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Clause 4.6 Variation Request

Building Height Development Standard

Ku-ring-gai Local Environmental Plan (Local Centres 2012)

Roseville RSL Memorial Club, Part 62, 64-68 Pacific Highway
Roseville NSW 2069

Submitted to Ku-ring-gai Council
on behalf of Hyecorp Property Group

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CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of Hyecorp Property Group . The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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1. Introduction

This report seeks a variation to a development standard prescribed by the *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (KLEP). The report relates to a Development Application (DA) seeking consent for Shop Top Housing at Nos. Part 62, 64-68 Pacific Highway, Roseville NSW 2069 (the subject site).

The variation is sought pursuant to Clause 4.6 under the KLEP in relation to the height of building development standards applicable to the subject development site, being 20.5m and 14.5m, pursuant to Clause 4.3(2) under the KLEP.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline Varying Development Standards: A Guide, August 2011, and has incorporated the relevant principles identified in the following judgements:

1. *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
2. *Wehbe v Pittwater Council* [2007] NSWLEC 827
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
4. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
5. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
6. *Moskovich v Waverley Council* [2016] NSWLEC 1015
7. *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191
8. *Ex Gratia P/L v Dungog Council* (NSWLEC 148)
9. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6 to be addressed in a written request from the Applicant. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

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 *Ku-ring-gai Local Environmental Plan (Local Centres) 2012* (KLEP).

3. What is the zoning of the land?

In accordance with Clause 2.2 of the KLEP the site is zoned B2 - Local Centres.

4. What are the objectives of the zone?

The land use table under the KLEP provides the following objectives for the B2 zone:

- *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.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide for residential housing close to public transport, services and employment opportunities.*
- *To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development.*

5. What is the development standard being varied?

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

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

The development standard being varied is prescribed under Clause 4.3(2) of the KLEP. An extract is below.

4.3 Height of buildings

(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.

7. What are the objectives of the development standard?

The objectives of the standard are set out below:

(a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

(c) to enable development with a built form that is compatible with the size of the land to be developed.

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

The map referred to in "6" above demonstrates that the site is affected by two (2) maximum building height standards. An extract of the map is shown in **Figure 1**. The map prescribes two (2) maximum building heights of 14.5m and 20.5m for the subject site.

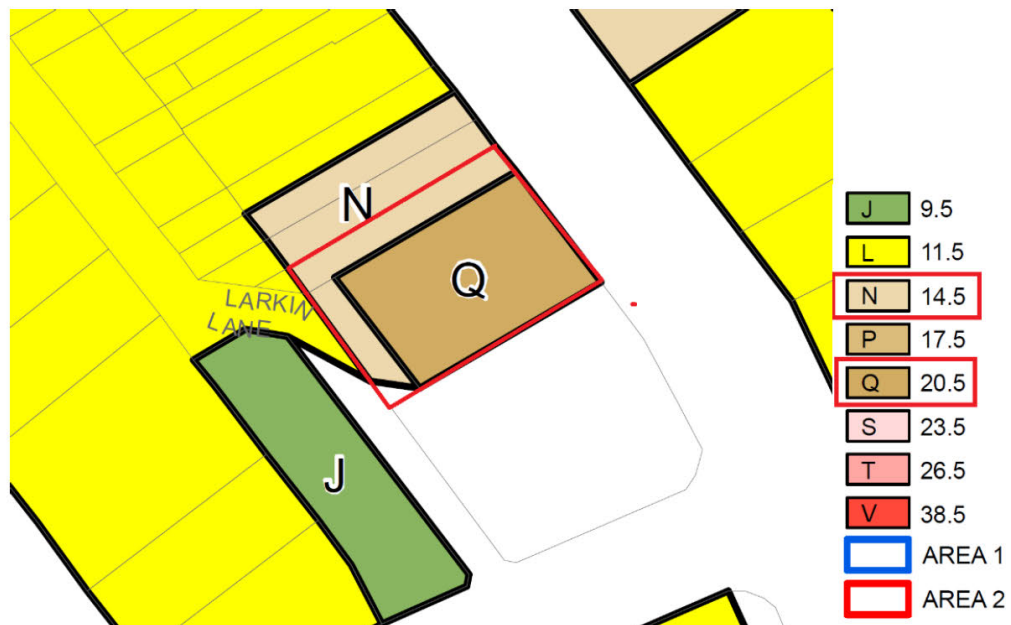


Figure 1: Building height map, site highlighted with red boundary (Source: NSW Legislation)

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

As noted above, the subject site is affected by two maximum height development standards. The maximum height of the building for each portion of the site are outlined below:

- 14.5m Height Standard: 14.5m. No portion of the building on this part of the site exceeds the height standard.

