordance with the Height of Buildings map.

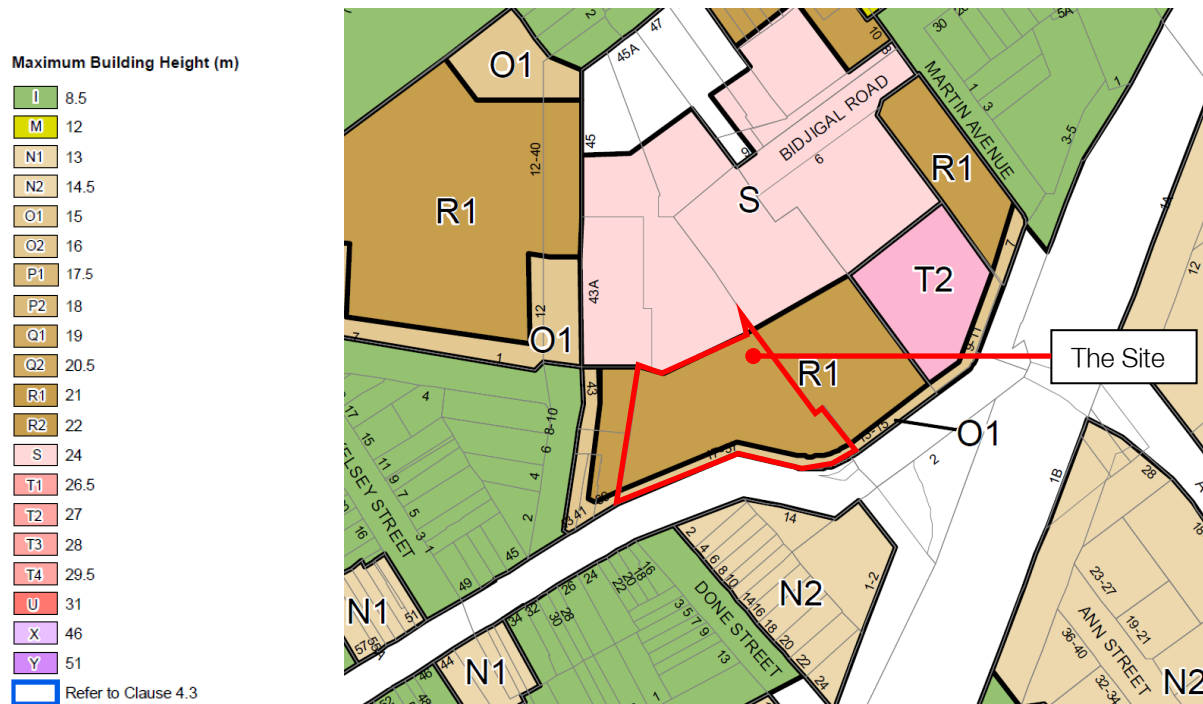


Figure1: Extract from Height of Buildings Map – RLEP 2011

The numeric height of building development standard is 24.0m for any building within area S, 21.0m for any building within area R1 and 15.0m for any building within area O1. The proposed building does not occupy the part of the site to which the 24.0m or 15.0m maximum height of building development standard applies. The building is setback outside this area and is proposed to be occupied by landscaping and pedestrian and vehicle access paths that do not contravene the building height development standard.

2.9 What is the proposed numeric value of the development standard in the development application?

The development proposes the following heights:

Location	Height
Communal terrace roof (Wollongong Road)	19.5m to 20m (RL 30.20)
Front parapet (Wollongong Road)	21m to 22m (RL 31.30)
Rear parapet/ Lift overrun	23.5m to 25m (RL 34.60)

Table 1: Proposed heights for the development

A visual representation of the above mentioned exceedance of the 21m maximum building height control is demonstrated in Figures 2, 3 and 4.

