



Clause 4.6 Variation Request



Height of Buildings
(Clause 4.3) Canada Bay
LEP 2013

2-4 Rothwell Avenue, Concord West

Submitted to Canada Bay Council
On Behalf of Eloura Holdings Pty Ltd

MAY 2019

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1. INTRODUCTION

This is a formal written request that has been prepared in accordance with Clause 4.6 of the *Canada Bay Local Environmental Plan (CBLEP) 2013* to support a Development Application (DA) submitted to Canada Bay Council for the construction of a residential flat building comprising eighty-eight (88) units at 2-4 Rothwell Avenue, Concord West (“the site”).

The purpose of this Clause 4.6 variation request is to address a variation to *Clause 4.3 Height of Buildings* under the CBLEP 2013. Specifically, this request seeks to vary the 16 m height standard that applies to the site.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the Department of Planning and Environment’s *Guidelines to Varying Development Standards* (August 2011) and relevant decisions in the New South Wales Land and Environment Court (LEC) and New South Wales Court of Appeal¹.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”), Chief Justice Preston provided further clarification on the application of cl 4.6 and the preconditions that must be satisfied for consent to be granted pursuant to cl 4.6(4). That is, the consent authority must form two positive opinions of satisfaction under cl. 4.6(4)(a), as summarised below:

- the **written request** has adequately demonstrated that the matters under cl 4.6(3) are satisfied, being that compliance with the standard is unreasonable or unnecessary, and there are sufficient environmental planning grounds to justify contravening the development standard. It is not the consent authority’s role to directly form an opinion as to whether these matters are satisfied, rather indirectly by the satisfaction that the written request has addressed these matters.
- be **directly satisfied** that the proposed development satisfies cl 4.6(4)(a)(ii), being that the proposed development will be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. The consent authority must form this opinion directly, rather than indirectly satisfied that the written request has adequately addressed these matters.

In Sections 3 and 4 of this request 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. In Sections 5, 6 and 7 we address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.

Specifically, the following request demonstrates that by exercising the flexibility afforded by cl 4.6, in the particular circumstances of this application, not only would the variation be in the public interest because it satisfies the relevant objectives of both the R3 Medium Density Residential zone and the development standard, but it would also result in a better planning outcome.

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

The Environmental Planning Instrument (EPI) to which this variation relates is the Canada Bay Local Environmental Plan (CBLEP) 2013.

1.2. What is the zoning of the land?

The site is zoned R3 Medium Density Residential pursuant to the CBLEP. Residential flat buildings (RFB’s) are permissible in the R3 zone with development consent.

¹ Relevant decisions include: *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; and *Moskovich v Waverley Council* [2016] NSWLEC 1015

1.3. What is the development standard being varied?

The subject development standard is specified under Clause 4.3 Height of Buildings of the CBLEP. This clause applies to specific land in a residential zone to which a maximum building height of 16 metres applies.

The proposed development has a maximum building height of 16.85 metres. This represents a maximum departure of 0.85 metres (5.3%) from the 16 m maximum height limit. The departure is attributed to the lift overruns and small point encroachments by six (6) of the upper floor units located at the rear of the site.

1.4. Is the development standard excluded from the operation of Clause 4.6 of the EPI?

CI 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the CBLEP 2013. Given the maximum height development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of CBLEP 2013.

2. EXTENT OF VARIATION

2.1. The site and its context

The site is located at 2-4 Rothwell Avenue, Concord West in the Canada Bay local government area (LGA). A location plan can be viewed at **Figure 1**. The site comprises three (3) lots that are legally described as Lots 1-2 in DP 215341 and Lot X in DP 404807.

