

Clause 4.6

Mixed Use Development – Short
Street, The Entrance

80515701

Prepared for
Central Coast Council

9 March 2017



Contact Information

Cardno (NSW/ACT) Pty Ltd
ABN 95 001 145 035

Level 3, Suite 34
207 Albany Street North
GOSFORD NSW 2250

Telephone: 02 4323 1000
Facsimile: 02 4324 3251

gosford@cardno.com.au
www.cardno.com

Author(s):

N. Wells

Natasha Wells
Manager Urban Design, Planning
and Environment

Approved By: Natasha Wells
Manager Urban Design, Planning
and Environment

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Table of Contents

1	Introduction	1
1.1	Background and Justification for the requested Amendment	1
2	Details of the Request	2
2.1	Land to which this Variation applies	2
2.2	Relevant Environmental Planning Instrument	4
2.3	Relevant Development Standard	4
2.3.2	Proposed Variation to the Standard	6
2.3.3	Variation Analysis	6
3	Response to the Clause 4.6 matters for consideration	9
3.1	Clause 4.6 Responses	9
3.2	The 'Five Part Test'	12
3.2.1	Wehbe v Pittwater Council (2007) NSW LEC 827	13
3.2.2	Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46	17
3.2.3	Four2Five v Ashfield Council [2015] NSWLEC 90	18
3.2.4	Is the proposal in the public interest?	18
4	Conclusion	19

Tables

Table 3-1	Clause 4.6 (1)	9
Table 3-2	Clause 4.6 (2)	9
Table 3-3	Clause 4.6 (3)	9
Table 3-4	Clause 4.6 (4)	10
Table 3-5	Clause 4.6 (5)	11
Table 3-6	Clause 4.6 (6)	11
Table 3-7	Clause 4.6 (7)	12
Table 3-8	Clause 4.6 (8)	12
Table 3-9	Assessment of Development Standard Objectives	16

Figures

Figure 2-1	Aerial view of subject Site (Source: https://maps.six.nsw.gov.au)	3
Figure 2-2	Additional road closure allotments subject to this variation Source: https://maps.six.nsw.gov.au	4
Figure 2-3	Wyong LEP Height of Buildings Map Source: WLEP 2013	5
Figure 2-4	Maximum Height Variation (Tower 1)	6
Figure 2-5	Maximum Height Variation (from North & South Elevation, Tower 1)	7
Figure 2-6	Maximum Height Variation (from East & West Elevation, Tower 1)	7
Figure 2-7	Maximum Height Variation (Tower 1, Section C)	8
Figure 3-1	March Shadows – additional height	13
Figure 3-2	June Shadows – additional height	14
Figure 3-3	September Shadow – additional height	14
3.2.1.2	The objectives of the standard are achieve notwithstanding non-compliance with the standard	15

1 Introduction

Cardno is providing urban planning services to support a development application to Central Coast Council (CCC) for a proposed Masterplan DA comprising:

1. Mixed Use Development containing: retail (2,156 m²) and residential floor space (81 units) with associated car parking (346 spaces). Including 19 on street spaces.
2. Street front podium elements are to be built predominately to the street frontages and the building height limited to 2 storeys at the boundaries (7-8m podium to natural ground level).
3. There are two residential towers proposed. Tower 1 (towards the Denning Street frontage) contains 12 floors of residential units over 1 level of retail development while Tower 2 (towards the Bayview Avenue frontage) contains 5 levels of residential units over 2 levels of retail development.
4. 3.5 levels of below ground car parking are proposed with loading facilities off Theatre Lane. Access to car park area is via two separate entrances off Short Street.

The subject site relates to two (2) areas with differing height controls, one which is identified as being a Key Site with a height limit of 50m and Lots 1 and 2 in DP 1219145 which are the subject of this variation with a height limit of 31m. Lots 1 and 2 in DP 1219145 previously formed part of Short Street and Theatre Lane.

The purpose of this Application is to request an amendment to the *Wyang Local Environmental Plan 2013* Development Standard for Building Height in order to permit an additional height of 15.15 metres (at its greatest extent in limited locations) over the 31 metre Development Standard that applies to the Site.

1.1 Background and Justification for the requested Amendment

During the early phase of this Project, discussions were undertaken in regard to partial road closure and expansion of the Short Street Carpark for future development. Advice was previously given to and from Council staff that should a road closure be undertaken, newly formed allotments could be amalgamated into the existing allotments over Short Street Carpark and that these allotments would then be subject to the same controls as those specified under the Key Site Controls for Short Street Carpark site. On this basis a road closure was undertaken to close parts of these roads to include the additional area as part of the Key Site (now known as Lots 1 and 2 in DP1219145).

Through the DA assessment phase it been advised that the key site relates only to that area outlined in Wyong Development Control Plan (WDGP) 2016, Part 6, Chapter 6.1 and that the additional lots 1 and 2 DP 1219145 would not benefit from the same controls as they are located outside of the key site boundary. It has since been discussed with CCC DA Assessment team that in order to achieve the desired height control over the whole development, a Clause 4.6 variation should be prepared and submitted.

Due to its topography, the subject site for this application poses various challenges to optimise its development potential while delivering appropriate amenity within and external to its boundaries. Given that the site is within The Entrance CBD, there is an imperative that the proposed development contributes to the objective to deliver high quality housing opportunities close to the Entrance's commercial centre and waterfront areas. The proposal as lodged achieves this with an increase in height on Lots 1 and 2 DP 1219145 over the local Development Standard that does not result in significant impacts, as discussed in **Section 3..** The proposed design in the Development Application has been an iterative process carried out in close consultation with Central Coast Council, previously Wyong Shire Council. Feedback received from Council during this consultation is addressed in the Statement of Environmental Effects supporting this Development Application.

The provision of the additional height over the Development Standard is considered desirable in the circumstances of this case for the following reasons:

- > The proposal in its current form with marginal additional height will generate the best outcome for this site with respect to the regional objective to maximise housing supply and choice;
- > The additional height will allow for optimal location of residential floor space where best advantage can be taken of views, solar access and cross ventilation.
- > Council and the Joint Regional Planning Panel (JRPP) have supported development proposals in The Entrance which exceed height and floor space standards by a similar or greater magnitude than this proposal.
- > The additional height will allow the building to demonstrate a higher quality standard of architecture.
- > The additional building height results in negligible overshadowing impacts to neighbouring residences when compared to a compliant design; and
- > Facilitates an active street frontage and the provision of pedestrian links and recreation areas through the site;
- > The additional height will have no detrimental effect on the amenity of the area.