- 20.5m Height Standard: 23.77m. Variation of 3.25m (or 15.9% variation). This maximum height relates to the top of the lift over-run, which has a maximum RL of 135.435 (AHD).

The variation to the standard is indicated in the Figure 2 to 5.



Figure 2: 3D perspective indicating what areas of the building that are above the height standard (areas above purple height 'blanket') (Source: PBD Architects)

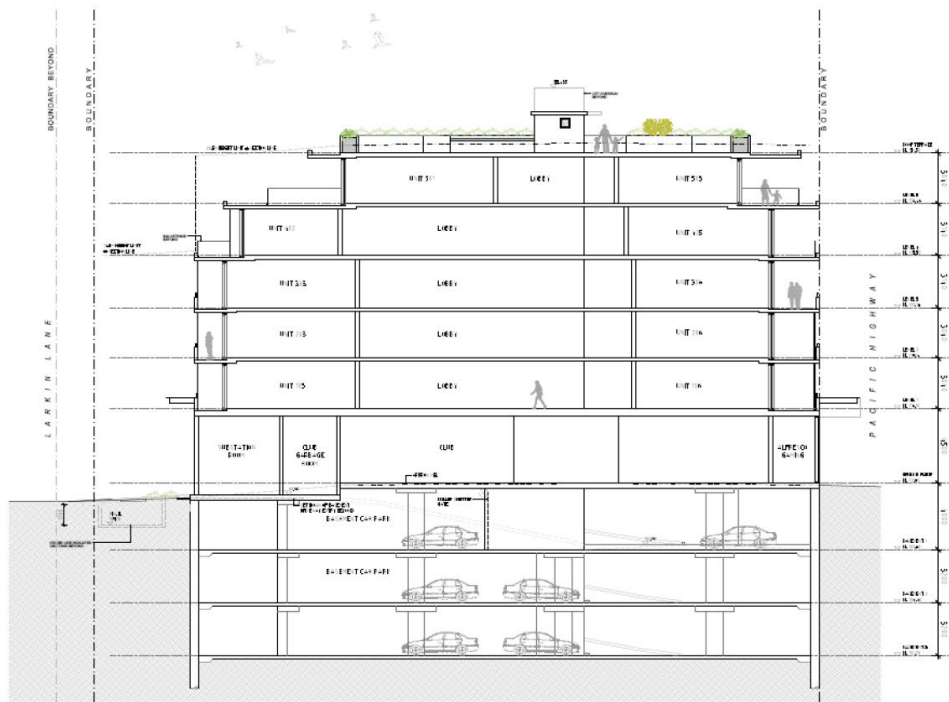


Figure 3: Section showing areas of the building above the 20.5m height standard (Source: PBD Architects)

