



Clause 4.6 Variation Request Building Height Development Standard

84-90 Atchison Street,
Crows Nest

Submitted to North Sydney Council
On Behalf of SPV 86 Dunning Avenue Pty Ltd

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1. Introduction

This Clause 4.6 variation report accompanies a Development Application submitted to North Sydney Council for a residential flat building development containing thirty-five (35) apartments.

The purpose of this Clause 4.6 variation report is to address a variation to the maximum building height in Clause 4.3 of the North Sydney Local Environmental Plan 2013 (NSLEP). The subject site is Nos. 84-90 Atchison Street, Crows Nest (Lots 8, 9, 10 & 11 Section 6 in DP 2872).

2. What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the North Sydney Local Environmental Plan 2013 (NSLEP).

3. What is the zoning of the land?

The zoning of the land is R4 High Density Residential under the NSLEP, as shown below.

Land Zoning Map
- Sheet LZN_001

Zone	
B1	Neighbourhood Centre
B3	Commercial Core
B4	Mixed Use
E3	Environmental Conservation
E4	Environmental Living
IN2	Light Industrial
IN4	Working Waterfront
R2	Low Density Residential
R3	Medium Density Residential
R4	High Density Residential
RE1	Public Recreation
RE2	Private Recreation
SP1	Special Activities
SP2	Infrastructure
UL	Unzoned Land

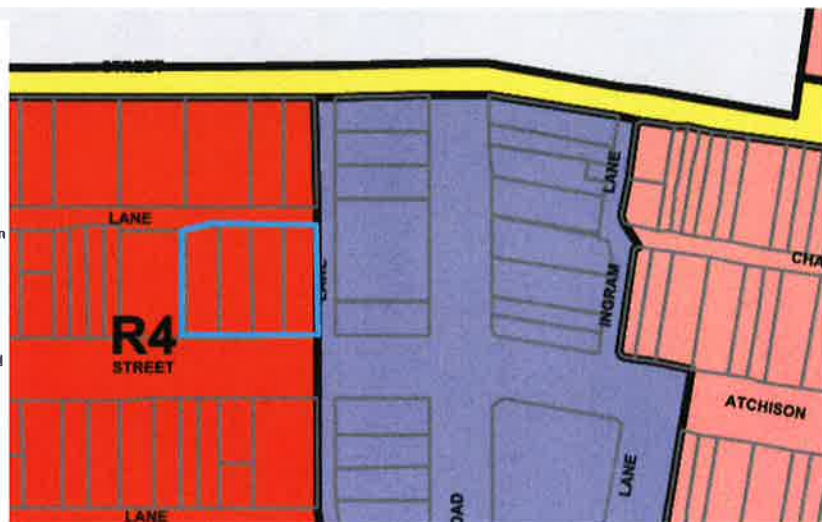


Figure 1. Extract of Land Zoning Map under the NSLEP. The subject site is circled in blue.

4. What are the objectives of the zone?

The objectives of the R4 High Density Residential are:

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.

To encourage the development of sites for high density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.

To ensure that a reasonably high level of residential amenity is achieved and maintained.

5. What is the development standard being varied?

The development standard being varied is the 'maximum building height'.

6. Under what clause is the development standard listed in the EPI?

The subject development standard is listed under Clause 4.3(2) of the NSLEP.

7. What are the objectives of the development standard?

The objectives of the building height development standard are set out below:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,
- (b) to promote the retention and, if appropriate, sharing of existing views,
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,
- (e) to ensure compatibility between development, particularly at zone boundaries,
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.

8. What is the numeric value of the development standard in the EPI?

The subject site has a maximum allowable building height of 16 metres as shown below:

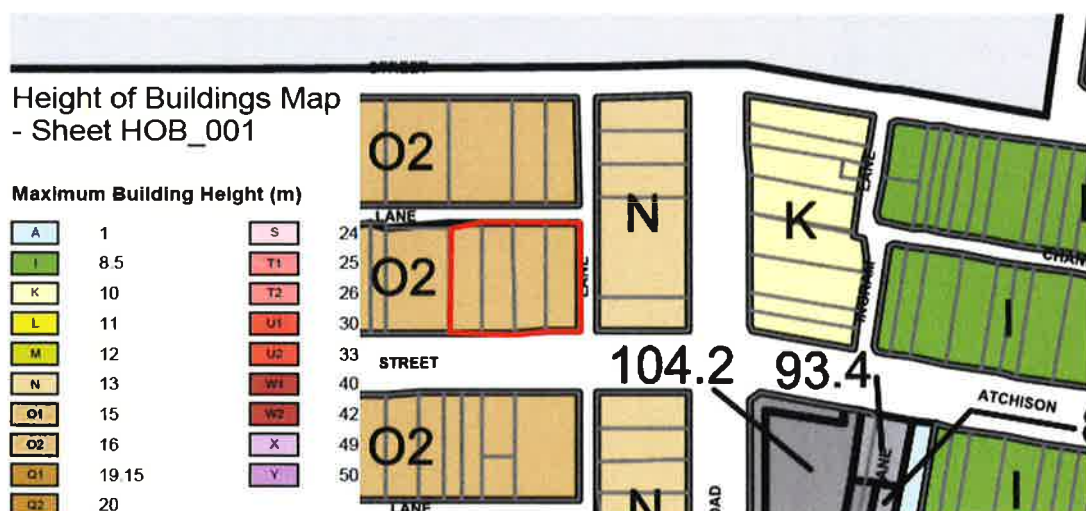


Figure 2. Extract of Height of Buildings Map under the NSLEP showing site, as outlined in red, with a 16m height limit.

9. What is proposed numeric value of the development standard in the DA?

As demonstrated on the plans prepared by Bureau of Urban Architecture, the proposal seeks to provide a maximum RL of 95.15 (residential flat building), which represents a maximum building height of 16.85 metres as measured from ground level (existing). This is a breach of the standard by 0.85m (i.e. 5% variation of the standard is sought).

The plans demonstrate that the bulk of the built form of the proposal from the ground floor to Level 4 is within or below the maximum building height limit. The breach of the standard relates to two lift over-runs. Figure 3 to Figure 7 and demonstrate the extent of the breach of the height standard.

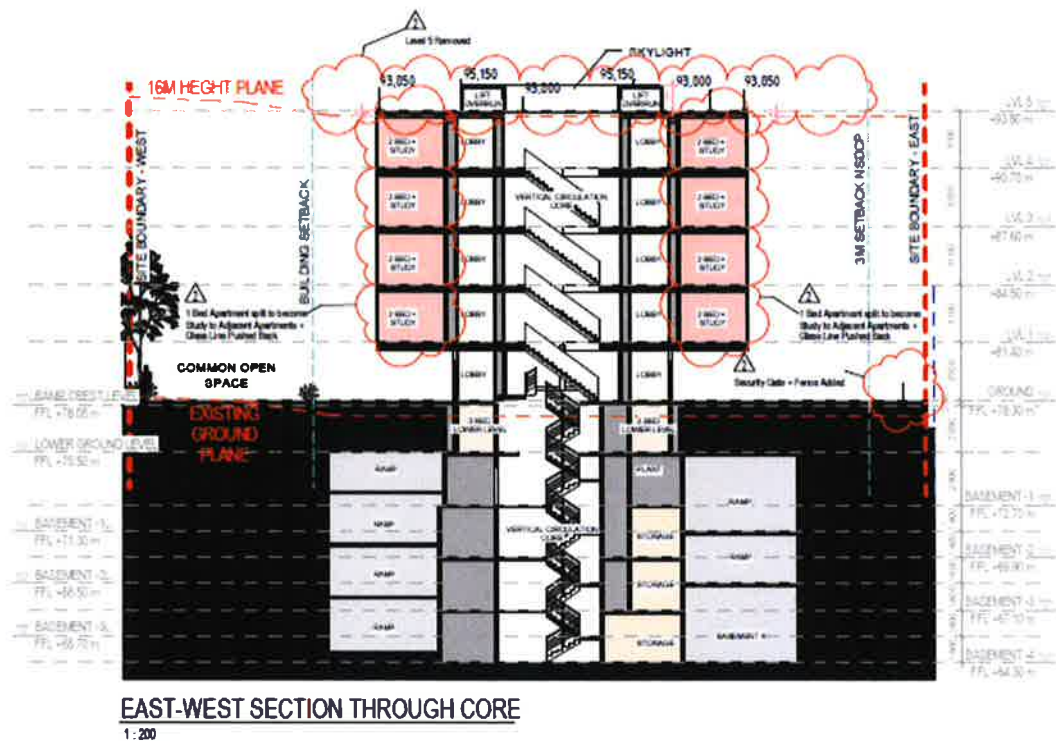
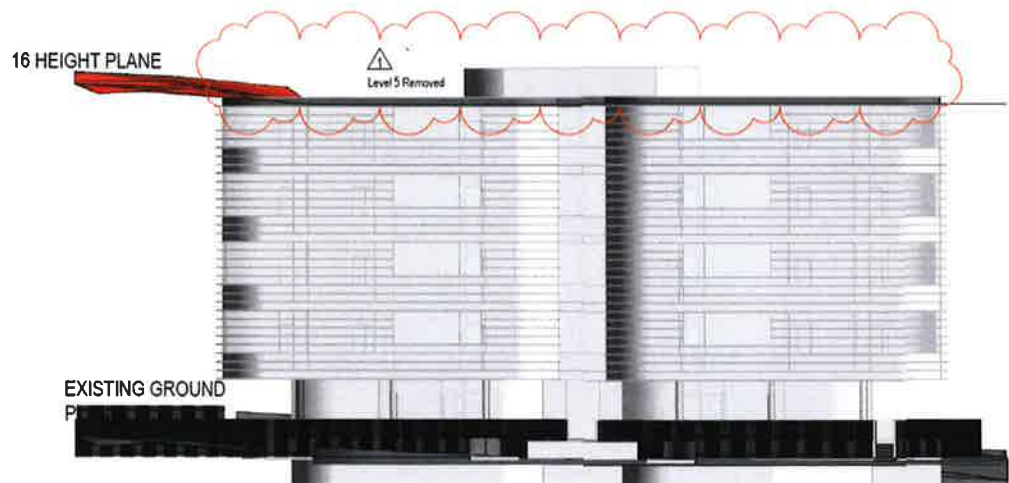