2 Details of the Request

2.1 Land to which this Variation applies

This request is lodged in support of a Development Application for a residential apartment building at 10 Denning Street The Entrance. The site currently comprises multiple allotments, listed as:

- > Lot 11 in DP 17376,
- > Lot 1 in DP 120735 and
- > Lots D, E, F and G in DP 348221.
- > Lots 1 and 2 in DP 1219145

The allotments subject to this application are Lots 1 and 2 in DP 1219145 as depicted in **Figure 2.2** below



Figure 2-1 Aerial view of subject Site (Source: <https://maps.six.nsw.gov.au>)



Figure 2-2 Additional road closure allotments subject to this variation Source: <https://maps.six.nsw.gov.au>

2.2 Relevant Environmental Planning Instrument

The Environmental Planning Instrument to which this variation relates is the Wyong Local Environmental Plan 2013 (WLEP 2013).

2.3 Relevant Development Standard

The development standard to which this objection relates is Clause 4.3 – Height of Buildings from the WLEP 2013.

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

- (a) *to establish the maximum height limit for buildings to enable the achievement of appropriate development density,*
- (b) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (c) *to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.*

(ca) in relation to land at Kanwal that is within Zone B6 Enterprise Corridor and is identified as “Area 4” on the Height of Buildings Map:

- (i) to provide incentives for the development of health-related facilities in this locality, and
- (ii) to encourage lot consolidation of smaller lots to reduce the possibility of fragmented development, encourage shared facilities and manage traffic movements.

(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), if the site area of a building on land identified as “Area 1” or “Area 2” on the Height of Buildings Map is at least 1,800 square metres, the maximum height of that building is:

- (a) in relation to land identified as “Area 1” on the Height of Buildings Map—20 metres, and
- (b) in relation to land identified as “Area 2” on the Height of Buildings Map—26 metres.

(2B) Despite subclause (2), the maximum height of a building on land identified as “Area 3” on the Height of Buildings Map is 10 metres if the building is to be located within 5 metres of any lot boundary with a frontage to Alison Road or the Pacific Highway.

(2C) Despite subclause (2), the maximum height of a building on land identified as “Area 4” on the Height of Buildings Map is 20 metres if:

- (a) the area of the building is 2,000 square metres or more, and
- (b) the building is used for the purposes of health services facilities or for a purpose that, in the opinion of the consent authority, complements and contributes to the special centre role of the hospital precinct adjacent to the land.

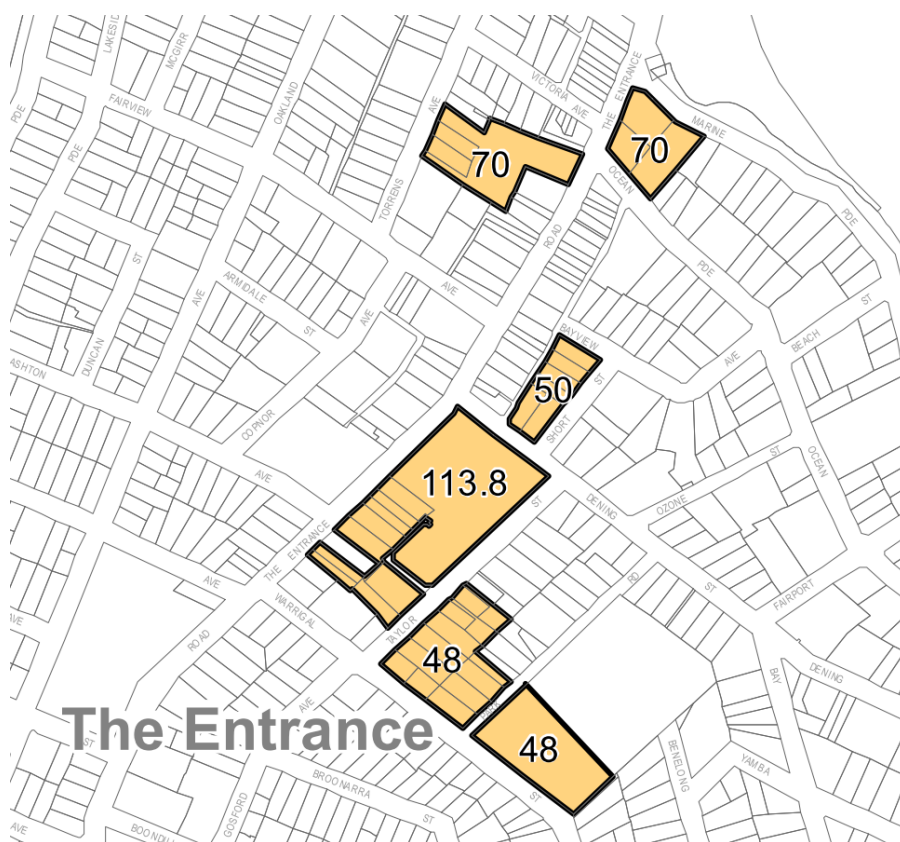


Figure 2-3 Wyong LEP Height of Buildings Map Source: WLEP 2013

2.3.2 Proposed Variation to the Standard

The proposed development seeks a variation to the maximum building height control on Tower 1 from 31m to 46.15m to the top of the 12th floor. At its greatest extent the Tower 1 would be 15.15m above the maximum height, however the variation is only for 448sqm of 6,457sqm being 6.9% of the built form. The variations are shown below as captured by the floor/ elevation/ section plans in Figures 2-4, 2-5, 2-6 & 2-7 below.

2.3.3 Variation Analysis

As shown on the northern and southern elevations (see Figures 2-5), the height variation relates to minor sections of the building to the east and west on Lots 1 and 2 DP 1219145 which have a maximum proposed height of 46.15. The variation relates to a width of 3.1 and 3.2-xxm of the building.

The overall proposed height of the building is 46.15m height, with a maximum permissible height of 50m over the remainder of the site, therefore, more than 93.1% of the proposed Tower 1 is compliant with the height controls.

The scale of the variation required to the east and west of Tower 1 is minor in comparison to the overall proposed building. Consequently, the northern elevation of the building is largely compliant. A full compliant design would have the same impact on views and solar impact from nearby properties at the detriment to reduced housing stock.

