



CLAUSE 4.6 VARIATION STATEMENT

MAXIMUM BUILDING HEIGHT – CLAUSE 4.3 OF BLACKTOWN LEP 2015

Demolition of Existing Buildings and Construction of residential flat building over basement parking

11-17 George Street, Seven Hills

Prepared for: Urban Link Pty Ltd

Ref. M190235

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Clause 4.6 Variation Statement – Height of Buildings (Clause 4.3)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Blacktown Local Environmental Plan 2015 to accompany submission of amended plans in relation to Development Application No. JRPP-16-03312. The revised plans seek consent for a demolition of existing structures, tree removal, and the construction of a six (6) storey residential flat building consisting of 81 residential units with 2 basement car parking levels at Nos. 11-17 George Street, Seven Hills ('the site').

2. PROPOSED VARIATION

Clause 4.3 of BLEP 2015 prescribes the maximum building height for the site and refers to the *Height of Buildings Map*. The relevant map [sheet HOB_014] indicates that the maximum building height permitted at the subject site is 20m. Building height is defined as:

"building height (or height of building) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The proposed building is below the maximum 20m height limit prescribed by Clause 4.3 with the exception of the lift overrun, shade structure, two stairs cores and balustrade/corner roof element over Unit 5.05. The maximum building height is to the lift overrun at RL68.6 which represents a variation of 3.6m or 18%, the remaining points of variation sit below.

The proposed height exceedance is also demonstrated by height blanket diagrams in Figures 2 and 3 below. Figure 3 illustrates the extent of non-compliance in plan form and confirms that they represent a small portion of the overall building footprint. The non-complying elements are small, do not contribute to additional floor area or amenity impacts are predominantly located at the centre of the building and are required to facilitate access to and weather protection for use of the roof top communal open space.

The maximum building height under Clause 4.3 is a "development standard" to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