Figure 3. Maximum height for the proposal. Height is shown to exceed the 16m height plane by a maximum 0.85m.



HEIGHT PLANE ELEVATION - ATCHISON LANE

Figure 4. Height limit as depicted by the red line. The view from Atchison Lane is shown.



Figure 7. Height limit as depicted by the red area and shown in 3-dimensions, showing the non-compliant aspects of the proposal.

As shown in the plans prepared by Bureau of Urban Architecture, , the lift overruns are centrally located on the roof and would be largely unseen from street level.

10. Matters to be considered under Clause 4.6 of the relevant EPI

The following table provides a summary of the key matters for consideration under Clause 4.6 of the NSLEP 2013 and a response as to where each is addressed in this written request:

Requirement/Subclause of Clause 4.6	Response/Comment
<p>(1) The objectives of this clause are as follows:</p> <p>(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,</p> <p>(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>It is key to note that the objectives of the clause are to provide flexibility in applying development standards in that so doing a better planning outcome ensues.</p>
<p>(2) Development consent may, subject to this clause, be granted for development even though the 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.</p>	<p>The maximum building height development standard under clause 4.3(2) is not expressly excluded from operation of this clause.</p>
<p>(3) 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:</p> <p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p> <p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>This written request seeks to justify the variation by demonstrating (a) is achieved (refer to Section 11 below), and (b) is achieved (refer to Section 12 below).</p>
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Director-General has been obtained.</p>	<p>This written request addresses all requirements of subclause (3).</p> <p>As set out in Section 13 of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.</p> <p>Concurrence is assumed but is a matter to be determined by the consent authority.</p>
<p>(5) In deciding whether to grant concurrence, the Director-General must consider:</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p> <p>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.</p>	<p>Potential matters of significance for State or regional environmental planning are addressed in Section 14 below.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in Section 15 below.</p> <p>Concurrence is a matter to be determined by the consent authority.</p>
<p>(6) 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.....</p>	<p>Does not apply.</p>
<p>(7) 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).</p>	<p>This is a matter for the determining authority.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following....</p>	<p>Does not apply to the site/proposed variation.</p> <p>It is noted that subclause (8)(ca), which limited variations to 3 metres, ceased to have effect on 31 December 2015 pursuant</p>

Requirement/Subclause of Clause 4.6	Response/Comment
	to clause 4.6(8A). Consequently, there is no quantitative limit on variations to the standard.

11. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, while this can still be considered under this heading, consideration of the remaining four (4) ways in *Wehbe* remains warranted.

The following discussion provides a response to each of these five (5) "tests".

Test 1. The objectives of the standard are achieved notwithstanding noncompliance with the standard;

The contentions below demonstrate how this proposal is consistent with the objectives in Clause 4.3:

(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,

While the site slopes in an east to west direction with an approximate fall of 1.50m, this minor slope does result in a varied height breach.

The elements that breach the height standard have been setback from the street frontages and are not highly visible from the public domain. The breach of the height standard is not inconsistent with this objective.

(b) to promote the retention and, if appropriate, sharing of existing views,

Due to the relatively modest size and substantial setbacks and separation distances of the top level, view sharing would not be compromised. Accordingly, the objective is achieved notwithstanding non-compliance with the standard.

(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,

The shadow diagrams accompanying the development application (drawing A131-A133) demonstrate that overshadowing associated with the variation is relatively minor. The orientation of the building ensures that shadows fall principally on the road, and where they do fall on the properties opposite, only affect the frontages of the buildings for short periods and exceed the minimum solar access requirements.

(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,

The proposed development is designed to provide privacy between the residents of the RFB, as well as maintain privacy for the existing dwellings around the subject site.

The area of the building that exceeds the height limit does not result in loss of privacy to the users of the building or surrounding existing dwellings. This RFB exceeds the minimum separation requirements between buildings under SEPP 65 and the NSDCP

(Figure 8).

The objective is met notwithstanding the breach of the height standard.



Figure 8. The visualised proposal from the corner of Atchison Street and Willoughby Road.

(e) to ensure compatibility between development, particularly at zone boundaries,

The proposed building will be perceived at close range as a 5 storey, 'height compliant' building at its street wall. This is consistent with new and approved development in its vicinity. Some variations to height have been approved as they relate to lift overruns. The height variation is associated with two lift overruns. These lift overruns are relatively small in profile and well setback and designed to not be significantly different to those typical roof features that Council has approved on buildings in this locality. The proposal, inclusive of the varied height, is therefore compatible with surrounding development.

In addition, the proposal responds positively to the adjoining mixed use zone, with a form and site coverage that provides a transition into this area of High Density residential development. An appropriate relationship to the residential development to the west is also achieved through design measures such as an articulated façade, incorporation of varied materials, landscaping, building separation, and privacy measures.



Figure 9. The visualised proposal from Atchison Street, showing effective 5 storey street frontage

(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.

The proposal site is within the St Leonards / Crows Nest Planning Area. According to North Sydney Council, the desired future character of the locality is to provide a predominant mix of medium high-rise, commercial and residential developments.

The proposal is of an appropriate scale and density that is consistent with Council's character statement for the Crows Nest precinct. The modest additional height is a necessary trade off to achieve the significantly improved design quality embodied in the proposed development.

The area that breaches the height standard is limited to two lift over-runs. These elements are situated centrally in the development, and are setback from the edges of the building. As such, these elements are inconsequential when viewed from the adjacent public domain and do not result in significant additional scale to that anticipated by the controls and approved by Council in the vicinity.

Aspects of the design that minimise the overall perceived building mass from the street are:

- Pedestrian entries on Atchison Street and Atchison Lane with a change in building materiality visually halve the building at street level and contribute to the fine grain in the development.
- Three metre setbacks from Atchison Street, Hume Lane and Atchison Lane enable the building to be coherently read from each street.
- Landscaping characterises each street frontage and provides a fine grain at street level which further mitigates the perceived scale of the building
- The common open space on the west side of the building is enhanced by extensive landscaping and supports the perceived permeability of the site and minimising the perceived bulk at Atchison Street.

The remainder of the building has been designed to respond to the anticipated built form and character of the area established by Council's controls for the zone.

Therefore, it is considered that the breach of the height limit does not result in any inconsistency with the anticipated scale and density of the site as envisaged by the controls.

In conclusion, in this instance it is considered that the objectives of the standard are achieved notwithstanding the non-compliance with the height standard.

Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

We do not rely on this reason.