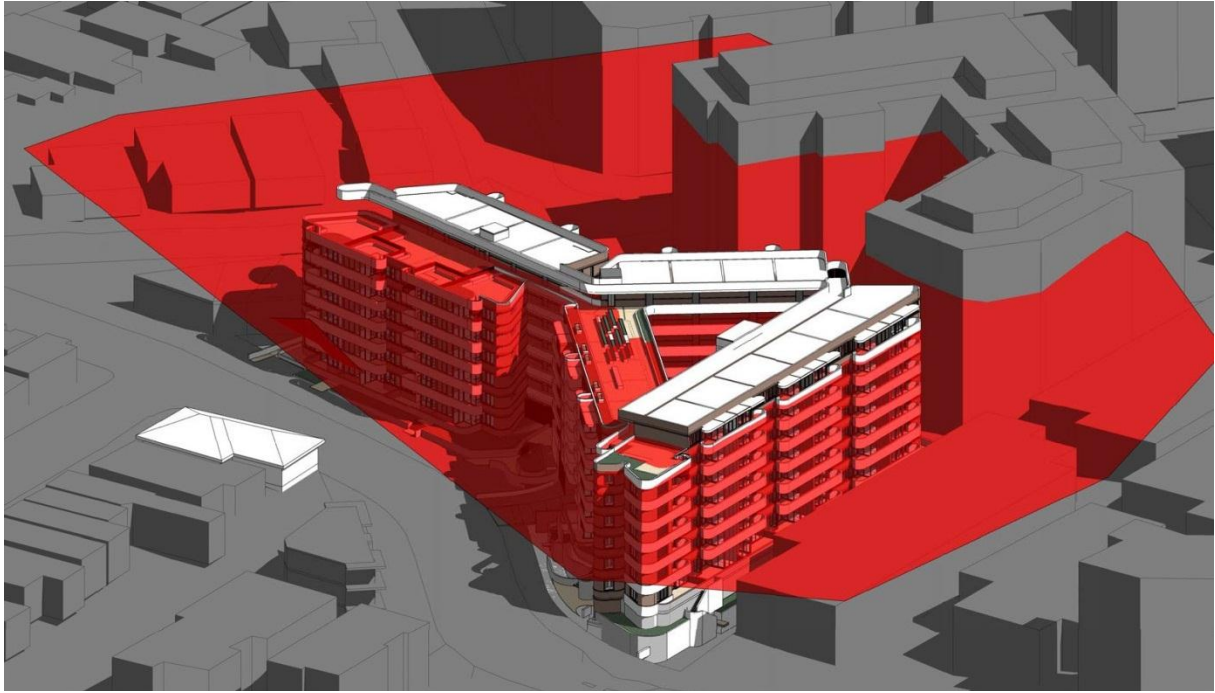


Figure 2: Diagram of height of building non-compliance to the height control shown above the red plane.

