



Clause 4.6 Variation Request

Height of Buildings




Clause 4.3 Newcastle LEP
2012

No. 309 King Street, Newcastle West

Submitted to The City of Newcastle
On Behalf of the Wests Group

AUGUST 2019

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1. INTRODUCTION

This is a formal written request prepared in accordance with Clause 4.6 of the *Newcastle Local Environmental Plan 2012* (NLEP 2012) to support a development application submitted to the City of Newcastle Council for the construction of a new mixed-use development at **No. 309 King Street, Newcastle West** (the subject 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.

The development standard that this request seeks approval to vary is the Height of Buildings control in Clause 4.3 of the NLEP 2012. The numeric value of the Height of Buildings development standard is 45m. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of NLEP 2012.

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 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 Clause 4.6 and the preconditions which must be satisfied for consent to be granted pursuant to Clause 4.6(4). That is, the consent authority must form two positive opinions of satisfaction under Clause 4.6(4)(a), as summarised below:

- The written request has adequately demonstrated that the matters under Clause 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; and
- The proposed development satisfies Clause 4.6(4)(a)(ii), being 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.

The following request demonstrates that by exercising the flexibility afforded by Clause 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 B4 Mixed Use zone and the development standard, but it would also result in a better planning outcome.

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; *Moskovich v Waverley Council* [2016] NSWLEC 1015; *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

2. EXTENT OF VARIATION

As shown in Figure 1, the NLEP 2012 prescribes a maximum building height for the subject site of 45m.