At the eastern and western elevation (see Figures 2-6), it appears as the whole tower is above the prescribed height plane of 31m. This however is misleading, as the non-compliance relates only to a width of 3.1 and 3.2m. The overall height of the proposed development from the eastern and western elevations would present the same to neighbouring properties as the majority of the building has a 50m height limit.

Based on detailed analysis for most of this proposed development, the height limit is compliant, the variation is considered to be reasonable.

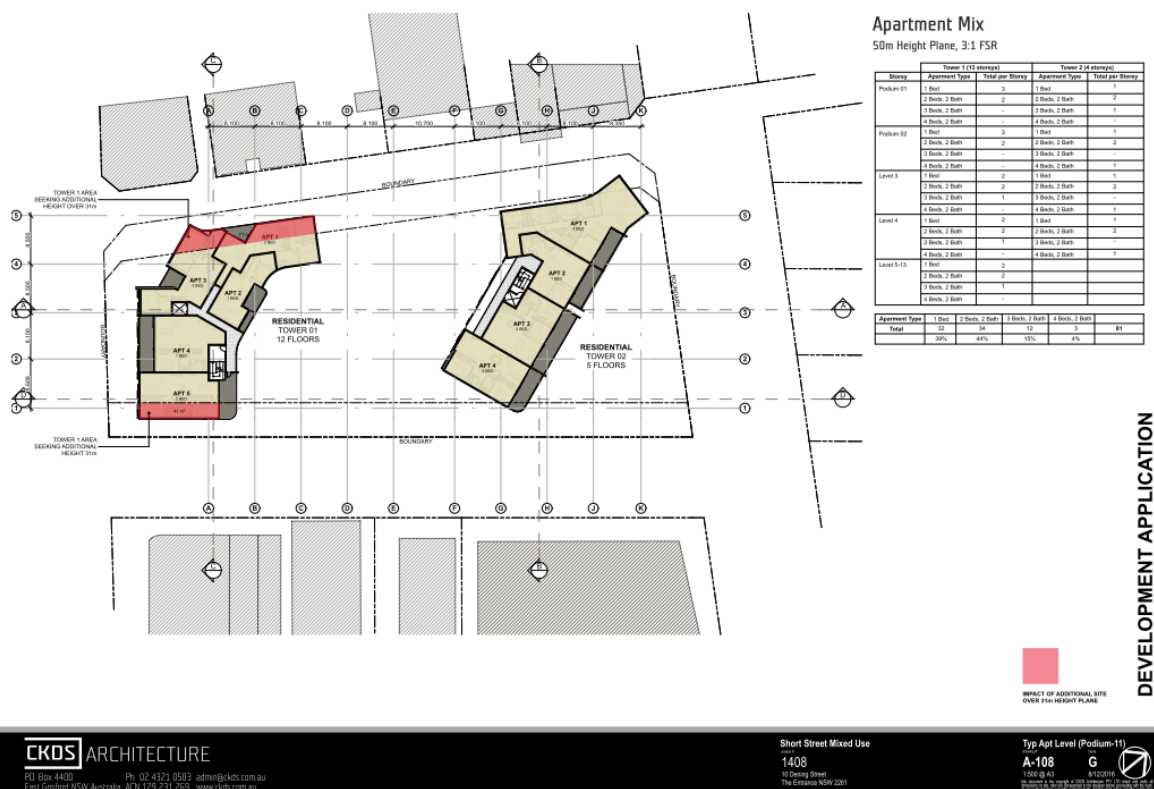


Figure 2-4 Maximum Height Variation (Tower 1)

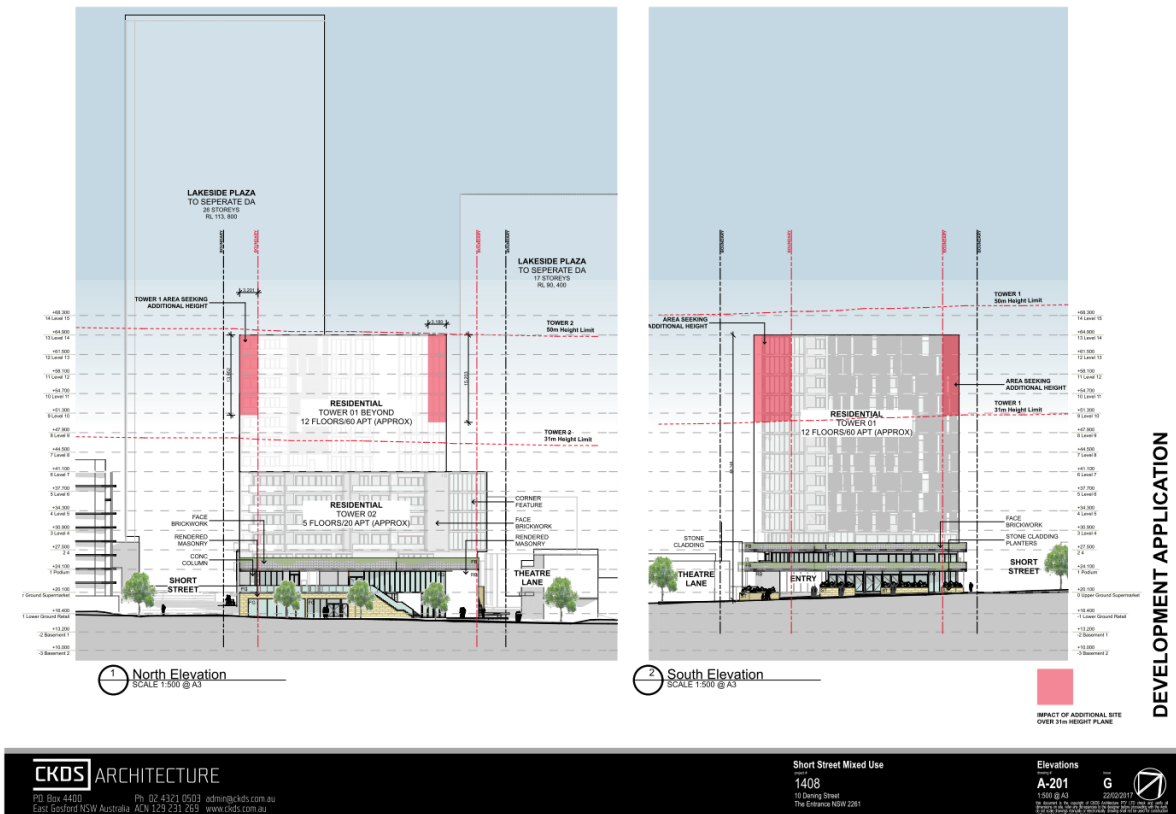


Figure 2-5 Maximum Height Variation (from North & South Elevation, Tower 1)

