

# **Clause 4.6 Variation Request**

**CLAUSE 4.3 HEIGHT OF BUILDINGS, LMLEP 2014**

**Proposed Mixed Use Seniors Housing (Independent  
Living Units) and Commercial Development**

**72 Wilsons Road Mount Hutton**

**Lot 13 DP11260**

**OCTOBER 2021**

**Ref: 1104\_CI 4.6**

**CLAUSE 4.6 VARIATION REQUEST FOR  
Proposed Mixed Use Seniors Housing (Independent Living Units) and Commercial Development**

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# 1 INTRODUCTION

This request has been prepared in accordance with Clause 4.6 of the Lake Macquarie Local Environmental Plan 2014 to justify a variation to the Height of Buildings development standard proposed in a Development Application for a mixed use seniors housing (independent living units) and commercial development at 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.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application. In particular, it is submitted that there are strong strategic planning and urban design grounds to support the overall proposed building height.

It is considered that the proposed development responds appropriately to surrounding built form and meets the relevant objectives of the site's B2 Local Centre zoning. It is noted that part of the site is zoned RE1 Public Recreation, however no part of the proposed building will be located within this part of the site and therefore the RE1 objectives are not considered relevant to this submission.

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

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard. These three matters, as established by relevant NSW LEC and Court of Appeal decisions, are:<sup>1</sup>

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. That 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)].

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

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<sup>1</sup> *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [23], *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

## 2 STANDARD TO BE VARIED

The standard that is proposed to be varied is the Height of Buildings development standard set out in Clause 4.3 of the of the Lake Macquarie Local Environmental Plan 2014 (LMLEP).

As shown in **Figure 1**, the maximum building height map for the area prescribes a maximum building height of 13m for the southern and central parts of the site and 8.5m for the northern part. All proposed building works are located in the part of the site to which the 13m height limit applies.

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 development standard to be varied is not excluded from the operation of clause 4.6 of the LEP.

**Figure 1 – LMLEP HOB Map**



### 3 Clause 4.6 of the LMLEP 2012

The objectives and provisions of Clause 4.6 are as follows:

#### **4.6 Exceptions to development standards**

- (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 Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning 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 Planning 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 2.8, 6.1 or 6.2.*

The development standards in clause 4.3 are 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 Subclause 4.6(3) and (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 to Clause 4.6(6).

## 4 EXTENT OF VARIATION

The proposed development involves the demolition of existing development within the site and the erection of a part three / part four storey development comprising 72 independent living units (self-contained dwellings) supported by indoor and outdoor communal space. The proposed units will be provided in two separate 'wings', stepping down the site at two distinct levels, connected by a central indoor and outdoor recreational spine above shared basement carparking. Three ground level commercial tenancies are proposed at the site's frontage to Wilsons Road, supported by at-grade car parking.

As discussed in the following sections, the proposed development has been sited and designed to respond to a number of key considerations and constraints including the proposed housing typology, the desired future character of the area, the amenity of adjoining development, the RE1 zone interface, as well as the amenity of future residents on the site. It has also been designed to respond to the slope of the site which falls generally from south to north.

As shown on the plans extracted in **Figures 2 and 3** below (**Appendix 1**), the proposed variation relates to minor components of the proposed roof plane of the western wing at the transition between the stepped building levels. Specifically, the western wing reaches the following maximum heights as measured from ground level (existing):



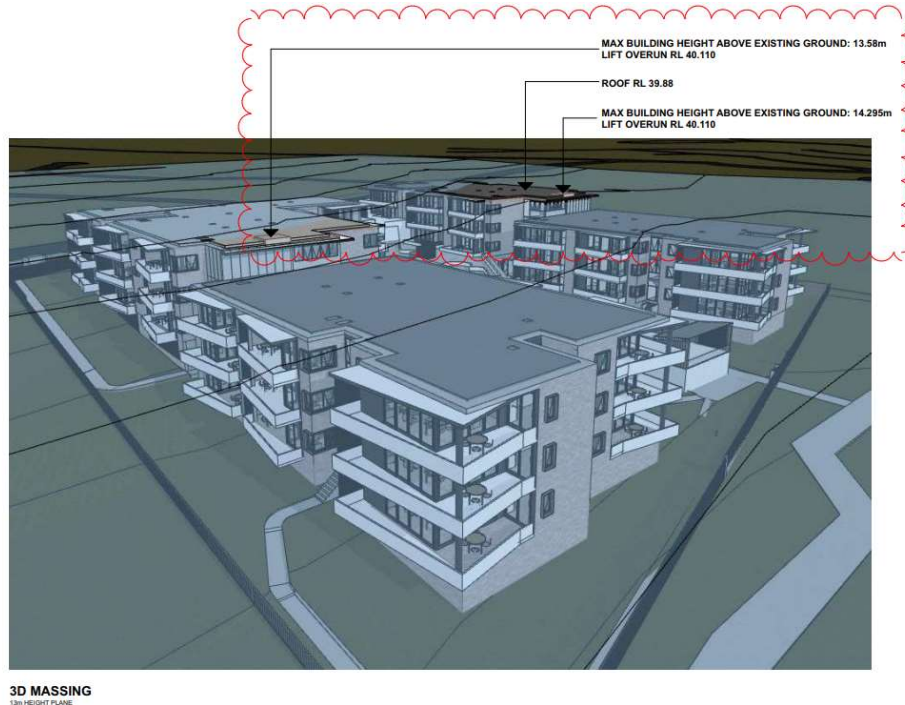
- Western wing – 14.295m at the highest part of the building, being the northern roof plane of the upper building tier, exceeding the prescribed maximum height by 1.295mm (9.9%).