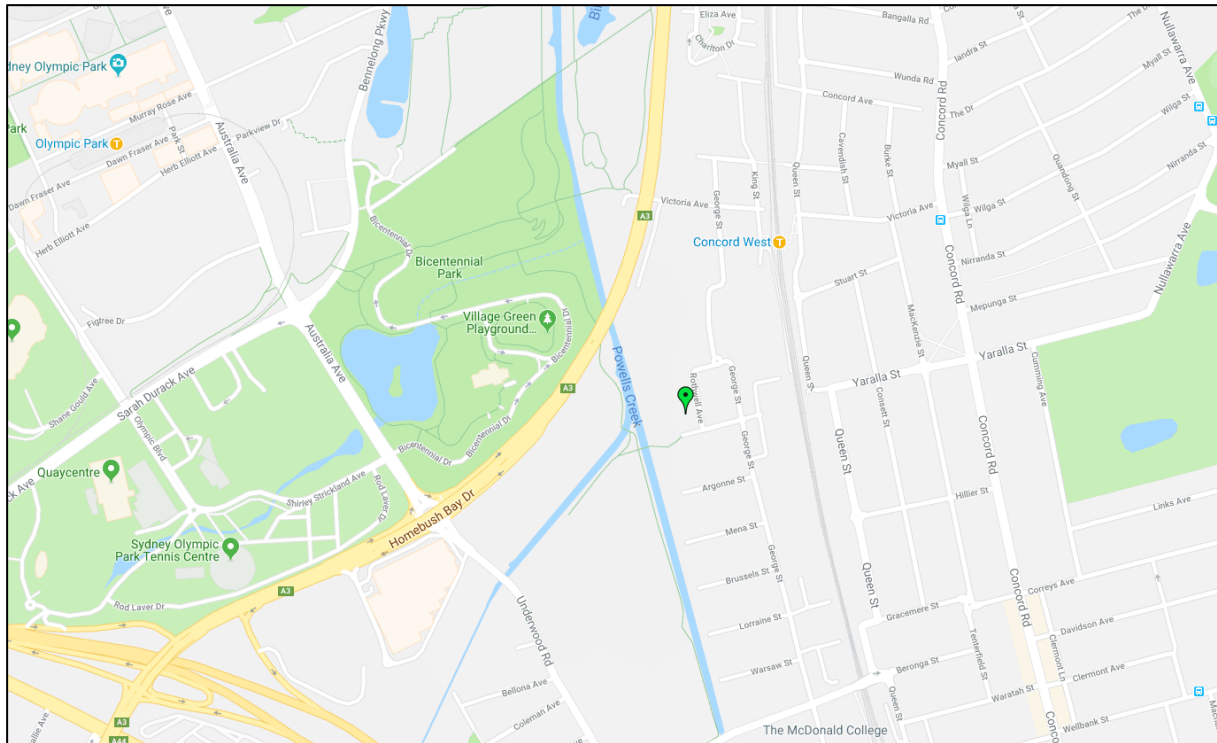


Figure 1: Location map with site identified by green marker (Source: Nearthmap)

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

This submission is made in support of a DA for the construction of a RFB (see plans at Appendix 1). This request specifically seeks to vary the maximum building height standard that applies to the subject site.

The subject site has a maximum building height standard of 16m. The maximum building height of the proposal, as measured from 'existing' ground level, is 16.85 meters (at RL 19.05) as confirmed by Terroir Architects and Matthew Pullinger Architect.

Therefore, the proposal breaches the standard by 0.85m (5.3%). Specifically, the portion of the building above the 16m height limit includes lift overruns and small point encroachments by six (6) of the upper floor units located at the rear of the site. The extent of the height breach is shown in **Figures 2 - 7** below.



Figure 2: Extract of 16m height plane based on existing ground (Source: Terroir and Matthew Pullinger Architect)



Figure 3: Extract of northern elevation (Source: Terroir and Matthew Pullinger Architect)



Figure 4: Extract of southern elevation (Source: Terroir and Matthew Pullinger Architect)



Figure 5: Extract of northern elevation for Block B (Source: Terroir and Matthew Pullinger Architect)



Figure 6: Extract of southern elevation for Block B (Source: Terroir and Matthew Pullinger Architect)