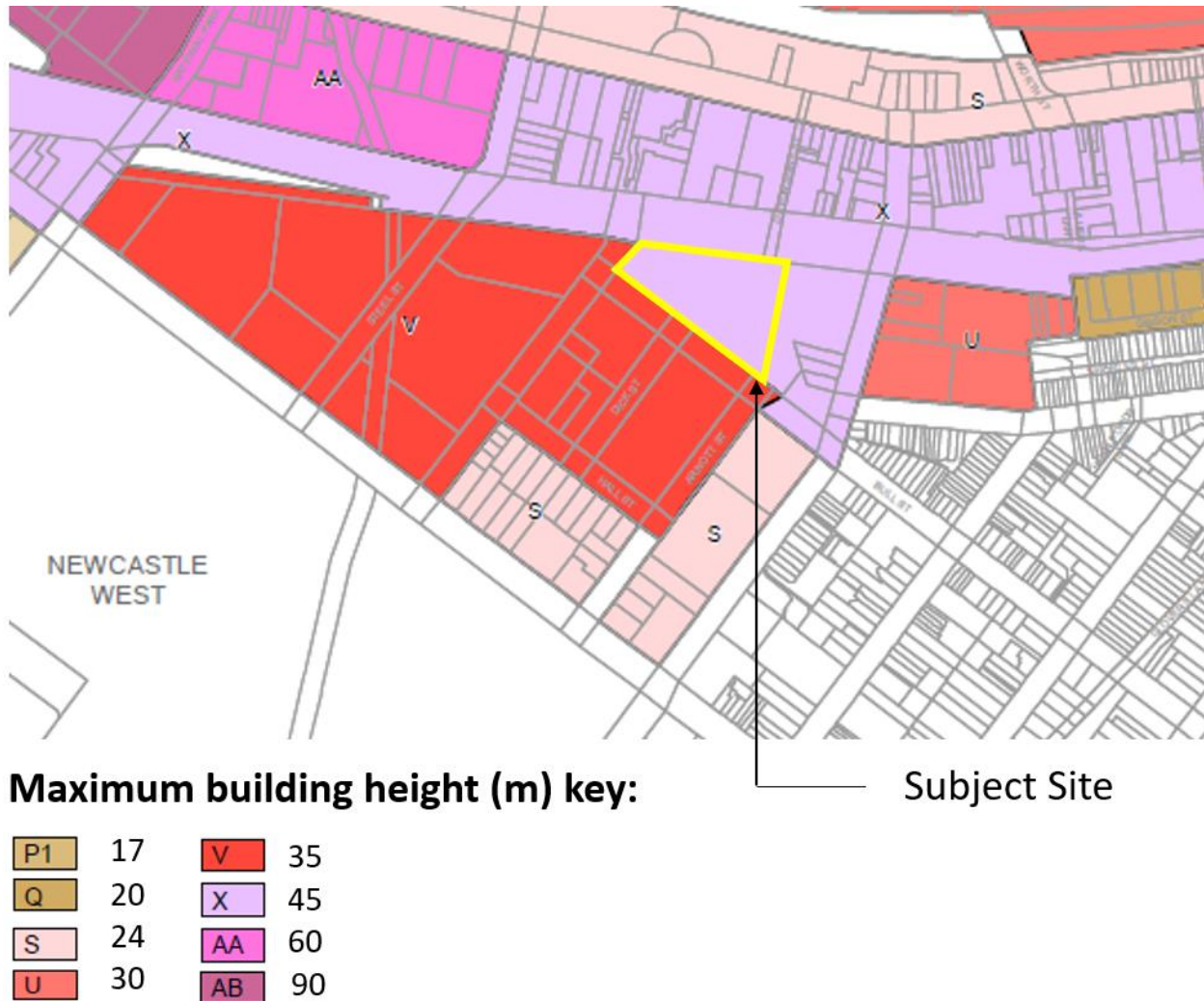


Figure 1: Extract of Height of Building map (source: NLEP 2012)

The proposed development will involve the construction of 2 x 14-storey buildings with shared basement carparking. The 2 separate 'tower' form buildings, referred to as 'Tower A' and 'Tower B', will be separated from each other and the adjacent 'Wests City' building by pedestrian open space and courtyards or laneways. The towers will include ground floor business, commercial and retail facilities, high and low care seniors housing and associated support facilities, as well as general residential apartments. Rooftop recreation space supportive of the general residential units is proposed on Tower B. Stair and lift access would be provided to the rooftop of both towers for servicing purposes and to facilitate disability access to the rooftop communal space.

The exception to the height of building development standard concerns a minor departure from the standard applicable to the subject site. Specifically, Tower A reaches a maximum height of 46.2m (RL 52.7m AHD)

as measured from ground level (existing) to the highest part of the lift overrun, exceeding the prescribed maximum height by 1.2m (2.6%).

As shown on the plans extracted in Figures 2 and 3 below (Appendix 2 of the SEE, Plan DA504 and DA505), six other lower rooftop elements of the towers slightly exceed the maximum building height, specifically:

- Tower A: building parapet (0.7m exceedance)
- Tower B: lift overrun (1.05m exceedance); building parapet (1m exceedance); pool balustrade (0.75m exceedance); balustrade (0.18m exceedance); and fire stair (1m exceedance)

As demonstrated in Figures 2 and 3, the exceedances are limited to exceedingly minor elements of the overall built form of each tower. The non-compliant rooftop elements do not comprise usable floor area and are restricted to a minor proportion of the roof area of each tower and will be set back a minimum of 6m from the street boundary.