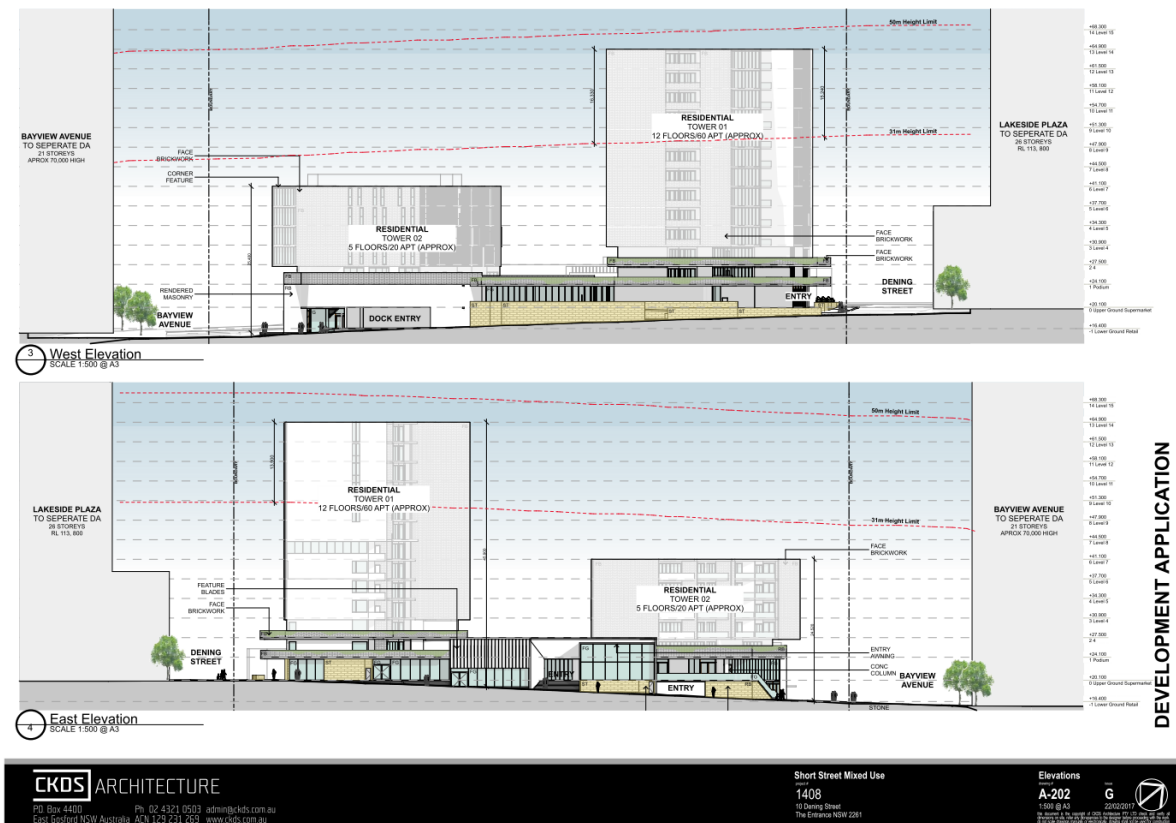


Figure 2-6 Maximum Height Variation (from East & West Elevation, Tower 1)



CKDS ARCHITECTURE
PO Box 4400
East Gosford NSW Australia ACN 129 231 269 www.ckds.com.au

Short Street Mixed Use
1408
12 Tring Street
The Entrance NSW 2261

Sections
A-302
1:500 @ A3
G
A-302

Figure 2-7 Maximum Height Variation (Tower 1, Section C)

3 Response to the Clause 4.6 matters for consideration

3.1 Clause 4.6 Responses

The objectives of Clause 4.6 – ‘Exceptions to development standards’ of the WLEP 2013 are identified below and a commentary is provided in response to each clause.

Table 3-1 Clause 4.6 (1)

Clause 4.6 (1)
<i>The objectives of this clause are as follows:</i>
> <i>To provide an appropriate degrees of flexibility in applying certain development standards to particular development;</i>
> <i>To achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i>

Table 3-2 Clause 4.6 (2)

Clause 4.6 (2)	Response
<i>Development consent may, subject to this clause, be granted for development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause</i>	The height development standard is not expressly excluded therefore it is possible for this development standard to be varied at the discretion of Council.

Table 3-3 Clause 4.6 (3)

Clause 4.6 (3)	Response
<i>Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:</i>	
<i>(a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</i>	<p>The impact of the additional height within the site, on adjacent site and in the broader context will be negligible, when compared to the permissible height, while providing a more appropriate density of residential development, as identified by the Central Coast Regional Strategy 2036. The compliance with the prescribed height standard is unreasonable and unnecessary in this context. Consequently, the requirement for the height to comply with the standard is contrary to the strategic intent in this instance.</p> <p>Shadow diagrams were lodged in response to Council's "request for information" demonstrating the impact of a compliant development and the impact of the proposed development with additional height on Lots 1 and 2 in DP1219145. The diagrams demonstrate that the impact from the additional height is negligible compared to that at a maximum permissible height.</p> <p>Due to the negligible impacts resulting and the positive aspects associated with increased housing provision and employment opportunities, as required by the Regional Strategy, compliance is considered unnecessary. The additional building height achieves a better urban design outcome.</p>

Clause 4.6 (3)	Response
<p>(b) <i>That there are sufficient environmental planning grounds to justify contravening the development standard</i></p>	<p>There is a clear planning case to support the additional height. The Central Coast Regional Strategy 2036 was developed by the NSW Department of Planning and Environment. The Strategy's intent is to ensure that adequate land is available and appropriately located to suitably accommodate the projected housing needs and promote local employment opportunities over the coming decades.</p> <p>The Wyong LEP 2013 reflects the Strategy through specific controls that aim to increase the density on the The Entrance Key Sites.</p> <p>The proposed development is considered to support the aims of the Central Coast Regional Strategy 2036 by providing significant additional residential space and employment opportunities at The Entrance. The additional height is considered to be a negligible issue within the context of the greater planning benefit both locally and on a wider regional scale.</p>

Table 3-4 Clause 4.6 (4)