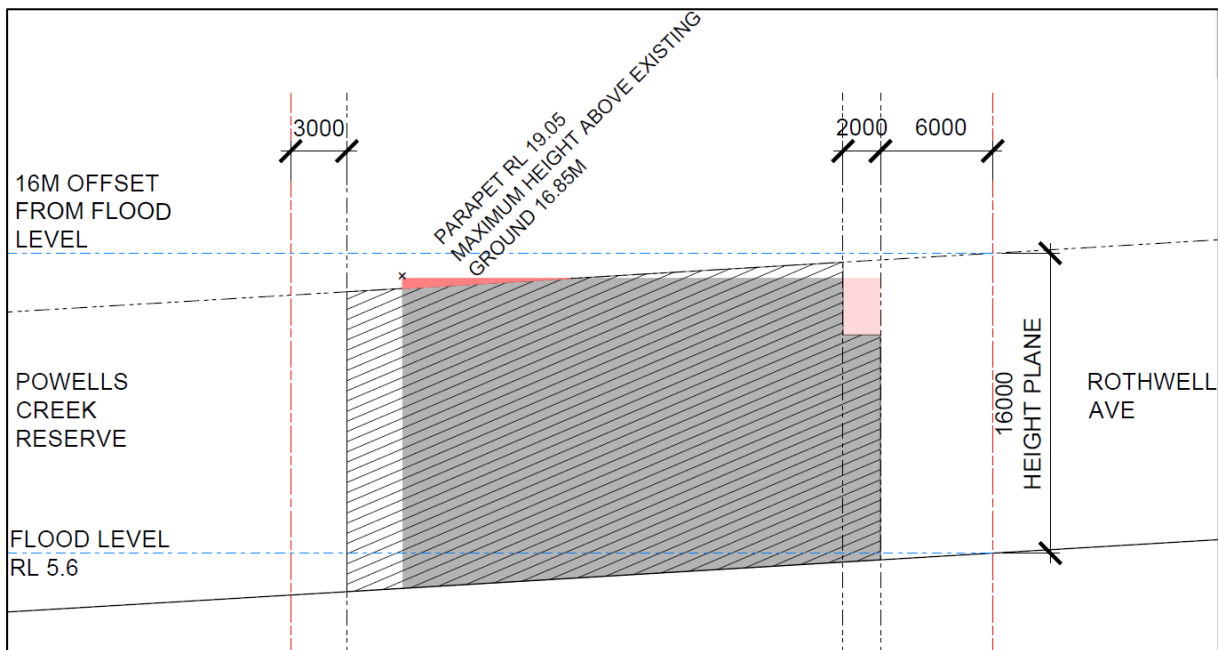


Figure 7: Extract of Control Section (Source: Terroir and Matthew Pullinger Architect)

The height variation, as shown in the above figures, is due to the following factors:

- The topographical fall across the site. The site slopes steeply away from the street ground level to the rear of the site. There is a level change of approximately 3 metres between the site's eastern boundary to Rothwell Avenue and its western boundary to Powells Creek Reserve (refer to above figures).
- The site is flood affected. Based on the identified flooding impacts on the site in association with the proposed development, a maximum flood level of 5.6 metres Australian Height Datum (AHD) has been identified for the site as demonstrated in **Table 1**.

Table 1: Flood Planning Levels (Source: TTW)

Location	100-Year Flood Level	Minimum FFL	Freeboard
2 Rothwell Avenue	2.40m AHD	2.70m AHD	300mm
2A Rothwell Avenue	Not flood affected	N/A	Minimum 150mm
4 Rothwell Avenue	5.30m AHD	5.60m AHD	300 mm

When the building height of the proposed development is taken from the maximum flood level of 5.6m AHD, full compliance with the 16m height limit prescribed for the site is achieved as demonstrated in **Figure 8**.