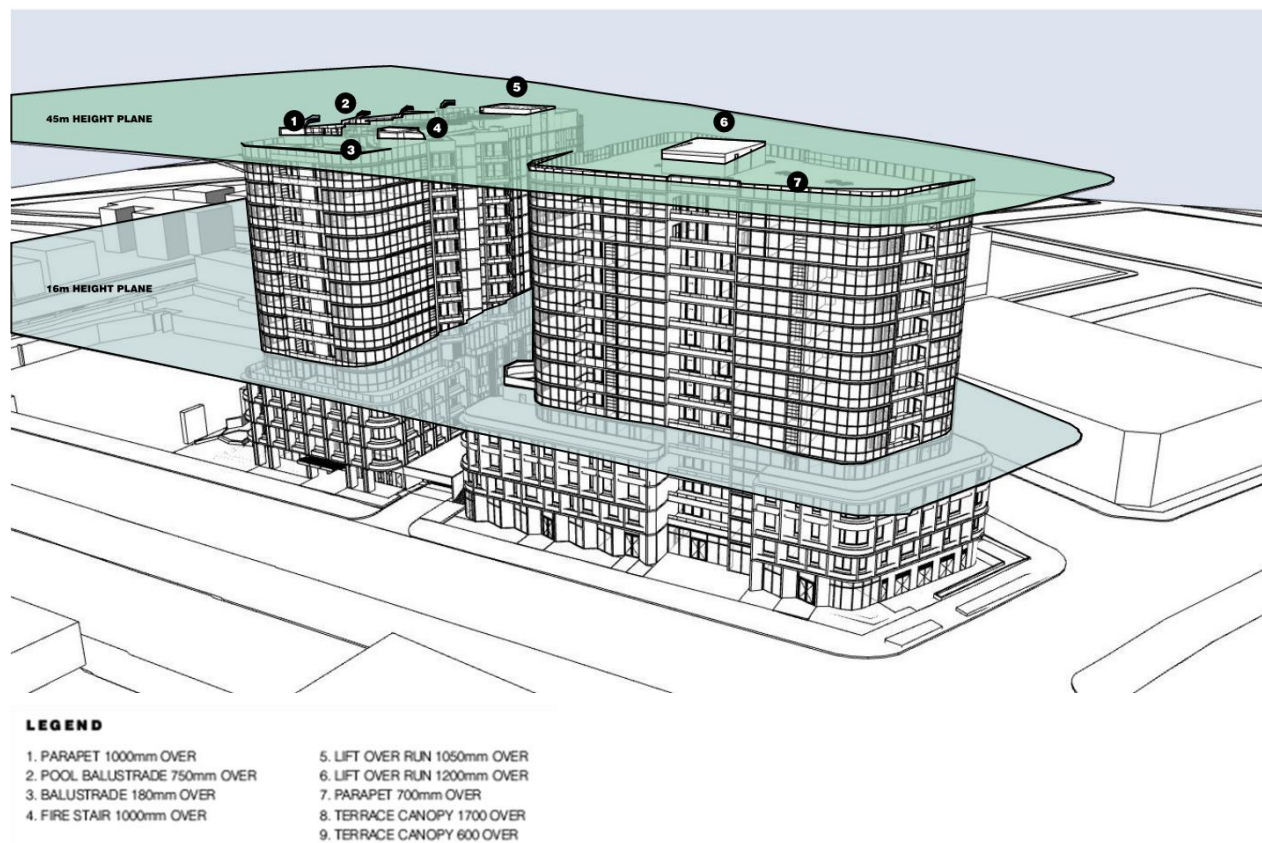
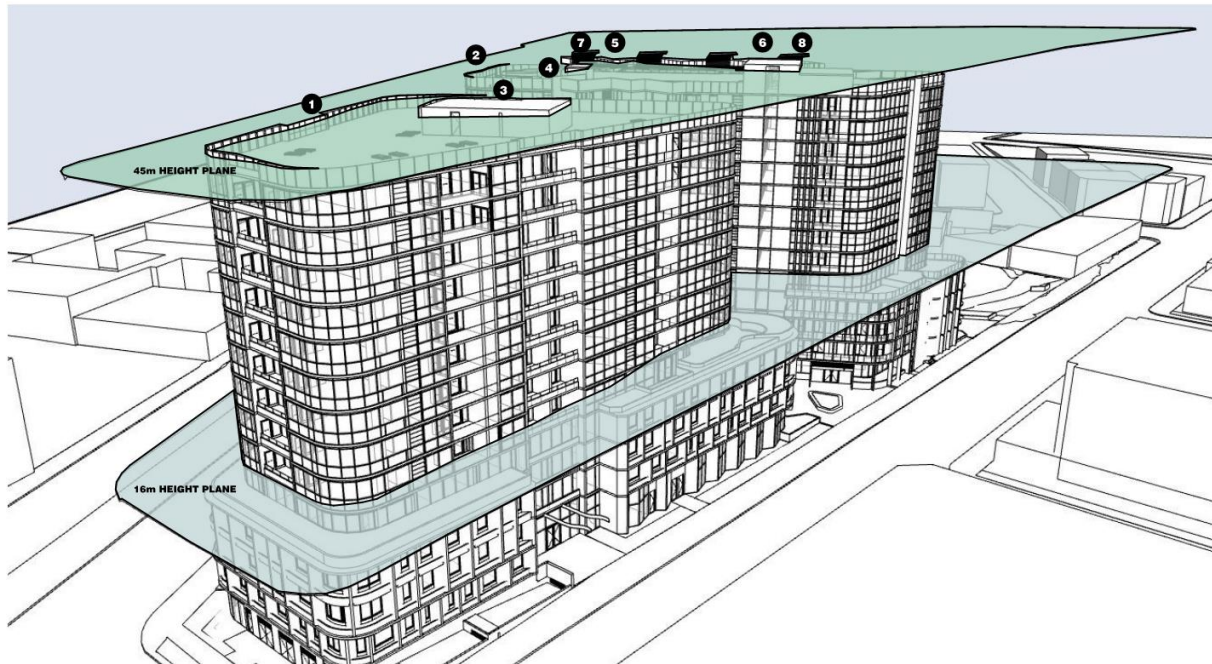