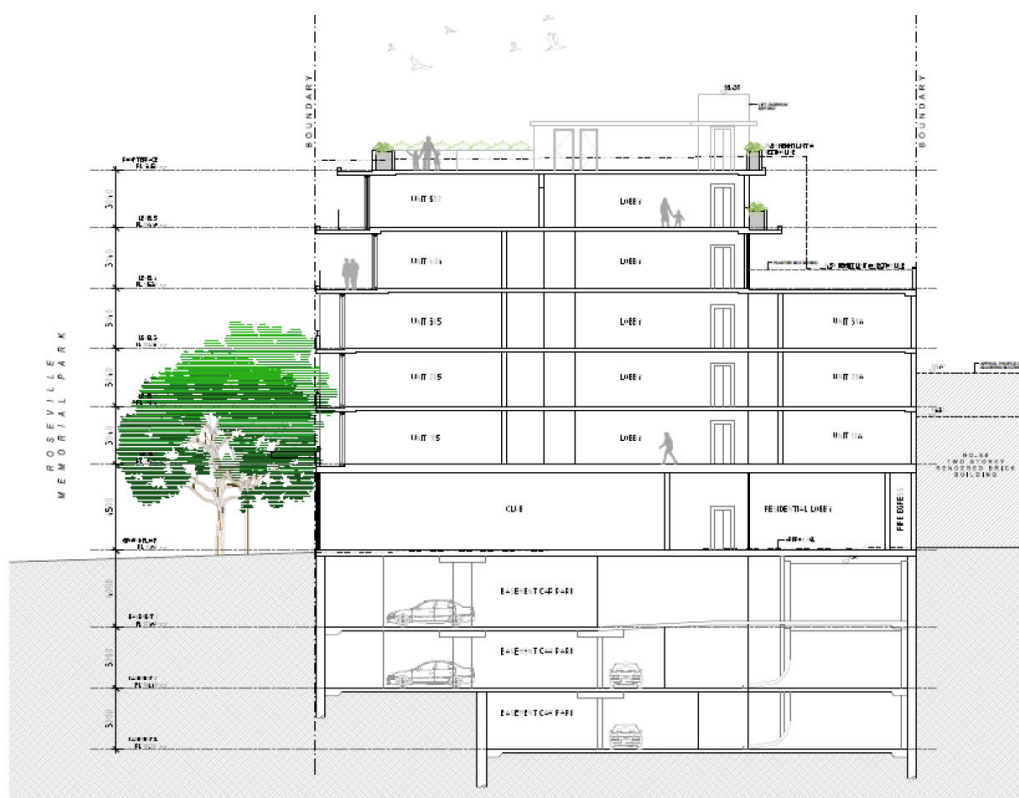


Figure 4: Areas of the building above the 20.5m height standard shown above dotted line. Note that the fire stairs and lift over-run are setback from the point of the section (Source: PBD Architects)

The maximum height of the building, as indicated above, is 23.77m which is measured to the top of the lift over-run. The variation is purely related to the provision of communal open space on the roof and providing equitable access to this space to all residents of the building. The variation only relates to a part of the building, noting that other parts of the building are well below the maximum height permitted.

10. Matters to be considered under Clause 4.6

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

TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6.

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 in so doing better development outcomes ensue.</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</p>	<p>The height standard is not expressly excluded from operation of this clause.</p>

apply to a development standard that is expressly excluded from the operation of this clause.	
<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 justifies the variation by demonstrating (a) is achieved in Section 11, and (b) is achieved in Section 12.</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 zones.</p> <p>Concurrence is assumed. Due to the extent of the variation, the application is required to be determined by the relevant independent planning panel.</p>
<p>(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.</p>	<p>Potential matters of significance for State or regional environmental planning is addressed in Section 14.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in Section 13.</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>(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</p> <p>(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.</p> <p>Note.</p> <p>When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition, R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.</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 Consent 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>

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 any environmental impact is of considerable merit.

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, we believe that it is useful to apply in the consideration of a request under Clause 4.6 of the KLEP, as confirmed in *Four2Five*.

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] NSWLEC 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*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).

Under *Micaul Holdings Pty Limited v Randwick City Council* (2015), it was stated that the consent authority needs to be satisfied that the written request adequately demonstrates that the strict compliance with the standard is unreasonable or unnecessary in the

circumstances of the case. The consent authority also needs to be satisfied that the development will be 'consistent' with the objectives of the zone and development standard.

The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

The objectives of the standard are set out in **Section 7** of this report. A response to each of the objectives is provided below:

(a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

The subject site is located within the Roseville Local Centre. The breach of the standard is related to the provision of Communal Open Space (CoS) on the roof of the building and providing equitable access to this space to all residents (including disabled persons). The location of CoS on the roof for the subject site and development is an improved outcome than locating it elsewhere (i.e. ground level). Thus, the provision of the CoS on the roof results in a better planning outcome than if compliance were to be achieved.

The parts of the building that are above the height standard have been setback from the edges, with the maximum variation (i.e. lift over-run) located centrally on the site. Therefore, these elements do not contribute to perceivable bulk as viewed from the surrounding area and public domain, and the proposal maintains a scale as anticipated for the Local Centre. The proposed variation of the standard does not affect achievement or consistency with this objective.

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

The proposed variation relates to the 20.5m height standard. The site is also subject to a 14.5m height standard, and the proposal does not exceed this standard. The proposal has been designed to provide an appropriate transition to the buildings to the north-west fronting Pacific Highway. Similarly, the proposal has also stepped the building in height from the western boundary (i.e. Larkin Lane) to provide a transition in scale to both the R4 high density zone to the west, and to the adjoining Memorial Park to the south. The stepping of the building, whilst not required by Council's DCP built form controls, has been undertaken to ensure that both the park and the residential property of 1 Maclaurin Parade receive adequate amenity and sunlight throughout the day.

The areas that breach the standard have been setback from the edges of the building and located centrally on the roof. The proposed variation of the standard does not affect achievement or consistency with this objective.