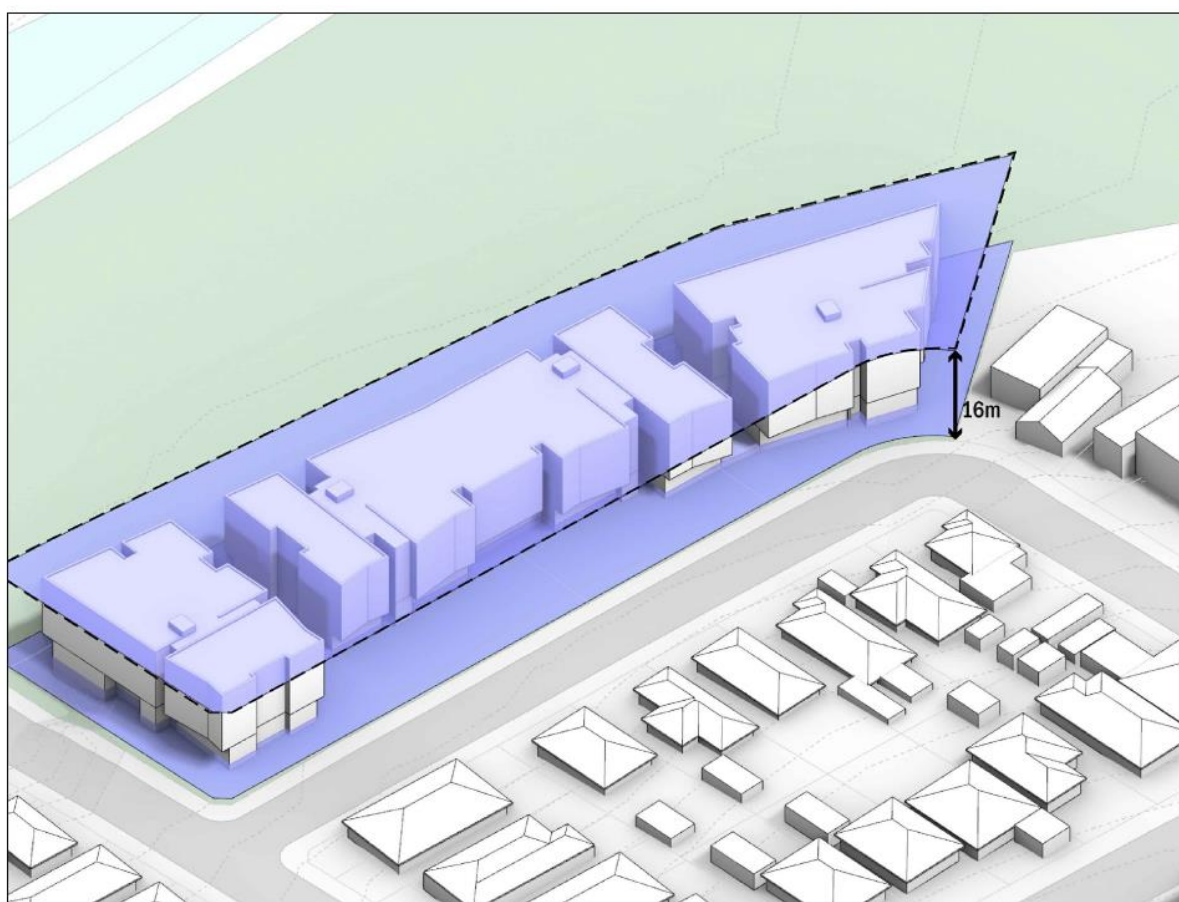


Figure 8: 16m height plane based on flood levels (Source: Terroir and Matthew Pullinger Architect)

The habitable floor space is predominantly contained below the maximum building height line with the encroachment limited to a small portion of the building only. The variation is not a means of achieving additional development yield on the site or an additional floor level, but is a site specific design response. The proposed number of storeys, being 4 in total, is consistent with a residential flat development in the 16 m height limit area. The encroachment will also have a negligible shadow and amenity impact on surrounding properties as the height breach is limited to the lift overruns and to portions of the building that are located at the rear of the site.

The proposed development seeks a variation to the height standard to ensure that the proposal delivers an appropriate built form that is consistent with the desired future character as outlined in the CBLEP 2013 and the Apartment Design Guide (ADG), and that is compatible with the site's flood risk.