Figure 2: Diagram showing minor exceedances above 45m building height limit, view looking south (Source: Fender Katsalidis Architects)



LEGEND

- | | |
|------------------------------|-------------------------------|
| 1. PARAPET 700mm OVER | 5. POOL BALUSTRADE 750mm OVER |
| 2. BALUSTRADE 180mm OVER | 6. LIFT OVER RUN 1050mm OVER |
| 3. LIFT OVER RUN 1200mm OVER | 7. TERRACE CANOPY 1700mm OVER |
| 4. FIRE STAIR 1000mm OVER | 8. TERRACE CANOPY 600mm OVER |

Figure 3: Diagram showing minor exceedances above 45m, view looking north-east (Source: Fender Katsalidis Architects)

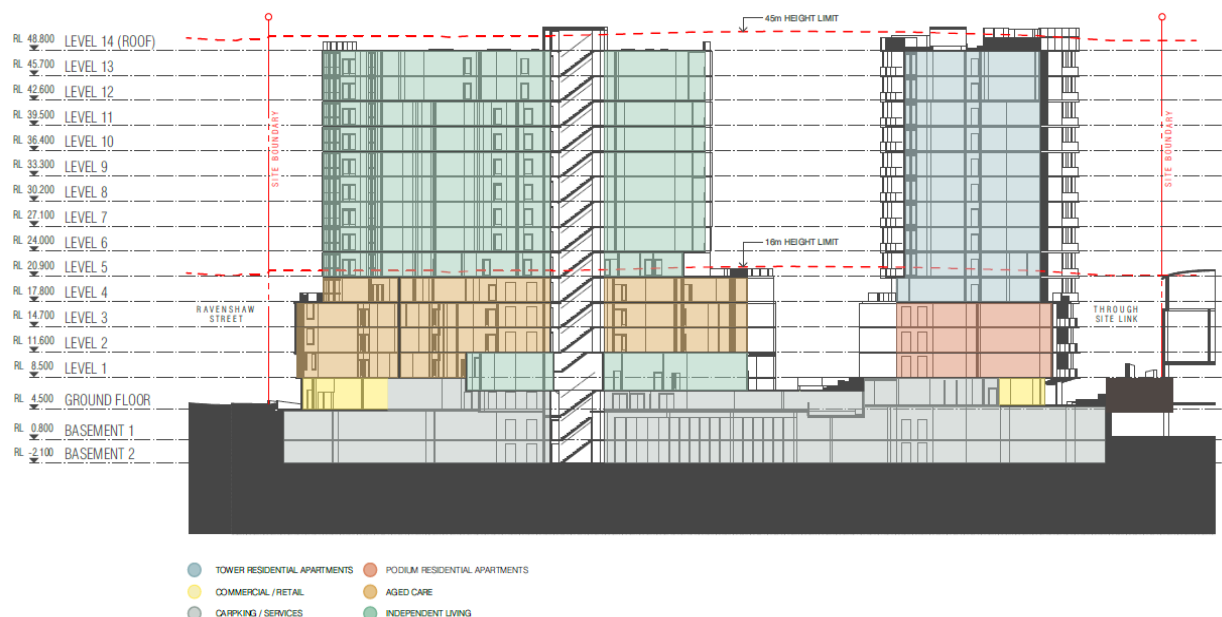


Figure 4: Section diagram through AA showing minor exceedances above 45m building height limit, view looking south-north (Source: Fender Katsalidis Architects)