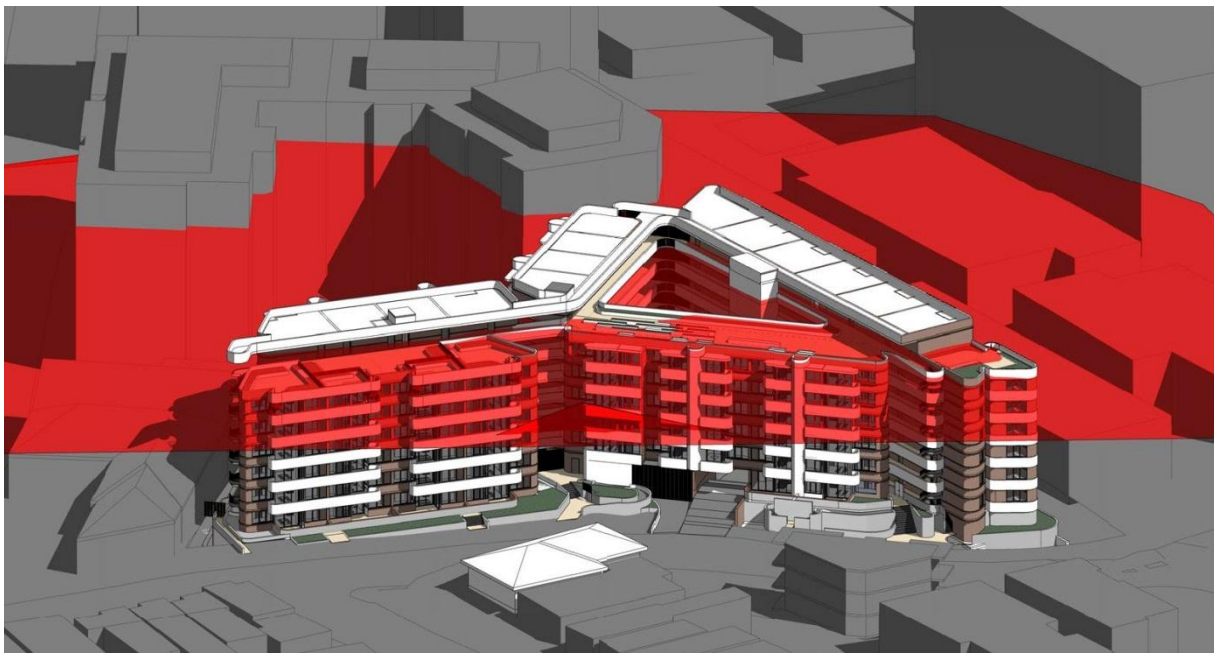


Figure 3: Diagram of height of building non-compliance to the height control shown above the red plane.

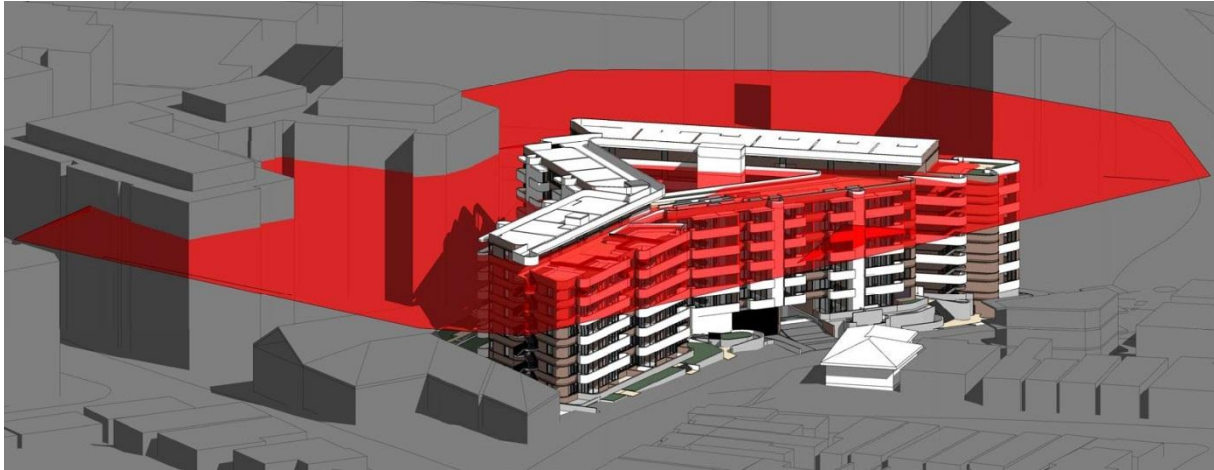


Figure 4: Diagram of height of building non-compliance to the height control shown above the red plane.

2.10 What is the percentage variation (between your proposal and the environmental planning instrument)?

The proposal in part exceeds the maximum height of building development standard of 21.0m by a maximum of 4% to Wollongong Road and 19% to the central and rear of the site. The building has been elevated by 1.45m (7% of the allowable height) to accommodate the flood planning level of RL11.60 to the Wollongong Road frontage (see Figures 5, 6 and 7). Compared to the 24.0m height of buildings control which applies to part of the site to the rear, the non-compliance reduces to 1.0m or 4%. Given the proposed stepping of the building from eight (part lower ground plus 7 upper storeys) to six storeys from the rear to Wollongong Road the non-compliance with maximum building height is predominantly restricted to the central and rear of the site i.e. away from Wollongong Road and toward the 24m height control to the rear portion of the site and adjacent to the residential development to the north.