Test 3: The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

We do not rely on this reason.

Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The area that exceeds the height standard relates to two lift over-runs. It can be argued that Council has virtually abandoned the standard in as much as it relates to lift overruns as a result of granting consent to other developments within the LGA and in the vicinity for breaches of a similar nature, including the subject site. Various examples where consent has been granted in the area with a variation to the standard are as follows:

- 84-90 Atchison Street, Crows Nest (DA 363/14): The subject application breached the standard by approximately 2.8m and related to the lift over-run located on the roof as well as a portion of the fifth residential level.
- 53-57 Atchison Street, Crows Nest (DA138/16): The subject application breached the standard by 3.24m (including the roof 'plant' and equipment) above the standard. The proposed development included a breach that related to the provision of communal open space in the form of a roof top terrace and a lift overrun. The Council considered the breach acceptable, and the DA was approved.
- 128 Military Road, Neutral Bay (DA 161/14): The subject application breached the standard by approximately 3.4m (including the roof 'plant' and equipment) above the standard. The proposed development included a breach that related to the provision of communal open space on the roof, and access to this communal open space. The Council considered the breach acceptable, and the DA was approved.
- 7-19 Albany Street (DA 167/14): This subject application breached the standard by approximately 2.8m (including the roof 'plant' and equipment) above the standard. The development included a breach that involved a portion of the building being a residential level, as well as roof top plant and equipment. Despite the proposal breaching the height of the recently gazetted instrument, the Council determined that the proposed breach was reasonable and supported the proposal.
- 222 Pacific Highway (DA 279/14): This subject application breached the standard by approximately 4m. This development included a whole storey above the standard, and included also the lift over-run as the maximum breach. The Council considered the breach acceptable, and the DA was approved.
- 231 Miller Street (DA 453/14): This subject application breached the standard by up to 6.22m, which was the maximum breach, and related to the lift over-run. The Council considered the breach acceptable, and the DA was approved.
- 106-108 Parraween Street (DA 260/14): This subject application breached the height by approximately 3m, and the breach included solar panels located on the roof. The Council considered the breach acceptable, and the DA was approved.
- 162-166 Willoughby Road (DA 233/13): This subject application breached the standard by approximately 1.61m of the NSLEP 2001. The development included a breach that involved a portion of the building being a residential level, as well as roof top plant and equipment. The Council (Independent Planning Panel) considered the breach acceptable, and the DA was approved.

For the above reasons, it is considered that the standard, relating to lift over-runs and minor elements of the building, has been virtually abandoned as a result of these other approvals.

The current proposal, whilst relating to two lift overruns, has been designed in such a way as to have no greater perceived scale or impact than many of the features that Council has approved elsewhere. Indeed, the design qualities of the building elements that exceed the standard in this case, are significantly better than most typical roof elements on other buildings.

Test 5: The compliance with 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.

We do not rely on this reason.

For the reasons as set out above, it is considered that compliance with the standard is unreasonable and unnecessary in the circumstances of the case.

12. Sufficient environmental planning grounds to justify the contravention

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development.

A height-compliant development would result in a marginally smaller scale of building, but the only potential adverse environmental planning impacts arising from the proposed variation relate to visual, privacy and shadow impacts.

In this case, the visual impacts are minor given the breaches are not highly visible from the adjacent public domain, adequate setbacks and design features mitigate any privacy concerns and the additional resulting shadows are minor and do not result in any adverse impacts on surrounding residential properties.

The SEE accompanying this DA provides robust justification to support the overall height, bulk and scale of the development and concludes that the outcome is appropriate on environmental planning grounds.

The most compelling environmental planning ground in support of this variation is demonstrated by comparing the development outcomes achieved by this proposal to the current development approval for the site that is able to be immediately constructed. We note that the approved building involves a variation to the building height standard also.

Compared to the approved development (DA363/14), this proposal represents a significant improvement for the subject site in terms of its built form. This has been achieved by reducing the foot print of the building by internal efficiencies and clever design resolution that has provided opportunities for a significantly enhanced landscape setting. This 'compaction' of the building footprint has necessitated a modest increase in building height. It is considered the benefits in terms of the quality of the built and landscape form of the building more than offset any perceived impacts associated with the additional height.