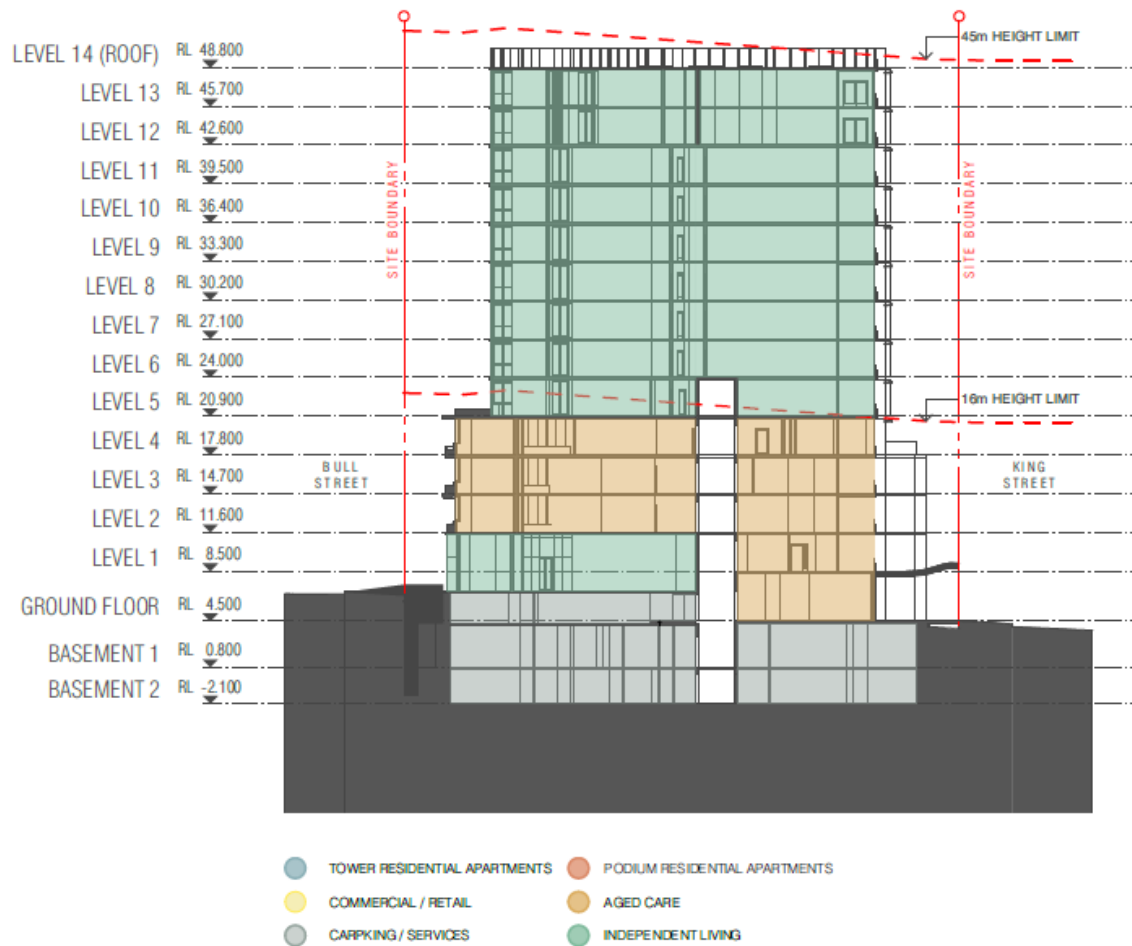


Figure 5: Section diagram through BB showing minor exceedances above 45m building height limit, view looking east-west (Source: Fender Katsalidis Architects)

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

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 contained in Clause 4.3 of the NLEP 2012 are achieved, notwithstanding non-compliance with the standard.²

For completeness, due to the site's location within the Newcastle City Centre, the height of buildings objectives contained in Clause 7.9 of the NLEP 2012 are also addressed, although they are not specifically applicable to the subject site. As demonstrated in Table 1 below, the proposed development would also be consistent with the Clause 7.9 objectives.

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 1: Achievement of Clause 4.3 Objectives

| Objective | Discussion |
|--|---|
| (a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy | <p>Strategically located between two key areas zoned B3 Commercial Core (to the north-east and north-west along King and Hunter Streets), the site is identified as a 'Key Site' under the NLEP and is zoned B4 Mixed Use. In terms of desired built form, the site and surrounding land between Hunter and King Streets is in a transitional area between generally higher building height limits to the west (West End) and generally lower building height limits to the north (Honeysuckle Precinct), east (Civic Precinct) and south-west (Marketown).</p> <p>The site has three public street frontages and currently accommodates a single-storey building and car park which provides little activation to, or connectivity with, the surrounding area.</p> <p>Consistent with the objectives of the B4 zone and the desired built form for the area, the application proposes the demolition of the existing building and car park and the construction of a new 14-storey mixed-use development on the site. The built form</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>of the proposed development has been configured into 2 separate towers above podium bases fronting King Street, providing visual separation