Clause 4.6 (4)	Responses
<p><i>Development consent must not be granted for development that contravenes a development standard unless:</i></p>	
<p>(a) <i>the consent authority is satisfied that:</i></p> <p>(i) <i>the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i></p> <p><i>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</i></p>	<p>(i) See response to Clause 4.6 (3) above.</p> <p>(ii) Objectives of the Height standard are as below and are addressed accordingly:</p> <p>(iii) To establish maximum height limits for buildings,</p> <p>(iv) To permit building heights that encourage high quality urban form,</p> <p>(v) To ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,</p> <p>(vi) To nominate heights that will provide an appropriate transition in built form and land use intensity,</p> <p>(vii) To ensure taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,</p> <p>(a) To protect public open space from excessive overshadowing and to allow views to identify natural topographic features.</p> <p>The proposed mixed use building complies with the objectives set out by Clause 4.3 – Height of Buildings from the WLEP 2013.</p> <p>The proposed development exhibits high quality urban form, and would not adversely impact on views due to the stepped built form with the lower tower located towards the waterfront; overshadowing, or sunlight exposure as illustrated by shadow diagrams. The proposed development will be located adjacent to the approved Lakeside Development and will contribute to the high density developments located in the immediate area.</p>

Clause 4.6 (4)	Responses
	<p>The proposed development provides a benefit with solar penetration into the development.</p> <p>The objectives of the B2 – Local Centre zone of which the Subject Site is a part are:</p> <p>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</p> <ul style="list-style-type: none"> • To encourage employment opportunities in accessible locations. • To maximise public transport patronage and encourage walking and cycling. • To permit residential accommodation while maintaining active retail, business and other non-residential uses at street level. • To minimise conflict between land uses within the zone and land uses within adjoining zones. <p>The proposed residential apartment building complies with the objectives of the B2 – Local Centre zone as set out in WLEP 2013. Specifically the development encourages employment opportunities and provides residential accommodation while maintaining active retail uses.</p> <p>The proposed development will help to facilitate a significant increase in the residential population of The Entrance whilst providing variety in the type of housing generally provided in the vicinity of the Subject Site.</p>
(b) <i>The concurrence of the Secretary has been obtained.</i>	The concurrence of the Secretary will be requested during the DA process

Table 3-5 Clause 4.6 (5)

Clause 4.6 (5)	Responses
<i>In deciding whether to grant concurrence, the Secretary must consider:</i>	
(a) <i>whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i>	There are no State or regional environmental planning issues contravened as a result of the additional height proposed.
(b) <i>the public benefit of maintaining the development standard, and</i>	The proposal responds to the strategic intent for The Entrance by providing increased residential development and employment opportunities, while resulting in no additional environmental impact compared to a development that is within the identified height controls.
(c) <i>any other matters required to be taken into consideration by the Secretary before granting concurrence.</i>	At the discretion of the Secretary.

Table 3-6 Clause 4.6 (6)

Clause 4.6 (6)	Responses
<i>Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:</i>	This clause does not apply as the subject site zoning is B2 Local Centre.

Clause 4.6 (6)	Responses
<i>the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or</i>	Not applicable.
<i>the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.</i>	Not applicable.

Table 3-7 Clause 4.6 (7)

Clause 4.6 (7)	Responses
<i>After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).</i>	Council will respond to this provision.

Table 3-8 Clause 4.6 (8)

Clause 4.6 (8)	Responses
<i>This clause does not allow development consent to be granted for development that would contravene any of the following:</i>	
(a) <i>a development standard for complying development,</i>	Not applicable.
(a) <i>a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,</i>	BASIX applies to the proposed development and it will be fully compliant.
(b) <i>clause 5.4,</i>	Clause 5.4 relates to controls pertaining to miscellaneous permissible uses and is not applicable to this proposal.
(ca) <i>clauses 4.1A, 4.3 (2A), 4.4 (2A), 5.3 or 7.11.</i>	Lots 1 and 2 in DP 1219145 are not located within the identified Key Site, therefore the development would not contravene Clause 7.11. Clauses 4.1A, 4.3(2A), 4.4(2A) and 5.3 are not applicable to this proposal.

3.2 The 'Five Part Test'

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 also assessed 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 provides guidance for consideration of Clause 4.6 Variations.

Additionally, the recent case of *Four2Five v Ashfield Council* [2015] NSWLEC 90 has set precedents requiring that all Clause 4.6 variation requests must state additional reasons in addition to compliance with the objective of the control. This Clause 4.6 variation request meets the requirements of that case by

identifying a number of additional reasons as to why the application of Clause 4.3 is considered unreasonable and unnecessary in this circumstance.

3.2.1 Wehbe v Pittwater Council (2007) NSW LEC 827

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, the Hon. Brian Preston, Chief Justice of the Land and Environment Court, set out a new test.

The Chief Justice stated that the assessment process is:

“..First, the Court must be satisfied that “the objection is well founded” The objection is to be in writing, be an objection “that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case”

The permissible height limit on Lot 1 and 2 in DP 1219145 is 31m and the proposed maximum height of the building is 46.15m, resulting in an additional 15.15m. Permissible height on the remainder of the site subject to this DA is 50m. Compliance with the development standard is both unreasonable and unnecessary as it would achieve no additional benefit to the quality of the building nor is there any undue negative impact associated with the additional height of the proposed development, as demonstrated by the attached shadow diagrams for a compliant 31m building within Lots 1 and 2 in DP 1219145 and the 46.15m building as proposed. Lots 1 and 2 in DP 1219145 are unique in that they adjoin both the western and eastern sides of an identified ‘Key Site’, creating the opportunity to increase housing and employment choices within The Entrance.