The building presents as a 5 storey building to the street lift overruns are well set back and not highly visible. There are no adverse impacts resulting from the height variation in terms of overshadowing, privacy, view loss or the like.

The applicant considered there to be opportunities for a development with superior design, amenity and commercial outcomes than the approved development and commissioned BUA to realise those better outcomes. We consider that this has been achieved.

A detailed comparison of key matters under the DCP and SEPP 65 is in Appendix 2 of the SEE, and is summarised below in diagrams showing the combination of site coverage (purple), unbuilt upon area (lime green) and landscaped area (dark green) for the approved and proposed schemes.

Other environmental planning grounds to justify the breach of the standard are:

- The area that exceeds the development standard is not highly discernible as viewed from the public domain as it has been setback from the edges of the building and located centrally on the roof. The proposed elements that breach the height standard do not significantly contribute to the bulk, scale or density of the building; and

- There are no adverse environmental impacts as a result of the proposed breach of the standard.

We consider that the comparisons above clearly demonstrate the better planning outcome achieved by this variation and provides adequate environmental planning grounds to justify the variation.

13. Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest because it is consistent with the objectives of the particular standard, and the objectives for the relevant zone in which the development is proposed to be carried out.

The objectives of the standard have been addressed in Section 12 above and are satisfied.

The objectives of the R4 High Density Residential zone are addressed below:

- To provide for the housing needs of the community within a high density residential development.

The proposed development contributes to the housing needs of the community through the provision of a high-quality high density residential development.

The proposed exceedance of the height standard adds to the amenity of the two level dwellings on the upper level of the building and is therefore consistent with this objective.

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

The proposed development comprises a considered mix of dwelling sizes and types that are based on market demand. The proposed exceedance of the height standard adds to the stock of larger (2 bedroom) dwellings in a highly accessible area. The variety of dwelling sizes contributes to the housing mix delivered by the North Sydney LGA and assists in achieving the dwelling supply as discussed in the draft North District Plan and the Plan for Growing Sydney.

The proposed exceedance of the height standard is consistent with this objective.

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

The proposed RFB is a permissible use within the zone. The proposed exceedance of the height standard does not affect consistency with this objective.

- To encourage the development of sites for high density housing if such development does not compromise the amenity of the surrounding area or the natural and cultural heritage of the area.

The proposal ensures a building form, type and scale compatible with the character of the surrounding built environment and does not detract from the amenity enjoyed by the nearby residents or the existing quality of the environment. The building has been designed with consideration of the existing buildings on adjoining sites as well as their potential future redevelopment. In this respect, windows and openings have been appropriately located to maintain visual and acoustic amenity between these sites. The four three-bedroom apartments are setback from the edges of the residential flat building and include landscape elements to mitigate any residual amenity impacts associated with the proposal. This is discussed in detail in the Bureau of Urban Architecture's SEPP 65 Design Statement and ADG Compliance Table in Appendices 3 and 4.

Any view and shadow impacts are minor given the area that breaches of the standard is not highly visible from the public domain and does not cause any adverse shadowing to residential properties.

The proposed exceedance of the height standard does not affect consistency with this objective.

- To ensure that a reasonably high level of residential amenity is achieved and maintained.

A height compliant scheme (not including the lift over-run and the living areas of four three-bedroom apartments) would reduce the amenity of the four three-bedroom apartments.

The proposed exceedance of the height standard is consistent with this objective.

Conclusion

The objectives of the zone, as demonstrated above, as well as the objectives for the standard, as demonstrated under Section 12, have been satisfied. Therefore, the variation to the height standard is in the public interest.

14. Matters of state or regional significance (cl. 4.6(5)(a))

There is no identified matters of state or regional significance arising from varying the development standard as proposed by this application.

15. The public benefit of maintaining the standard (cl. 4.6(5)(b))

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”.

There is no public benefit in maintaining strict compliance with the development standard given that there are no un-reasonable impacts that will result from the variation of the height standard by a maximum of 0.85m (i.e. 5% variation of the standard).

Therefore, there is no public benefit in maintaining the standard.

16. Is the variation well founded?

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the RLEP 2014, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves and is consistent with the objectives of the development standard and the objectives of the R4 zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The proposed variation will not hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*; and
- The contravention does not raise any matter of State or Regional Significance.

The variation is therefore considered well founded.