(c) to enable development with a built form that is compatible with the size of the land to be developed.

As noted above, the areas of the building that exceed the height standard have been setback from the edges of the building, with the maximum height of the building, being the lift over-run, being located centrally on the roof. These elements above the standard do not contribute to excessive bulk or scale to the building, as these are predominantly hidden from view from the surrounding area. The proposal has been designed to be compatible with the existing and desired future character of the area, noting that the existing properties to the north-west fronting the highway have yet to be developed to the current planning controls. Further and as discussed under objective (b), the proposal has provided a

stepped built form to the western boundary, whereas the controls allow a 0m setback up to the 14.5m

The proposed variation of the standard does not affect achievement or consistency with this objective.

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. The underlying objective or purpose of the standard is relevant to the development and is achieved.

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

We do not rely on this reason.

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;

We do not rely on this reason.

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.

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 subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development. There is robust justification throughout the SEE and accompanying documentation to support the overall development and contend that the outcome is appropriate on environmental planning grounds.

Some additional specific environmental grounds to justify the breach of the standard are summarised as follows:

- The proposed variation to the standard relates to the provision of CoS located on the roof of the building and providing for equitable access (including disabled persons) to this area of the building. The communal area is located above ground level, which is considered suitable in the context of the Local Centre particularly given Council's desire to have commercial/retail activation at ground level. The provision of communal open space that achieves high levels of amenity, and that is accessible to all residents of the building, is a better planning outcome than if compliance were to be achieved and this area to be removed/deleted.
- Much of the area that exceeds the development standard is not discernible as viewed from the public domain as it has been setback from the edges of the building, and the lift over-run and fire stairs (which exceeds the standard the greatest) have been located more centrally on the roof. The proposed elements that breach the height standard does not contribute to distinguishable bulk, scale or density of the building;

- Various elements that breach the standard are related to providing high levels of amenity to the communal open space area, such as planter boxes, and shade structures.
- There will be no adverse amenity impacts to the surrounding properties or the public park as a result of the proposed variation.
- The proposal does not result in any unacceptable overshadowing impacts to adjoining properties other than what is anticipated by Council's controls.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the development is consistent with the objectives of the development standard and the objectives of the B2 zone, notwithstanding the variation.

The above points are environmental planning grounds that warrant the exceedance, which are not "generic", but rather, specific to the site and circumstances of the development.

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 development within the zone in which the development is proposed to be carried out.

The objectives of the standard have been addressed in **Section 11** and are demonstrated to be satisfied.

The objectives of the zone are addressed below in **Table 2**.

TABLE 2: RESPONSE TO OBJECTIVES OF B2 ZONE

Objectives of B2 Zone	Response/Comment
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>The proposal includes the re-development of the existing club that is currently operating on the site. Thus, the proposal will provide ground floor retail premises that will provide for the needs of people who live and work in the area.</p> <p>The variation to the standard does not affect consistency with this objective.</p>
To encourage employment opportunities in accessible locations	<p>The proposed development includes ground floor retail premises, that will create/maintain ongoing employment for the area.</p> <p>The variation to the standard does not affect consistency with this objective.</p>
To maximise public transport patronage and encourage walking and cycling.	<p>The variation to the standard does not affect consistency with this objective.</p>
To provide for residential housing close to public transport, services and employment opportunities	<p>The proposal provides for additional housing, in close proximity (i.e. 150m) of the Roseville train station.</p>

	<p>The variation to the standard does not affect consistency with this objective. However, it does contribute to the amenity of the residents who live in the building. Thus, the breach of the standard provides an improved amenity outcome to the residents of the building.</p>
<p>To encourage mixed use buildings that effectively integrate suitable business, office, residential, retail and other development</p>	<p>The variation is a result of providing CoS on the roof of the building. The provision of CoS is desirable in residential developments, as recommended in the ADG. Given the site is located in the Roseville Local Centre, and Council desire the ground floor to achieve activation through the provision of ground floor commercial/retail uses, locating CoS at the ground level is not as desirable for this site. Thus, the variation directly achieves this objective by integrating a desirable residential amenity element into the building, whilst maintaining the ground level commercial ground level activity.</p> <p>The proposal is consistent with and achieves this objective.</p>

The objectives of the zones, as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the height of buildings standard is in the public interest.

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

There is no prejudice to planning matters of State or Regional significance resulting 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 *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 unreasonable impacts that will result from the variation to the Height of Buildings standard and hence there are minor public disadvantages.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.