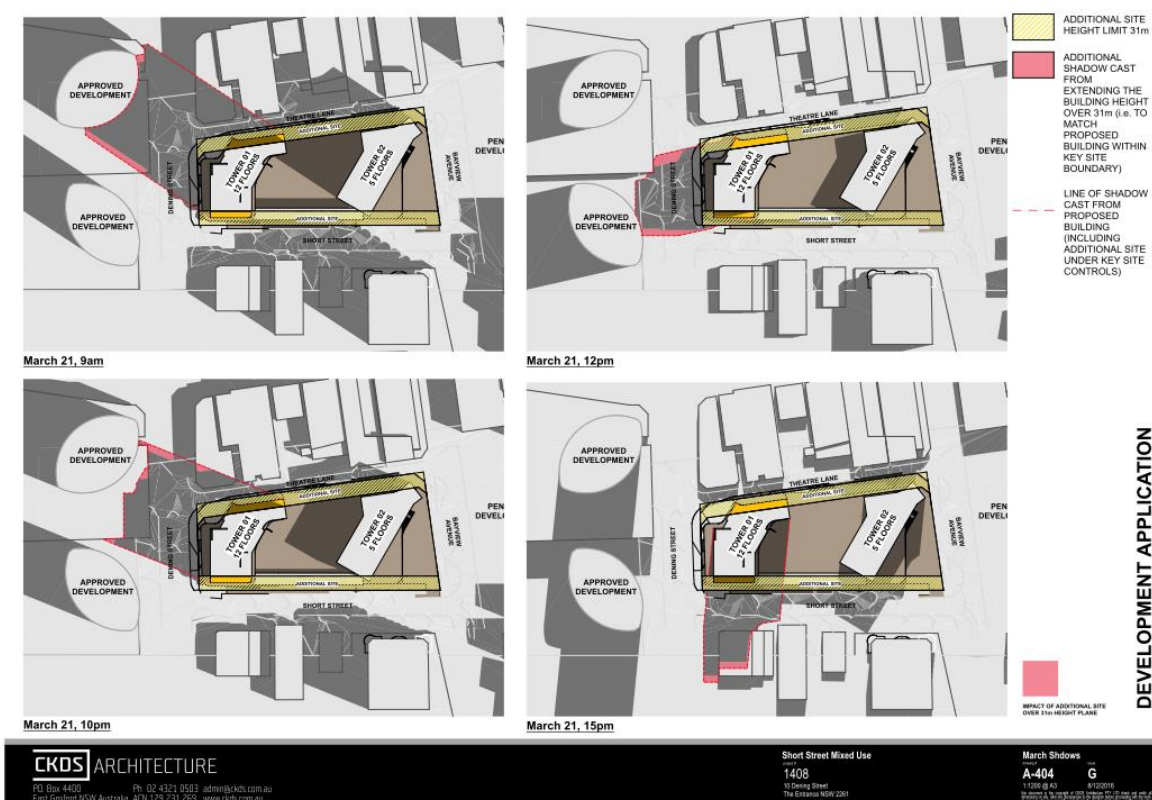


Figure 3-1 March Shadows – additional height

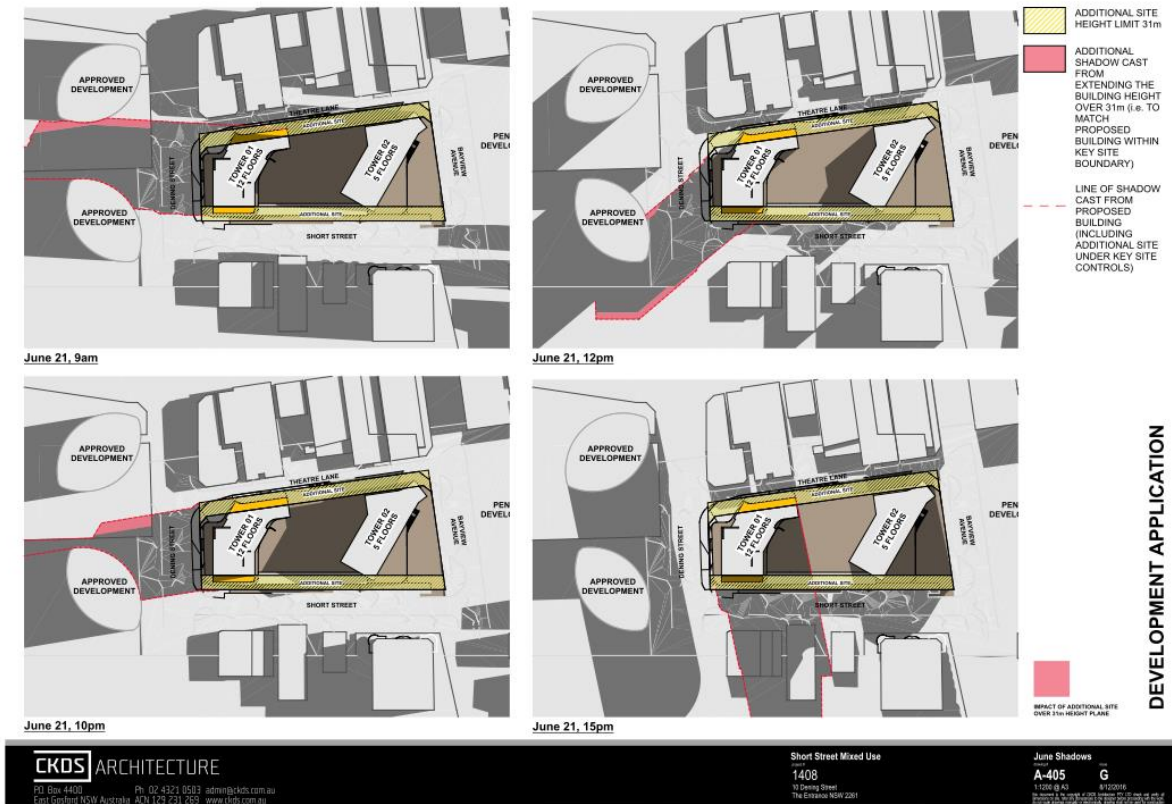


Figure 3-2 June Shadows – additional height

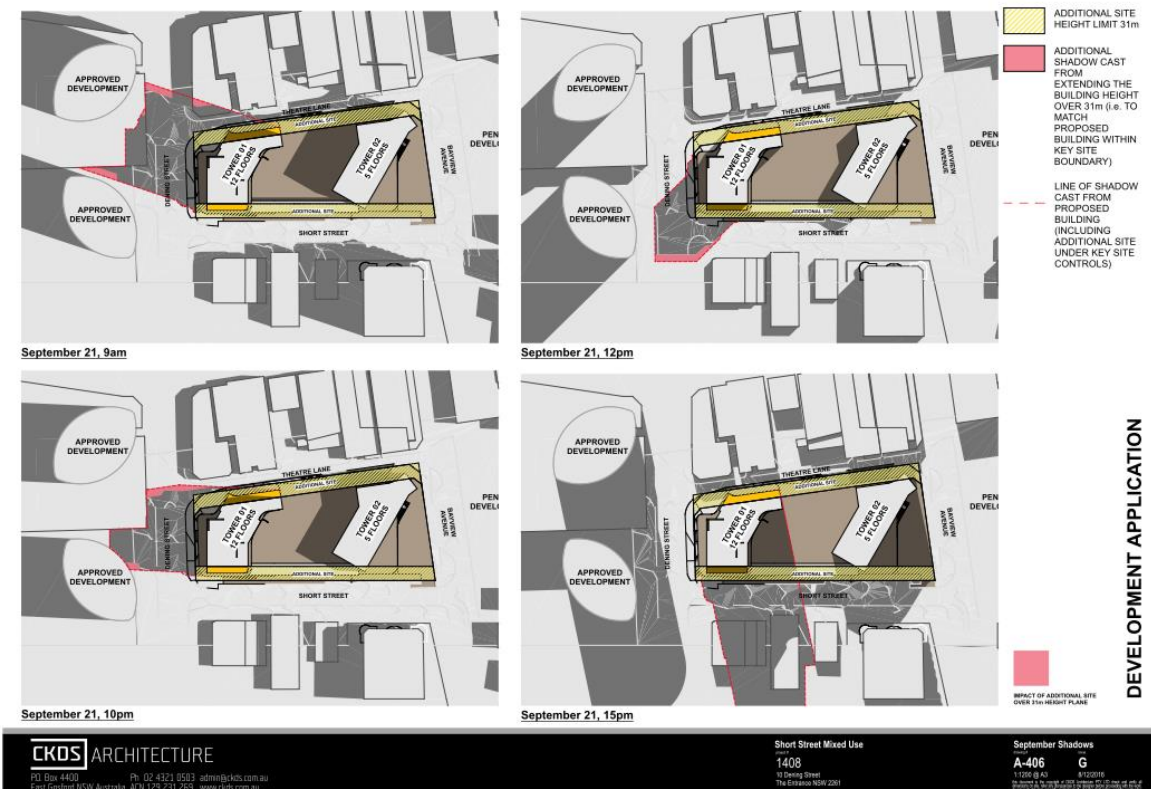


Figure 3-3 September Shadow – additional height

“Secondly, the Court must be of the opinion that “granting of consent to that development application is consistent with the aims of this Policy This matter is cumulative with the first matter The aims and objects of SEPP 1 ... are to provide “flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act”

The relevant policy in this case is Clause 4.6 of the Wyong LEP. It is designed to achieve the following stated objectives:

“(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.”

In this case, an appropriate degree of flexibility is sought to facilitate an increase to building height above that proscribed by the height limit on lots 1 and 2 in DP 1219145. This will achieve superior outcomes for the development by allowing it to take full advantage of the site's position and location. The variation will also provide a better outcome for the community from the development by locating more residents within The Entrance.

“Thirdly, the Court must be satisfied that a consideration of the matters in clause 8(a) and (b) of SEPP 1 justifies the upholding of the SEPP 1 objection: Fastbuck4 v Byron Shire Council (1999) 103 LGERA 94 at 100 and City West Housing Pty Ltd v Sydney City Council (1999) 110 LGERA 262 at 291. The matters in clause 8(a) and (b) are:

(a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and...”

No issues of state or regional planning significance are raised by this non –compliance. Rather it supports the Wyong LEP intentions of encouraging a diversity of housing types and providing greater housing choice and employment opportunities in the area. This development aligns with the objectives within WDCP Chapter 6.1 Key Sites for Denning/ Short Streets Carpark being:

- To incorporate mixed use development comprising retail and commercial, entertainment, community services / facilities, permanent residential and tourist accommodation land uses
- To provide visible activity along all street frontages with retail and commercial uses on the two lower storeys, and residential accommodation on the levels above
- To incorporate high quality coastal design

Consequently the variation does not raise any matter of significance for State or Regional Planning.

...(b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.”

The issue of public benefit is addressed fully in Section 3.2.4 below.

The Chief Justice then advised that there are 5 different methods by which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy”

3.2.1.2 *The objectives of the standard are achieve notwithstanding non-compliance with the standard*

The relevant objectives are identified and discussed below in Table 3-9.

Table 3-9 Assessment of Development Standard Objectives

Clause 4.3	Response
<i>(1) The objectives of this clause are as follows:</i>	