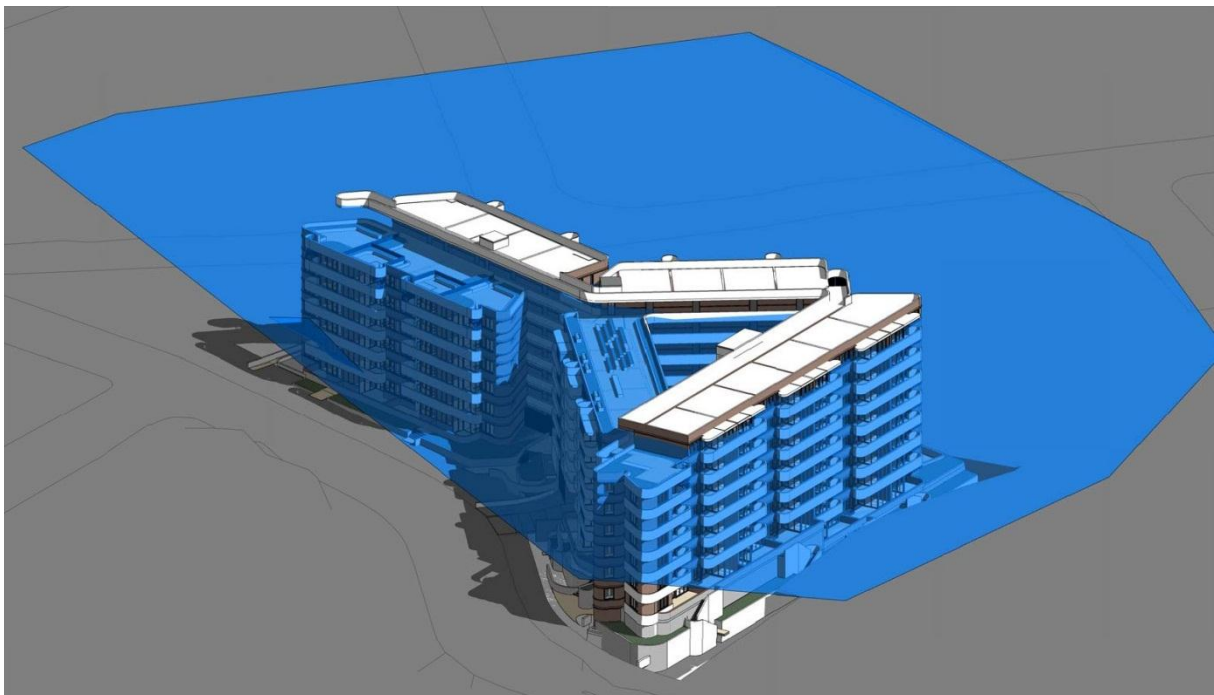


Figure 5: Diagram of height of building non-compliance resultant from flood planning level shown above the blue plane.

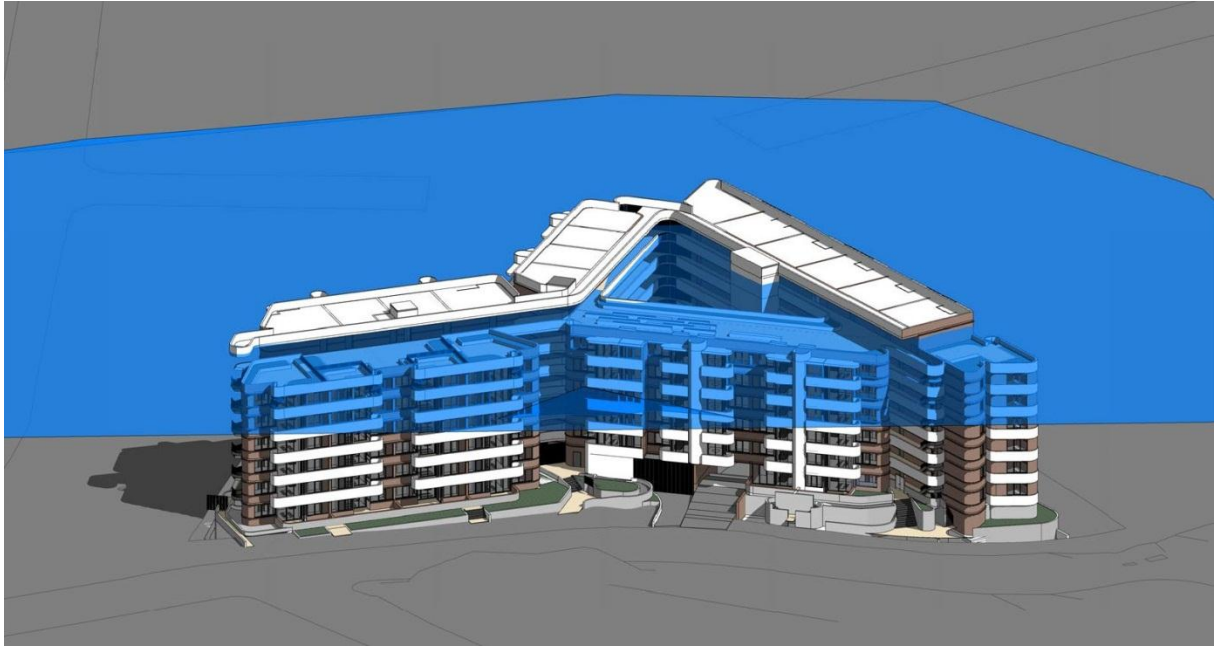


Figure 6: Diagram of height of building non-compliance resultant from flood planning level shown above the blue plane.