As provided in **Figures 2 and 3**, the proposed non-compliant roof elements are confined to less than 5% of the development's overall roof area.

**Figure 2 - Maximum Building Heights**



**Figure 3 - Maximum Building Height Plane**





## 5 UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827, ‘Wehbe’). This judgement states:

*“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 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 purpose of this Clause 4.6 variation)

The five ways of establishing that compliance is unreasonable or unnecessary 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 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 the standard is unreasonable and unnecessary; and*
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 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.”*

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- The development is consistent with the standard (height of buildings) and zone objectives, even with the proposed variation to the maximum building height;
- There are no additional significant adverse impacts arising from the proposed non – compliance; and
- Important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

## **6 Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))**

Having regard to Clause 4.6(3)(b) and the need to demonstrate there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* (paragraph 24) states:

*“The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* at [31].”*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 90* and *Four2Five Pty Ltd v Ashfield (2015) NSQCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The height breach is primarily a result of the site topography where the site falls from south to north by approximately 6 metres. This is a site specific condition that contributes to the extent in the variation to the LMLEP 2014 height limit.

2. The social benefits of providing housing stock for seniors within a highly sought after location should be given weight in the consideration of the variation request. The additional distribution of floor space required for seniors housing necessitates a built form outcome with larger units (92 – 123m<sup>2</sup>) resulting in fewer units per floor when compared to a conventional two bedroom residential unit (ADG Minimum 70m<sup>2</sup>). Thus to achieve the required yield to achieve project feasibility, additional height is needed.

Under the circumstances a compliant outcome would not deliver the yield required to allow for a seniors housing development. Therefore, the additional height is required to deliver the housing typology proposed and therefore relevant in contemplating the planning grounds for justifying the contravention.

3. The application to which the Clause 4.6 Variation relates is for *Housing for Seniors and People with a Disability*. While the occupants of the units will be ‘seniors’, one in two people aged 65 and over live with some level of disability (source: <https://www.aihw.gov.au/reports/dis/74/people-with-disability-in-australia-in-brief/contents/how-many-people-have-disability> ).

Lake Macquarie City Council has recently approved to update the Lake Macquarie Housing Strategy to recognise the importance of accessible and adaptable housing. In the report presented to Council, it is noted that approximately 24,700 residents of Lake Macquarie City with disability that results in a mobility limitation, with the vast majority living in private accommodation and the need for accessible housing increasing with age.

In this regard units have been designed to be adaptable, resulting in larger footprints and thus, to achieve the required yield to make the project feasible, necessitates the need for additional building height when compared to a conventional residential scheme. In this respect, the additional height proposed in the scheme is in part the result of the housing typology proposed. Insistence on compliance with the height control would result in the removal of four units of housing designed specifically for seniors and people with a disability.

4. Alternatively, a compliant building height could be achieved by stepping the upper building levels further into the site. Under the circumstances, the additional excavation required is considered unnecessary given the minor nature of the breach as well as the functionality implications of increasing the level changes within the building.
5. The additional height will not result in any additional floor space, and the proposal remains compliant with setbacks, landscaping and site coverage requirements for the site under Council’s DCP. Accordingly, the height breach will not result in any additional demands on parking, essential services and infrastructure, social infrastructure, nor any additional traffic or waste generation.
6. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:

- a. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining residential properties and the public domain when compared to a compliant building envelope. Being positioned centrally within the site, the height breach will not result in unreasonable loss of solar access to the residential property to the east and the public domain along Wilsons Road. Any additional overshadowing compared to a compliant scheme would be negligible. Due to the site's orientation, there will be no overshadowing impacts on the RE1 zoned land to the north.
  - b. Being limited to roof elements, the height breach does not result in any additional adverse privacy impacts. The impacts do not change as a result of the additional height and thus any loss of privacy or perceived loss of privacy caused by the non compliant height would be insignificant.
  - c. The height breach will not result in significant view loss for existing or future development. The location of the breach relative to the topography of the site and surrounds and orientation of the allotments relative to the orientation of the building reduces the likelihood of view loss in a northern direction. The extent of view loss caused by the non compliant element would be insignificant.
7. The proposal meets the objectives of the development standard and meets the objectives of the B2 Local Centre zone (as detailed in **Section 8** below).
8. The proposed development achieves the objects provided in Section 1.3 of the EP&A Act, specifically:
  - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for mixed use residential and commercial development (1.3(c));
  - b. To promote the delivery and maintenance of affordable housing (1.3(d));
  - c. 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 (1.3(g));
9. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)*. In particular:
  - a. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
  - b. Approval of the proposed variation will allow for variation of building height and scale across the locality which is a commonly accepted urban design approach instead of buildings with consistent height; and

- c. Approval of the proposed variation will support a variety of housing typologies in the locality by providing a well located and compact development that will provide a better choice for a greater number of 'seniors' (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, in particular the effect of topography on the built form outcome, and the design implications associated with an application for seniors housing. Insistence on compliance with the height control will result in a reduction of four units proposed as housing for seniors and people with a disability, or additional excavation. The additional height does not noticeably impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is complementary to the local context and desired future character of the B2 Zone at Mount Hutton whilst maintain an appropriate interface with the RE1 zoned part of the site.