<i>(a) to establish the maximum height limit for buildings to enable the achievement of appropriate development density.</i>	This objective is complied with when Clause 4.3 is considered in the context of clause 4.6. These clauses provide flexibility to vary the maximum height limits in favourable circumstances. Therefore, the effective maximum height limit is flexible. The proposed variation to the maximum height limit is therefore entirely reasonable subject to satisfying the other objectives of the control.
<i>(b) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,</i>	Varying the height limit will permit construction of a high quality mixed use development on sites forming part of a larger identified 'Key Site' and provides an appropriate urban design response to pedestrian connectivity, recreational areas and stepped built form (including the built form of the approved Lakeside Development. The Lakeside Development is located adjacent the site to the south and has an approved height 112m significantly higher than that proposed for this development. Therefore, the objective is achieved only through the height variation.
<i>(c) to ensure that the height of buildings protects the amenity of neighbouring properties in terms of visual bulk, access to sunlight, privacy and views.</i>	<p>This objective is achieved because the site is sloping. The exceedance is minimal on the east and western elevations of the southern building to the upper levels of the building. Consequently, there will be negligible impact on the level of exposure to the sky for surrounding dwellings.</p> <p>Shadow diagrams have been prepared to demonstrate that a building compliant with the 31m height limit on Lots 1 and 2 in DP 1219145 would produce the same overshadowing for adjacent dwellings as the 46.15m building proposed. Consequently, the objective would be no better achieved by smaller sections of the building on those two allotments than it is by the proposal.</p> <p>It is also noted that this area is undergoing a transition to increased height of buildings and higher densities and that some increased overshadowing is to be expected as part of this transition. There is no detrimental effect on the amenity of existing properties.</p>

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

The underlying purpose of the standard is to limit the scale of development, however this is in conflict with the objectives of the Settlement Strategy and the Strategic Context of The Entrance CBD which are attempting to facilitate greater residential densities and economic activity. Consequently, the underlying objective of the height control is superseded to a significant degree and not relevant to the proposed development. Therefore, compliance with this development standard is not necessary.

3.2.1.4 The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Compliance with the height controls would result in the removal of up to five (5) floors of the building outside of the mapped Key Site Area, vastly reducing the yield, or require a complete reconfiguration of the development. This will reduce the pedestrian friendly areas as the buildings occupy more floor space to achieve the current yield within a smaller building footprint. Alternatively increasing height to both Towers 1 and 2 within the Key Site, which would result in a less desirable urban design outcome for the site. Therefore, it is considered unreasonable to require compliance with the height control in this case.