Figure 7: Diagram of height of building non-compliance resultant from flood planning level shown above the blue plane.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a 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.*

Where concurrence is required to be granted or assumed the following matters also need to be considered:

- (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.*

An assessment of the height of building development standard variation is provided below in accordance with the requirements of clause 4.6. In addition, this variation has been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard. The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in the decision of Justice Lloyd in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46 outlined below:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- Is compliance with the development standard consistent with the aims of the Policy, 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 *EP&A Act 1979*;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary; and
- Is the objection well founded.

In accordance with the Guideline, the assessment also addresses the 'five part test' established in the decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the height of building development standard of 21.0m is unreasonable or unnecessary in this circumstance for the following reasons:

- The non-conforming element of the building is setback and still facilitates the built form transition encouraged by the height of buildings development standard;
- The non-compliance is unreasonable in the circumstance as a strictly numerically compliant development would result in a poorer amenity outcome to the proposed development compared to the proposed design as demonstrated in the SEE and would impact SEPP 65 compliance;
- The non-compliance to the building height development standard does not result in additional development potential rather facilitates the accommodation of the permitted FSR on the site in a manner that achieves superior urban outcomes as well as superior amenity outcomes;
- The form and scale responds to the broader context of the site and the high density residential form that has emerged as the locality has transitioned from an industrial precinct to a residential precinct;
- A strictly compliant development would fail to maximise the housing contribution of the site in a locality that has been specifically planned to accommodate housing to the density proposed and which is well served by passenger rail services in an easy walkable distance; and
- The numerical non-compliance is a result of the overriding imperative to seek consistency with the apartment amenity considerations required by the provisions of SEPP 65 Design Quality of Apartment Development which is a higher level Environmental Planning Instrument than the LEP which contains the height of buildings development standard.

A development that strictly complied would result in an impeded built form and a less articulated response to the site constraints specifically the height of surrounding developments to the north, but importantly would fail to achieve the level of residential amenity achieved by the proposed design.

3.2.2 Would the underlying objectives or purpose be defeated or thwarted if compliance was required?

Compliance with the objectives of the 21m height of building standard would be thwarted if strict compliance with the standard was required, as this would then prevent the condition of the site being improved through the construction of a high density residential development comprising communal open spaces at ground level to the rear and roof terraces to Wollongong Road, and lift access between the basement and all upper level apartments

A development that strictly complied with the standard would likely result in an inferior urban design response to the site. It would be a compromised amenity outcome relative to the residential amenity able to be achieved for the proposed dwellings that is made far superior through the response that seeks to exceed the building height standard towards the central and rear portions of the site. Visually, the stepped building form provides for a more interesting façade and composition that reduces building height to Wollongong Road whilst providing articulation and sheltered roof top communal open space areas. Furthermore, exceedance of the height control would not be visible from Wollongong Road frontage.

As such, strict compliance with the 21m height control would thwart the intention to ensure building height is consistent with the desired future character of the Bonar Street Precinct area and nominate heights that will provide high quality urban form.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard cannot be said to be abandoned. Rather, it is noted that the site is located immediately southward of No. 45 Bonar Street (approved and constructed) which has a maximum height of ten (10) storeys. As such, the proposed height of six (6) storeys to Wollongong Road and eight (8) storeys (part lower ground plus 7 upper storeys) to the rear of the site is a direct response to the higher building to the north (No. 45 Bonar Street within the Bonar Street Precinct), whilst maintaining a desire to provide high levels of amenity for future occupants of the site.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location in the Bonar Street Precinct which is undergoing transition from an industrial area to a high density residential area. Additionally, the site and surrounding properties are located within the Arncliffe Priority Precinct, which is being investigated to be rezoned to accommodate higher density residential forms in the vicinity of the Arncliffe Railway Station.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