It is noted in *Initial Action Pty Ltd v Woolahra Municipal council (2018) NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 Variation does and does not need to satisfy. Importantly, there does not need to be a 'better' planning outcome.

*86. The second way is 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. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

## **7 The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))**

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed.

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 standards 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 5** above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in **Section 8** below). Clause 4.6(3)(b) is addressed in **Section 6** 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 of development in 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 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 8** below.

## **8 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))**

### **8.1.1 Height of Building (Clause 4.3)**

The height of building objectives contained in clause 4.3 of the LMLEP 2014 are addressed as follows:

#### ***Objective (a) to ensure the height of buildings are appropriate for their location***

The height of the proposed building is considered appropriate in its location for the following reasons:

- The built form outcome is of a height and scale which is consistent with the desired future character for Mount Hutton;
- Whilst exceeding the maximum building height allowed under Clause 4.3, the height and building typology is generally consistent with that provided in the Mount Hutton Area Plan, providing a 3-storey built form presenting to Wilsons Road;

- The additional non-compliant height is positioned centrally within the site and will not result in unreasonable loss of amenity to surrounding properties by way of excessive overshadowing, unreasonable view loss or loss of privacy.

***(b) to permit building heights that encourage high quality urban form***

The proposal has been architecturally designed to create a modern building that achieves a high-quality urban form. The building's height and massing has been considered with respect to the site's topography and to reduce visual bulk and scale by separating the built form into two separate wings, connected by a central indoor and outdoor recreational spine.

The building wings step down to follow the site's natural topography, with car parking areas partly below natural ground level, to minimise overall building height and to better visually integrate into their surrounds. This response is achieved by redistributing additional height to the central portion of the site. In doing so, it allows the development to present as a compliant 3-storey building to Wilsons Road and minimises any external amenity impacts associated with the breach.

The additional height also facilitates the provision of building separation and landscaping within the site by allowing the building's ground-level footprint to be minimised. This built form outcome facilitates the provision of seniors housing in an attractively landscaped setting.

The development's overall height could be reduced by stepping the upper building levels further existing ground levels, however this would result in additional excavation as well functionality implications associated with increasing the level changes within the building.

### **8.1.2 Objectives of the Zone**

Clause 4.6(4)(a)(ii) 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 the B2 Zone are as follows:

- 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 create spaces that are accessible and are a central focus for the community.
- To provide for housing as part of mixed use developments.

The proposal is considered to be consistent with the objectives of the B2 zone, as follows:

- The proposal provides three commercial tenancies fronting Wilsons Road. One of the tenancies is intended to be used as a hair salon for use by residents, while the other two are of a suitable size and layout to accommodate a range of commercial uses to serve the needs of residents and the broader community.
- The commercial tenancies, along with the seniors housing component of the proposal, will provide employment opportunities in a highly accessible location, being immediately adjacent to the Mount Hutton town centre.



- The proposal's town centre location and the availability of public transport will also encourage public transport patronage, walking and cycling by residents, staff, visitors and patrons of the commercial premises.
- The commercial tenancies have been designed to meet relevant accessibility standards and are positioned at the site's frontage to provide activation and convenient access for patrons and staff.
- The proposal provides much-needed self-contained seniors housing integrated with commercial premises that help meet the need of future residents of the seniors housing as well as the broader community.

## **9 The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))**

The concurrence of the Secretary can be assumed as provided in Planning Circular PS 2020 – 02.

## **10 Whether contravention of the development standard raises any matter of significance for State or Regional Environmental Planning (Clause 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. There are no matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application, and we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence pursuant to clause 4.6(5).

## **11 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 permitted on site by up to 1.295m (9.9%), it is evident that the proposed development is consistent with the objectives of the development standard and objectives of the zone in which the development is proposed to be carried out.

## 12 CONCLUSION

This submission requests a variation under clause 4.6 of the Lake Macquarie Local Environmental Plan 2014 to the height of buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this proposed development;
- The proposed development achieves the objectives of the development standard (Test 1 of Wehbe) and is consistent with the objectives of the B2 Local Centre zone; and
- There are sufficient environmental planning grounds to justify the contravention.

With respect to the public interest, the Council as consent authority can be satisfied as required that the development achieves the objectives of the development standard and is consistent with the objectives of the R3 zone notwithstanding non-compliance with the height of buildings standard.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 2020 - 02.

Having regard to the above, it is considered appropriate for the Council as consent authority to exercise the flexibility provided by clause 4.6 in the circumstances of this application and agree to vary the building height development standard as proposed.