and facilitating pedestrian links through the site. The extent of the variation is limited to the lift overruns of each tower, building parapets, pool balustrades and stairs to the communal open space to Tower B. These rooftop elements will not be easily visible from the streetscape and do not significantly alter the bulk or scale of the development.</p> <p>The proposed built form and massing is considered to positively contribute to the quality and transitioning identity of the area. It is considered that, overall, the proposal will deliver an appropriate built form that is consistent with the desired future character, while remaining compatible with the scale of nearby developments. The Urban Design Consultative Group provided its support for the proposed bulk and scale during its June 2018 meeting.</p> |
| <p><i>(b) to allow reasonable daylight access to all developments and the public domain.</i></p> | <p>The non-compliant components of the proposed development are dispersed across the roof forms of Towers A and B, and are set back a minimum of 6m from the site's boundaries. These components are graphically shown and particularised in Figures 2 & 3 above.</p> <p>Shadow diagrams have been prepared for the proposal by Fender Katsalidis Architects and are included in the Architectural Plans submitted with this DA (Appendix 2 of the SEE, Plans DA500-503). Figures 4-6, below, have been extracted from the Architectural Plans. These extracted figures demonstrate that shadows cast by the non-compliant rooftop elements during the winter solstice will generally be confined to the roof area of each tower and therefore do not extend beyond the site boundaries.</p> <p>Accordingly, the non-compliant components of the development will not result in any overshadowing to surrounding development or the public domain, including during the winter solstice. This will ensure that reasonable daylight access to neighbouring developments and the public domain is maintained as a result of the height non-compliances.</p> |



PROPOSED 12pm - JUNE 21

Figure 4: Shadow diagram extract, 9am winter solstice (Source: Fender Katsalidis Architects)