It is considered that there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the R4 High Density Residential zone and the objectives of the standard as described in Section 3.2 above;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts;
- As outlined in Section 3.2 a variation to the standard is required to support a viable development on the site. The proposal provides a high density apartment building that is appropriate for the sites location and current/ future setting within a high density zone in the Bonar Street Precinct;
- The proposal does not give rise to unacceptable impacts associated with an increased maximum building height, including greater intensity of development, traffic generation or bulk and scale; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Rockdale Development Control Plan 2011.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the Height of Building standard

The proposal remains consistent with the objectives of the Height of Building Development standard outlined in subclause 4.3(1) despite the non-compliance. This is demonstrated in the assessment of the objectives relating to the Height of Buildings:

(a) to establish the maximum limit within which buildings can be designed and floor space can be achieved

In addition to the Maximum Height of Buildings development standard, the site is subject to a maximum floor space ratio (FSR) development standard of 2:1. The building including the non-compliant building height is compliant with the FSR development standard (in accordance with the standard GFA definition). The preparation of the application concept has been subject to extensive design development and option testing. A fundamental outcome of the design testing has been to explore options for the site to achieve the FSR and consistency with the amenity provisions of State Environmental Planning Policy No.65 –

Design Quality of Residential Apartment Development. The exhaustive exercise has demonstrated that within the building height residential apartments are not able to be accommodated whilst achieving the key amenity considerations of solar access and natural ventilation required by the Apartment Design Guide.

The proposed configuration responds to the environmental and planning objectives whilst considering and adapting to the context; specifically the departure from the standard on the site located directly to the north which, at ten (10) storeys, has a maximum height of 31.1m in Area S (24m height control). The proposed development's built form steps down from eight (part lower ground plus 7 upper storeys) to six (6) storeys from the rear towards Wollongong Road to provide an appropriate transition to the streetscape.

The configuration of the proposed building has allowed for the provision of a building with narrower floor plates and in particular providing a bank of apartments on level 6 which are all dual aspect and all of which have excellent access to the available northerly orientation. This responds to the solar impact of the 10 storey development located immediately to the north.

The architectural analysis undertaken in the Pre-DA package (see Attachment 2 of SEE) has clearly demonstrated that the height limits in place do not facilitate the achievement of the FSR as required by the objective when compliance with SEPP 65 is also desired. A numerically compliant height could be provided on the site which would result in a development of poorer amenity that does not achieve SEPP 65 consistency and consequently a poorer design quality. Due to the height exceedance of the building to the north, the construction of a six (6) storey building on the subject site cannot achieve compliance with SEPP 65.

(b) to permit building heights that encourage high quality urban form

The proposed building is of a high quality urban form. The building provides a high quality landscaped setting with very generous setbacks from the development to the north which also provides for a substantial amenity in the form of communal open space for future residents of the building. Additionally, an internal courtyard at ground floor level and communal roof terrace on Level 6 is provided as shown on the proposed floor plans.

The urban form addresses Wollongong Road and provides a reduced building height to the street which is consistent with the height control and steps up a storey to the rear of the site away from the street frontage. The street frontage is activated through the inclusion of individual dwelling entries and a landscaped treatment that will augment to the public domain and provide an amenity for the future residents. The integration of the built form with the public domain and open space can be seen in the proposed landscape plans.

(c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain

The site is oriented to address the street, with this orientation being due south. The solar access analysis has demonstrated that the proposed building, including the portions of the building that are non-compliant with the height control, do not result in adverse solar access impacts on surrounding existing or potential future development as shown in section 4.9.1 of the SEE. The building orientation and layout incorporating substantial setbacks from the rear northern boundary ensures that future potential development to the west will have excellent access to daylight and sunshine. Development to the east of the site will be separated by a future new road consistent with the Bonar Precinct Masterplan.

The proposed building and resulting building height does not result in adverse impacts upon the amenity, sky exposure or daylight access to key public domain areas or public open space areas.

(d) to nominate heights that will provide an appropriate transition in built form and land use intensity

Despite the numerical non-compliance the building provides an appropriate transition from the approved ten (10) storey buildings to the north of the site stepping down to the Wollongong Road frontage and the 3 and 4 storey buildings on the southern side of Wollongong Road. The building to the north at 45 Bonar Street has a roof RL of 38.45. The proposed building has a maximum height (lift overrun) of RL of 34.60 to the north stepping down to a parapet RL of 31.30 fronting Wollongong Road. The subject site is within a 250m walking distance of Arncliffe Station. The subject site and area to the immediate south is located within an area known as the Arncliffe Priority Precinct, which is being investigated to be rezoned to accommodate higher density residential forms in the vicinity of the rail station. The height to the Wollongong Road frontage is of a scale that is consistent with the applicable development standard and will provide the transition in building heights appropriate for the existing planning controls and existing buildings. Given the potential outcome of the Priority precinct investigations, building heights to the south of the subject could be increased.