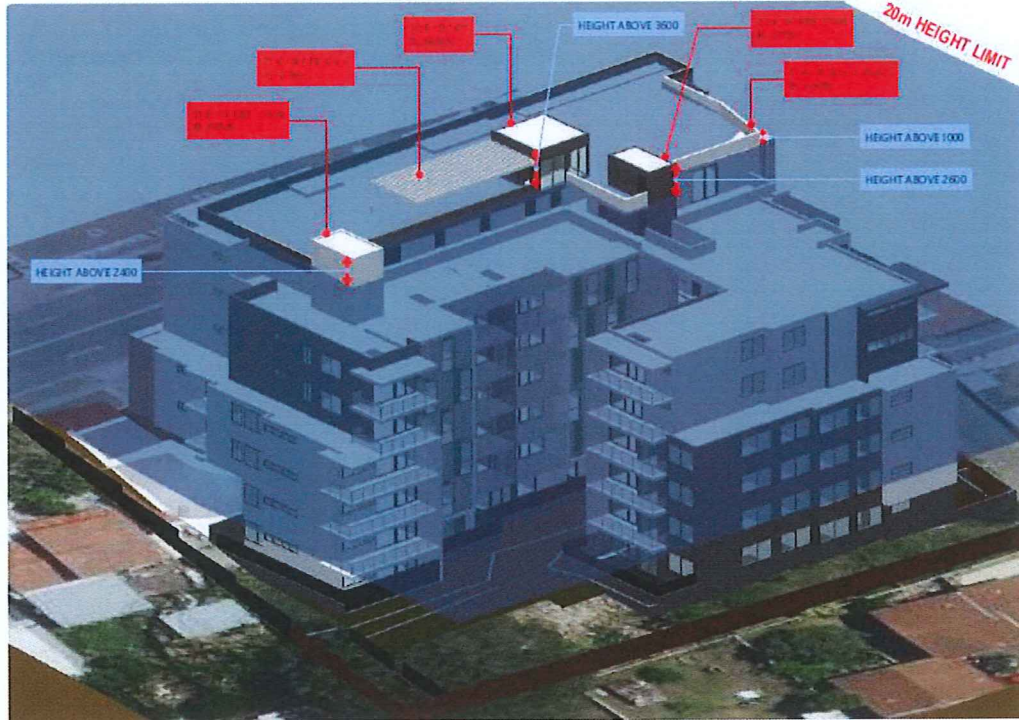


Figure 1 Height blanket diagram including maximum RL's. Viewed from south-east



Figure 2 Height blanket diagram viewed from corner of George and Clancy Streets

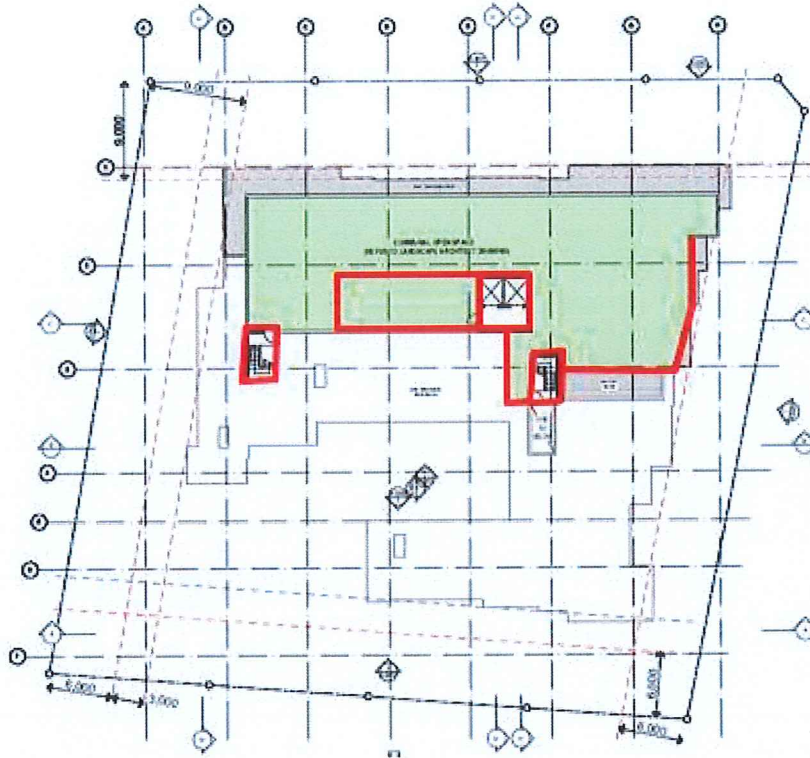


Figure 3 Roof plan indicating location and size of non-complying elements - outlined in red)

3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

- (1) *The objectives of this clause are as follows:*
 - (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.*
- (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.*
- (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:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

(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:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) 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.

Note. When this Plan was made it did not include all of these zones.

(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).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) 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,

(c) clause 5.4,

(ca) clause 6.1 or 6.2,

(cb) clause 4.1C.

It is noted that Clause 4.3 is not "expressly excluded" from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

4. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In *Wehbe v Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
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;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in Section 7 of this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, the following planning grounds are submitted to justify contravening the maximum building height:

1. The non-compliance affects a small portion of the building and relates to one lift overrun (3.6m), two fire stair exits (2.4-2.6m), shade structure (2.8m) and a small portion of the balustrade to the roof top communal open space (1m) which sits above the roofline to Unit 5.05, marginally above the maximum 20m HOB. The breach ranges in height from 1m-3.6m (5%-18%) and only relates to the small projections required for access, safety, and weather protection. The amended proposal ensures that the point of maximum breach (3.6m) is set in the middle of the building away from the road property boundaries.
2. The proposed height non-compliance relates to parts of the building that do not contribute to calculable floor space, it merely provides lift access, safety and weather protection for to the roof top communal terrace for equitable use by future occupant of the development;
3. The height breach to the lift overrun, fire exit stairs and balustrade will not be readily visible from George Street or Clancy Lane.
4. It is considered that there is an absence of any material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on the desired future character of the area which will be characterised by similar 20m high residential flat buildings. Noting a height variation has been supported for a development west of the site on Olive Street.
5. The non-compliant portions of the building create minimal additional shadow impacts in midwinter to the neighbouring sites, compared to a compliant development scheme. The shadow cast from the non-compliant roof structures falls within the subject site and not onto neighbouring sites due to their location at the centre of the building and away from the property boundaries. The shadow that falls on neighbouring sites is from the compliant portions of building, meets the minimum daylight and sunlight requirements for neighbouring sites and is therefore what would be reasonably expected of development on the subject site given the height and density controls applicable.
6. The non-compliant portions of the building are not useable habitable floor area, are located away from the building edge and would not contribute to any loss of privacy.
7. The proposed development meets the objectives of the development standard and meets the objectives of the R4 High Density Residential zone (as further detailed in Section 7 below);
8. The height non-compliance is partly a result of the fall across the consolidated sites from George Street to the rear boundary. The design seeks to achieve unimpeded access for all residents to the roof top communal open space. Given the location of the lift within the front part of the building, where the COS is located, exceedance of the height limit is unavoidable in achieving unrestricted access for all residents and visitors.
9. There is significant benefit to residents through the provision of rooftop open space; the proposed lift and lift overruns are necessary to provide equitable access to this space, balustrading is necessary for safety and the shade structure is necessary for weather protection. To insist on strict compliance are locate communal open space elsewhere on the site would be a suboptimal outcome.
10. It is considered that there is an absence of any material impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character;
11. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
 - a. The proposal promotes the orderly and economic use and development of land through the redevelopment the site for residential use within a priority precinct as identified by the Department (1.3c);

- b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. The building height is met for the most part other than in relation to lift and stair access which are critical in ensuring all residents and visitors can use the communal open space available. The location of the COS within the front part of the building ensures neighbour's privacy is maintained for the sites to the rear that are likely to be redeveloped in the future given the same R4 zone applicable. The shadow impacts from the non-compliant elements are contained entirely within the application site, causing no increased amenity impacts compared to a compliant scheme. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. CLAUSE 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly

satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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 (CLAUSE 4.6(4)(a)(ii))

7a. Objectives of Development Standard

The objectives of Clause 4.3 are as follows:

- "(a) to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,*
- (b) to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown,*
- (c) to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities,*
- (d) to ensure that sufficient space is available for development for retail, commercial and residential uses,*
- (e) to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.3 are addressed in turn below.