PROPOSED 9am - JUNE 21

Figure 5: Shadow diagram extract, 9am winter solstice (Source: Fender Katsalidis Architects)



PROPOSED 3pm - JUNE 21

Figure 6: Shadow diagram extract, 3pm winter solstice (Source: Fender Katsalidis Architects)

Table 2: Achievement of Clause 7.9 Objectives

| Objective | Discussion |
|--|--|
| <i>(a) to allow sunlight access to key areas of the public domain by ensuring that further overshadowing of certain parks and community places is avoided or limited during nominated times,</i> | <p>As discussed in relation to Clause 4.3(1)(a) above, shadows cast by the non-compliant rooftop elements do not extend beyond the site boundaries. In any event, the proposed development will not result in any overshadowing to key areas of public domain, including National Park to the south-west of the site.</p> <p>The proposed development will result in limited periods of internal overshadowing to parts of the new public domain areas within the site (e.g. the memorial and publicly accessible laneway). Importantly, however, these periods of overshadowing are not directly caused from the non-compliances, nor will they result in unreasonable amenity impacts for their future users.</p> |
| <i>(b) to ensure that the built form of Newcastle City Centre develops in a coordinated and cohesive manner,</i> | <p>As discussed in relation to Clause 4.3(1)(b) above, the proposal will deliver an appropriate built form that is consistent with the desired future character of the area, while remaining compatible with the scale of the nearby recently approved and constructed developments.</p> <p>The non-compliant rooftop elements will not noticeably alter the overall scale or built form of the proposed towers, or result in structures that compromise the emerging skyline of the CBD.</p> |
| <i>(c) to ensure that taller buildings are appropriately located,</i> | <p>The height of the proposed development, which substantially complies with the building height limit, is considered entirely appropriate on this "Key Site". The non-compliant rooftop elements will not be readily seen from the ground level directly below on any of the three adjoining street frontages, or from distant vantage points when looking back towards the two towers. Together with 'The Verve' (Nos. 464-470 King St, Newcastle), 'The Onyx' (No. 10 Steel St, Newcastle), 'Sky Residences' (No. 509 Hunter St, Newcastle) and the 'Marketown Spire Apartments' (Nos. 21 Steel St & 23 Ravenshaw St, Newcastle West), the proposed new development will sit comfortably in, and complement the precinct.</p> |
| <i>(d) to nominate heights that will provide a transition in built form and land use intensity in Newcastle City Centre,</i> | <p>The majority of each tower's built form is compliant with the building height limit. The non-compliant rooftop elements do not noticeably alter the built form of the proposed towers, nor do they result in any additional gross floor area / land use intensity. However, the overall height of the proposed towers</p> |

| Objective | Discussion |
|---|---|
| | supports Council's aspirations to site high rise developments in this area within the City Centre, commensurate with its capacity to comfortably accommodate higher intensity land use. |
| <i>(e) to ensure the preservation of view corridors that are significant for historic and urban design reasons.</i> | The site itself does not contain any 'key views' or 'vistas', as identified within the <i>Newcastle Development Control Plan 2012</i> . Importantly however, the non-compliant rooftop elements are not of a size, location or design that will detrimentally affect existing views across or through the site from surrounding developments. This includes the more recently constructed larger buildings such as 'The Verve' and the 'Marketown Tower'. |

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 clause 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.

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.