3.2.1.5 *The compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

It is noted that development applications for residential flat buildings have been approved at 14 The Entrance Road and 2 Ocean Parade. Clearly the area is in transition to increased height of buildings and higher density. The building height limit applied by Clause 4.3 is inadequate and inappropriate for the addition to the site (approved) that is otherwise entitled to a 50m height limit and is appropriately sized and located for a tall development. Applying the 31m height limit strictly to the proposed additional areas of the development site when it does not negatively impact on surrounding areas would result in a poor outcome for the site and potentially higher built form elsewhere to ensure no reduction in the capacity of the site for residential development. The additional height relates only to 6.9% of the overall proposed built form, a minor component of the proposal. This control is clearly unreasonable and inappropriate and a variation is justified.

3.2.2 Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46

The following principles were identified for consideration in this matter.

3.2.2.1 *Is the planning control in question a development standard?*

Clause 4.3 Height of Buildings is explicitly identified as setting a development standard. It is located within “Part 4 Principal development standards” of the Wyong LEP. The clause is framed as a development standard rather than a prohibition, and a note within the clause states directly that clause 4.6 may provide exceptions to it under certain conditions.

3.2.2.2 *What is the underlying object or purpose of the standard?*

The purpose of Clause 4.3 is identified in the clause objectives which are individually addressed above in Table 3-9. In summary, the objectives are to set height limits for buildings which preserve amenity and light in public space, encourage a suitable transition of densities and high quality urban form, and ensure taller buildings are appropriately located.

3.2.2.3 *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 Act?*

The objects of the Act identified in this question are shown below.

- (i) 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,*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the development standard would reduce the yield of the site and compromise the financial viability of the project to the point where it may not proceed. This would result in a lost opportunity to provide housing in the Entrance, and by extension within the greater Sydney region, or taller building throughout the remainder of the site which would have a greater impact on solar access and loss of views. Compliance with the development standard would therefore, not promote the social and economic welfare of the community. Further, the development would not adversely impact on the conservation of natural or artificial resources.

The subject sites are identified for higher density development as supported by the application of Clause 4.3, and the neighbouring site (Short Street Carpark) being identified as a ‘Key Site’ further enhances the vision for taller high density development. The range of high density residential and commercial uses are permissible with consent in the B2 zone and conform with the strategic planning context for The Entrance. Therefore, this proposal is being made in coordination with the planning context and achieves the highest and best use of the site in the current economic conditions. Therefore, compliance with the development standard would not achieve the promotion of coordinated, orderly and economic use of the site.

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

The identification of the “Key Sites” did not consider expansion of, or amalgamation of lots involving adjoining former road reserves for inclusion into the Key Sites. Limiting the height to part of the overall site is considered unreasonable when the project and design is viewed holistically. A reduction in height to part of the development would result in a larger building footprint, subsequently reducing the pedestrian connectivity to Denning Street and passive recreational areas. An alternative is to increase Tower 1 to 50m and include additional levels on Tower 2 which introduces impacts upon adjoining sites and is considered to result in an inferior urban design outcome compared to this proposal. Both passive recreational areas and pedestrian connectivity are important urban design responses for development on this site, as is the stepped height between the two towers to enhance view sharing to the north. The compliant building would produce the same or similar impacts on view sharing and overshadowing as the proposed building, as demonstrated by the included shadow diagrams which indicate minimal impact for a 31m building in comparison to the 46.15m building proposed.

3.2.2.5 *Is the object well founded?*

Given the reasons set out above, the objection is considered to be well founded.

3.2.3 Four2Five v Ashfield Council [2015] NSWLEC 90

This case established that applicants for a Clause 4.6 variation must demonstrate that the existing control is unreasonable, and that appropriate environmental planning grounds particular to the development must be supplied for the variation.

As demonstrated above, the height control standard applied by clause 4.3 is not reasonable on this site due to the significant slope across the site imposing an awkward and uneven height limit on the building. Compliance would result in an undesirable urban design outcome with the buildings requiring a larger building footprint at the detriment of pedestrian connectivity and passive recreation areas or deletion of units, resulting in a significantly reduced yield, which would be counter to the strategic intent.

The height control did not anticipate or make provision for addition of sites to the identified Key Sites, involving adjoining former road reserves and therefore the variation is necessary.

In terms of environmental planning grounds, the Entrance is the focus of attempts to encourage development and growth by Central Coast Council. Council has introduced measures such as LEP Clause 7.11 identifying Key Sites in which height controls have been increased within the CBD. The application is an appropriate response to this environmental planning context.

3.2.4 Is the proposal in the public interest?

The public benefit attributed to this proposal is that it increases dwelling supply, housing choice, employment opportunities and promotes the orderly and efficient use of land. The proposed development is ideally located in proximity to public transport networks, local employment, shops and retail services, and community facilities. The proposal is considered to be aligned to the public interest as it will assist with meeting the dwelling targets set out in Central Coast Regional Plan 2036 as a result of the growing population and assists with housing affordability.

This Statement, the accompanying plans and technical reports demonstrate that no unreasonable built form, environmental, amenity, social or economic impacts will result from this proposal. On balance this project is therefore considered to be in the public interest.

4 Conclusion

In conclusion this proposed Clause 4.6 Exceptions to Development Standards variation to the height limit provided by Clause 4.3 is well substantiated.

The height limit applying to the site is inappropriate and unreasonable given the 50m height limit on the Key Site adjoining the two subject sites, which they now form a part of. In addition strict compliance with the height control will result in poor architectural and urban design as a larger footprint would be required resulting in less pedestrian connectivity and passive recreational areas. Further, compliance with this standard would produce an inappropriate architectural outcome. The objectives of clause 4.3 would be defeated by strict compliance with the height controls.

The scale of the variation is not unprecedented given the recent approval of Lakeside Plaza, DA 1080/2014 by the Hunter and Central Coast JRPP based on a recommendation for approval by Council. Therefore, a clear precedent has been established for the variation of height controls consistent with the “Five Part Test” which this proposal satisfies.

The required encroachment of height is only in the order of 6.9% of the built volume.

Finally, Clause 4.3 defines development standards for the purposes of variation by Clause 4.6. The height limit on the subject sites is controlled by this clause and can be varied.

There is a strong public interest in the economic development of the Entrance which will be facilitated by this development at its proposed scale.