Objective (a): "to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain from buildings,"

Objective (a) seeks to limit building height to minimise the visual impact, loss of privacy and loss of solar access to surrounding development and the adjoining public domain. Compared to the original plans submitted, the current proposal is lower and ensures that the building wall height is below the 20m height limit, with the exception of a very small encroachment above Unit 5.05. The remaining non-compliant parts of the building (lift overrun, shade structure, stair access and balustrade) are not readily visible from George Street or Clancy Lane and seek to ensure that the impact to surrounding development is minimal.

In relation to overshadowing, the impacts of overshadowing are entirely acceptable given the orientation and aspect of the site and the future redevelopment expected to the south and south-east. The proposal results in overshadowing of residential properties to the west at 9.00am (where the building height is compliant) and the shadow for the remaining parts of the day will move south over the dwellings to the rear fronting William Street. The shadow impacts of the non-compliant portions of the building (lift overrun, stair access and balustrade) are negligible in relation to the shadow that is cast from the compliant elements of the building. In addition, all adjoining properties retain sunlight for a minimum of 2 hours in mid-winter in accordance with Council's minimum requirements. As such, the height non-compliance will not give rise to any unreasonable shadow impacts.

Therefore objective (a) is achieved.

Objective (b): "to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities and commercial centres within the City of Blacktown"

Objective (b) seeks to ensure that buildings are compatible with the height, bulk and scale of the surrounding residential localities within the City of Blacktown. In relation to the built form context, the majority of buildings in the vicinity of the

site are detached residential dwellings that will be redeveloped in the near future to realise the development potential afforded to them under the Blacktown LEP 2015 and the areas recognition as a "priority precinct" by the Department. The site and surrounding properties are identified as being able to accommodate a building height of 20m.

It cannot be said that the proposal by virtue of the height exceedances to the small structures projecting above the 20m height limit are incompatible with the desired future character of the surrounding properties.

Therefore objective (b) is achieved.

Objective (c): "to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities"

Objective (c) seeks to define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities. This objective is satisfied by the hierarchy of height limits that are established on the height of buildings maps. Notably, the subject site is located within the centre of an area identified to accommodate high density development with a building height of 20m. Council records indicate that there are a number of current development consents and recent proposals that will see a change in the character of the immediate area with both increased densities and building height. The subject site will form part of this denser development in this highly suitable location. Therefore, the minor height exceedances identified above are not antipathetic to this objective.

Therefore objective (c) is achieved.

Objective (d): "to ensure that sufficient space is available for development for retail, commercial and residential uses"

This objective seeks to ensure that sufficient space is available for development for retail, commercial and residential uses. The proposed development makes efficient use of the site and the applicable height limit to provide residential accommodation in a location that is both highly desirable and suitable for such a level of density. Therefore, the proposal is consistent with this objective as the maximum height control is used to efficiently allocate appropriate residential floor space at the site within the minimum allowable floor to ceiling heights. The applicant has amended the proposal removing the non-compliant height that would contribute additional floor space and in turn reducing the number of apartments from 90 to 81. The remaining height exceedance is limited to the lift overrun, shade structure, stair access and balustrade surrounding the COS and to insist on strict compliance would result in a further loss of apartments with no demonstrable built form advantages.

For these reasons the proposed height achieves Objective (d).

Objective (e): "to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces"

Finally, this objective seeks to establish an appropriate interface between centres, adjoining lower density residential zones and public spaces. As discussed previously, the site is located within the centre of a high density area and there are no immediately adjoining low density residential zones or public spaces. The amended proposal complies with the height limit to the habitable floor area, including all external walls of the building and once the neighbouring sites are redeveloped, the proposal will provide an appropriate building scale in relation to adjoining properties. The site has no interface with public open space or adjoining centres and therefore is entirely consistent with the intention of this objective.

For these reasons the proposed height achieves Objective (d).

7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R4 are as follows:

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

The proposal will provide for the housing needs of the community within a well-designed, high density residential environment.

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

The proposal will provide a high density residential development that provides a range of accommodation types, orientations, internal living arrangements as well as the required number of adaptable dwellings.

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

The proposal is entirely residential but will not limit other land uses nearby that provide facilities or services to meet the day to day needs of residents. The occupants of the development would support nearby business, particularly within the centre.

- *To enable certain activities to be carried out within the zone that do not adversely affect the amenity of the neighbourhood*

The proposal will not preclude the other activities to occur within the zone.

- *To permit residential flat buildings in locations close to public transport hubs and centres.*

The proposal seeks construction of a modern architecturally designed building that is in close proximity to public transport and the local centre.

The proposed development is consistent with the objectives of Zone R4 in that it will provide high density residential development within close proximity of public transport and a local centre. It will provide a density of residential accommodation that will add to the vitality of the local centre and will contribute to a variety of housing types in the area.

The height variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

9. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum height permitted on the site by up to 3.6m (lift overrun) to accommodate the lift access to the roof top communal open space the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.