3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [CL.4.6 (3)(A)]

3.1. Achieves the objectives of the standard

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.²

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”. Demonstrating that there will be no adverse amenity impacts is therefore one way of showing consistency with the objectives of a development standard.

Table 2: Achievement of Development Standard Objectives.

Objective	Discussion
To ensure that buildings are compatible with the desired future character in terms of building height and roof forms,	<p>The Concord West Precinct is characterised by a mix of built forms and uses, including dwelling houses, townhouses, apartment, mixed-use buildings, education facilities and industrial uses. Historically, the area was predominantly industrial, but the recent regeneration of the area has increased the demand for housing.</p> <p>The proposed development has a maximum height of 16.85m and is provided with a flat roof form. The proposal is considered compatible with the height, design, bulk and scale of more recent development in the nearby R3 zone (i.e. 4-6 storeys), and with the desired character of the Concord West Precinct.</p> <p>The properties to the north of the site, on the opposite side of the public pedestrian link proposed as part of this DA, are currently zoned IN1 General Industrial. However, this land has been identified as being appropriate for residential redevelopment by Council in accordance with the Concord West Precinct Masterplan. The height control for these industrial zoned properties is currently 12m, but it is envisaged that it will increase to 16m under the Masterplan.</p>

² In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that 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 the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

Objective	Discussion
	<p>Properties to the south and east of the site on the opposite side of Rothwell and Conway Avenues are zoned R2 Low Density Residential and have a maximum height limit of 8.5m. Further east of the site along George Street is land zoned R3, which has a maximum height limit of 16m to 21m.</p> <p>The R2 and R3 zones are separated by Rothwell Avenue and Conway Avenue, which assists in providing an appropriate separation between the different scaled properties.</p> <p>The minimum 6m front building setback to the proposed development also ensures that there is a generous separation between the low density and proposed medium density residential built forms.</p> <p>There will be no adverse amenity impacts to the properties located in the R2 zone in terms of overshadowing, overlooking, noise, or views as a result of the breach of the height standard.</p>
<p>To minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</p>	<p>The subject site is located within the R3 Medium Density Residential zone. Residential flat buildings are permissible in the zone with consent.</p> <p>The variation is not a means of achieving additional development yield on the site or an additional floor level, but is a site-specific design response. The development has been designed to address the natural fall of the site and to minimise the extent of cut and fill.</p> <p>Considering that a significant portion of the development is below or complies with the 16m height limit, any impact on the streetscape as a result of the encroachments will be negligible as the lift overruns and rear of the building will be visually unnoticeable when viewed from the street.</p> <p>The proposed development will not cause any unreasonable visual impact. The breach occurs as a result of the lift overruns and a small portion of six (6) of the rear units, which are only visible from certain parts of the road frontage, noting that most of the built form is significantly setback from Rothwell Avenue.</p> <p>The use of a wide range of high-quality building materials will also ensure that the building contributes positively to the streetscape and enhances the mixed-density residential environment in which it is located.</p> <p>The variation of the height standard does not result in any additional overlooking of</p>

Objective	Discussion
	<p>neighbouring properties and does not cause any disruption to views.</p> <p>The additional height will also not result in any unreasonable loss of solar access to any surrounding development, as demonstrated by the accompanying shadow diagrams at Appendix 1.</p> <p>Environmental considerations are also discussed further under the Clause 4.6(3)(b) assessment below in Section 4 of this report and demonstrate that the development is satisfactory in terms of visual impact, privacy and solar access.</p>

Compliance with the maximum height development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance (Test 1 under Wehbe).

4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [CL. 4.6(3)(B)]

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under cl 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole.

As discussed earlier, the elements of the development that contravene the height standard are the portion of the building above the 16m height limit which includes the lift overrun and small point encroachments by six (6) of the upper floor units located at the rear of the site.

The majority of the building mass, however, sits below the maximum height limit. In this regard the environmental impacts are negligible, as explained earlier in the discussion regarding privacy, overshadowing and visual impacts in Section 3. There are no unreasonable adverse environmental impacts associated with additional overshadowing or overlooking as a result of the proposed variation of the standard.