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

- The subject site is identified as a "Key Site" under the NLEP 2012 and benefits from three street frontages. The site is also identified as being within the "Parry Street" character area under the DCP. A key principle applying to development in the Parry Street character area is that *'public domain spaces are improved to support the evolving character of the area into a high-density residential and mixed use precinct.'* The proposal responds to this prominent and unique setting and Council's strategic vision for the locality by providing accessible landscaped public open space and important pedestrian links through the site. As a result, the opportunity to provide high amenity to communal open space areas is primarily limited to the podium and rooftop.
- The proposed exceedances are primarily proposed to facilitate high-quality outdoor communal space, including disability access to this space and shade, rather than to achieve additional living area. The rooftop communal open space would achieve excellent solar access and benefit from views over the area. It would also limit privacy and acoustic impacts rather than if it were to be located at a lower level.
- The building height exceedances are limited to minor rooftop elements of the overall built form of each tower. The majority of each tower's built form is below the 45m building height limit.
- The exceedances will not result in any additional amenity, overshadowing, streetscape or heritage impacts. The non-compliant rooftop elements will not be visible from the adjacent streets, nor easily noticeable from any nearby development.
- Pursuant to Clause 7.5(5) of the NLEP 2012, the Government Architect NSW (delegate of the Director-General) has certified in writing that a design competition is not required for the proposed development on the site. This exemption was granted on the basis that the proposed development exhibits design excellence, notwithstanding the non-compliant building height. This finding was further confirmed via the support of the Newcastle Urban Design Consultative Group, which considered that *'the proposed building and landscaping are potentially of high quality and should substantially enhance the area.'* Accordingly, pursuant to Clause 7.5(6) of the NLEP 2012, it is submitted that the proposed variation, being less than 10% of the 45m building height limit, is warranted on design excellence grounds.

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 B4 Mixed Use zone as explained in Table 3 (below).

Table 3: Consistency with Zone Objectives.

| Objective | Discussion |
|---|---|
| To provide a mixture of compatible land uses. | The proposal provides for a compatible mix of retail, commercial, business, and higher density seniors and general residential housing opportunities that will serve the needs of the local and wider community. |
| To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling. | <p>The proposal integrates ground floor business and retail facilities, high and low care seniors housing and associated support facilities, as well as general residential apartments, in a highly accessible location. The site is in close proximity to various public transport nodes and a wide range of services, recreational opportunities and community facilities to maximise opportunities for public transport patronage and to encourage walking and cycling.</p> <p>The proposed public domain improvements and pedestrian laneway will enhance pedestrian permeability and accessibility through the site to surrounding areas. Facilities within the proposed development, including the proposed medical centre and cafe, will assist in meeting the day to day needs of future residents, thereby further reducing the need to travel by car.</p> |
| To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres. | <p>The proposal provides compatible and business supporting land uses, including additional housing opportunities, to help support the viability of the Centre.</p> <p>The proposed public facilities and amenities (e.g. 1989 Newcastle Earthquake memorial, commercial development) will accommodate the needs of the building's future residents as well as bring the general public into the site. The demographic diversity of the proposal and the generous landscaped spaces and shared facilities that blur the boundaries between the site and the</p> |

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'

| Objective | Discussion |
|-----------|---|
| | surrounding streetscape transform the site to a vibrant social hub in the heart of Newcastle. |

As can be seen from Tables 1 -3, the proposal is consistent with the objectives of the standard and the objectives of the zone and is therefore considered to be in the public interest.

**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.

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

The redevelopment of the site will facilitate a diverse mix of additional housing opportunities, as well as commercial, business and retail floorspace, to support the viability of the Newcastle City Centre. The demographic diversity of the proposal and the generous landscaped spaces and shared facilities that blur the boundaries between the site and the surrounding streetscape transform the site to a vibrant social hub in the heart of Newcastle. Importantly, the communal roof area provides high-quality outdoor recreational space, without creating additional bulk or adversely impacting the amenity of nearby development.

Overall, the proposal aligns with Council's strategic vision to support the evolving character of the area into a high-density residential and mixed-use precinct. As demonstrated within this submission, the Height of Buildings exceedance would not result in any adverse amenity, environmental or social impacts, and the building would continue to maintain 'design excellence'.

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 standard. Additionally, any disadvantages are minor and inconsequential.

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

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".

8. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the *Newcastle Local Environmental Plan 2012*, 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 and is consistent with the objectives of the B4 Mixed Use zone, notwithstanding the variation;
- 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, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.