In considering the land use intensity the proposed building complies with the FSR standard which is the typical measure of land use intensity. The non-compliant height does not increase the density or yield of development but as outlined previously has been pursued to ensure that the resulting development achieves a high quality residential amenity in a quality setting that improves the architectural quality of buildings in the locality.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the R4 High Density Residential Zone despite the non-compliance with the height of buildings development standard. This is demonstrated in the assessment of the zone objectives below:

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

- The proposal provides residential apartment development in the Bonar Street Precinct that has been specifically rezoned and planned within the RDCP 2011 to accommodate higher density residential development. The development has responded to the site and legislative frameworks and has sought to vary the building height to achieve the permitted FSR (in accordance with the standard definition of GFA) within a building form and configuration that achieves consistency with the SEPP 65 amenity provisions that would not otherwise be achieved in a building that strictly numerically complied with the height of buildings development standard. The requested variation to the height of building development standard facilitates the delivery of high quality high amenity accommodation consistent with the intended density of the locality as envisaged by the objectives of the Bonar Street Precinct being an area that is well served by public transport options and also is in an area being investigated under the Priority Precinct program.

To provide a variety of housing types within a high density residential environment

- The proposal seeks to accommodate a range of dwelling types that are specifically targeted to the market demand for the locality. The dwelling mix reflects the market demand and the sites proximity in an easy walk to the Arncliffe Station. The proposal includes the provision of 10% of the dwellings as adaptable consistent with Council's policy requirements. The proposal reflects the changing character of the area that is well supported by public transport and in close proximity to jobs and services. This environment is supported by the precincts planning objectives.

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

- The development proposes only residential accommodation in this instance and does not seek to provide other land uses also permitted in the zone.

3.5 Whether contravention of the development standard raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the broad brush nature of a control applied across an area that supports a variety of built forms that are reflective of different zones, and are a function of their use.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

“to encourage

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally, and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard objectives, and principally, maintains the scale and density of recently approved buildings.

The development as proposed is consistent with the provisions of orderly and economic development, and strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.7 Is there public benefit in maintaining the development standard?

In the circumstances there is public benefit in maintaining standards; however there is public interest in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height of buildings development standard applying to the site would preclude the delivery of high amenity apartments as required by SEPP 65. The design proposed achieves a public benefit for the future residents in providing high quality residential amenity and to the broader public through the efficient use of quality urban land that is well served by transport and the resulting positive contribution to the public domain.

A strictly numerically complying development would result in a less interesting urban response to the locality and a less articulated building. Importantly a numerically compliant building would achieve a poorer residential amenity outcome and would forgo the opportunity to maximise the housing opportunity for the site taking advantage of the superior urban attributes of the site and locality.

3.8 Is the objection well founded?

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance, and that granting an exception to the development can be supported in the circumstances of the case.

The development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and the development will satisfy the R4 High Density Residential Zone objectives and the objectives of the Clause 4.3 Height of Buildings development standard.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result for the locality by restricting building height to 21.0m for the proposed building. It has been demonstrated that the proposal will promote the social and economic welfare of the community and will have positive outcomes for the environment.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the standard.

The development will not result in unacceptable impacts with regard to the amenity of surrounding properties. The overall aesthetic appearance and scale of the development is that of a residential form that is compatible with the typologies in the surrounding area.

The proposal accords with the stated objectives for the R4 High Density Residential zone and the Clause 4.3 Height of Buildings development standard. The additional height does not contribute to significant adverse amenity impacts by way of overshadowing or privacy impacts and does not result in a building that is out of proportion or scale with surrounding existing and anticipated development.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses but would detrimentally impact upon the amenity of the proposed development. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader City of Rockdale LGA given the site considerations and surrounding pattern of development including flood levels for habitable floors.

It is concluded that the objection is well founded as compliance with the standard is both unnecessary and unreasonable.