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 through 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 breach of the standard allows for a development that is consistent with the existing and desired future character of the area;
- As demonstrated by the shadow diagrams accompanying the DA, the variation of the height standard does not result in any unreasonable overshadowing impacts and will not unreasonably impact on the availability of solar access to adjoining and nearby neighbours. The shadow diagrams are included at **Appendix 1** and are considered acceptable given that solar access is still available to the surrounding properties, including the R2 zoned properties on the opposite side of Rothwell and Conway Avenues, for most of the day.
- The proposed development complies with the solar access and ventilation requirements of the ADG and does not prevent any adjoining site from also receiving adequate solar access and ventilation.
- The breach of the height limit does not cause any loss of privacy for neighbouring properties.
- The breach allows for level access to the proposed development from the primary frontage along Rothwell Avenue, noting that the development has been designed to address the required flood levels;
- The proposed RFB has been built within the permissible maximum FSR standard for the site, and is predominantly within the building envelope controls; and
- The proposal would result in a better planning outcome than if compliance were to be achieved, as it provides a development that meets the objective of the standard.

The development promotes good design and amenity, avoids excessive cut and fill, and address required flood considerations. The proposed variation of the building height standard is therefore considered to outweigh the negligible environmental harm resulting from the variation. In this regard we submit that there are sufficient environmental planning grounds to justify contravening the height of buildings development standard to the extent proposed in this application.

5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

In Section 3 (above), it was demonstrated that the proposal is consistent³ with the objectives of the development standard. The proposal is also consistent with the objectives of the R3 Medium Density Residential zone as explained in **Table 3** (below).

Table 3: Consistency with Zone Objectives.

Objective	Discussion
To provide for the housing needs of the community within a medium density residential environment.	The breach of the standard does not result in an inconsistency with this objective. The proposed development assists in providing additional housing in a medium-density residential location that is close to the Concord West railway station and a range of local employment opportunities and amenities, including Sydney Olympic Park.
To provide a variety of housing types within a medium density residential environment.	The breach does not result in an inconsistency with this objective, as it provides a mix of 1, 2- and 3-bedroom units in an area that has previously been dominated by detached dwelling houses and non-residential uses.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The breach of the standard does not result in an inconsistency with this objective. The proposed development is for a residential flat building and does not include any non-residential uses. The site, however, is located near the Concord West commercial area and will support the viability of the uses within the area.

As can be seen from **Table 2** and **Table 3**, the proposal is consistent with the objectives of the development standard and the objectives of the zone and is therefore considered to be in the public interest.

³ In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'

6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING. [CL. 4.6(5)(A)]

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application. The development meets the objectives of the R3 Medium Density Residential zone and results in no detrimental impacts. The proposed development also satisfies the objectives of the standard.

7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [CL. 4.6(5)(B)]

The development complies with the stated objectives of the zone and the development standard seeking to be varied. It will provide additional dwellings in an area identified as being a suitable location for the provision of new homes, while still ensuring that the development is generally consistent with the existing height control. There are no unreasonable environment impacts as a result of the variation.

The breach of the standard is minor and includes lift overruns, which provides equitable access to units. The breach also includes a portion of the rear upper floor units due to the slope of the land and identified flood planning levels. The encroachment, however, does not result in an additional storey. The proposed number of storeys, being 4, is consistent with other residential flat developments in the 16m height limit area.

Accordingly, there is no public benefit⁴ 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 development standard. Rather, there are better outcomes for and from the development as a result of the variation sought.

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

8. THERE ARE NO OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY [CL. 4.6(5)(C)]

It is considered that all matters required to be taken into account by the Secretary before granting concurrence have been adequately addressed as part of this cl 4.6 variation request to vary cl 4.3 of the CBLEP 2013.

⁴ *Ex Gratia P/L v Dungog Council* (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

9. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the CBLEP 2013, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard (Test 1 under Wehbe) and is consistent with the objectives of the R3 Medium Density Residential Zone;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.

APPENDIX 1

Architectural Plans