

15 February 2023

**CLAUSE 4.6 REQUEST TO VARY A DEVELOPMENT STANDARD:****Property:** 30 First Avenue, Blacktown 2148, Lots 2 DP550677**Development:** Development Proposed Construction of a 21 storey Commercial tower including Basement Car Parking, Shops, Function Centres, Offices, Stormwater Drainage, Landscaping and Site Works.**Proposed variation: 0.68% to a maximum 3.605% non-compliance****Standard:** Clause 4.3 of Blacktown Local Environmental Plan 2015 (BLEP 2021) states:-**4.3 Height of buildings***The objectives of this clause are as follows—*

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

*(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.*

*Note—See clauses 4.3A, 4.3B and 7.7A for exceptions to the maximum height of buildings.*

**Background**

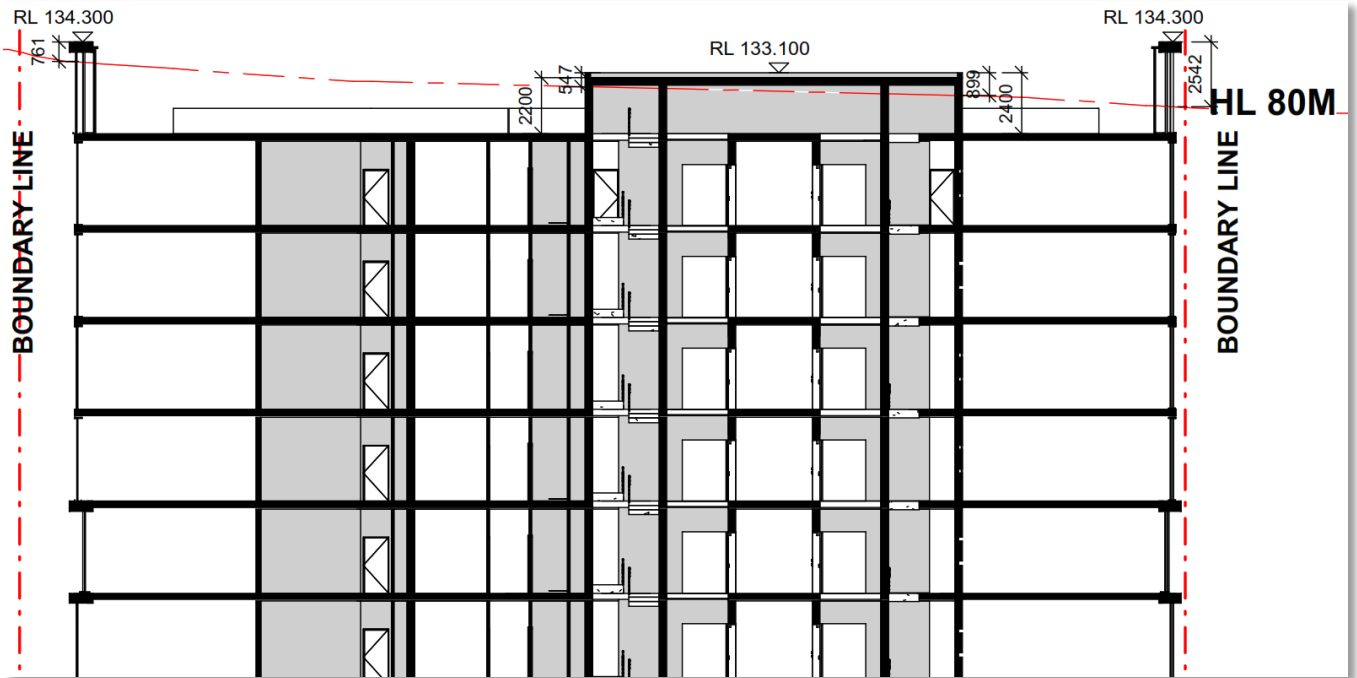
This Clause 4.6 departure has been prepared in support of the proposed *Construction of a 21 storey Commercial tower including Basement Car Parking, Shops, Function Centres, Offices, Stormwater Drainage, Landscaping and Site Works.*

Pursuant to Blacktown Local Environmental Plan 2015, the Site is zoned B4 Mixed Use with a mapped height of 80m (refer Figure 1 below).

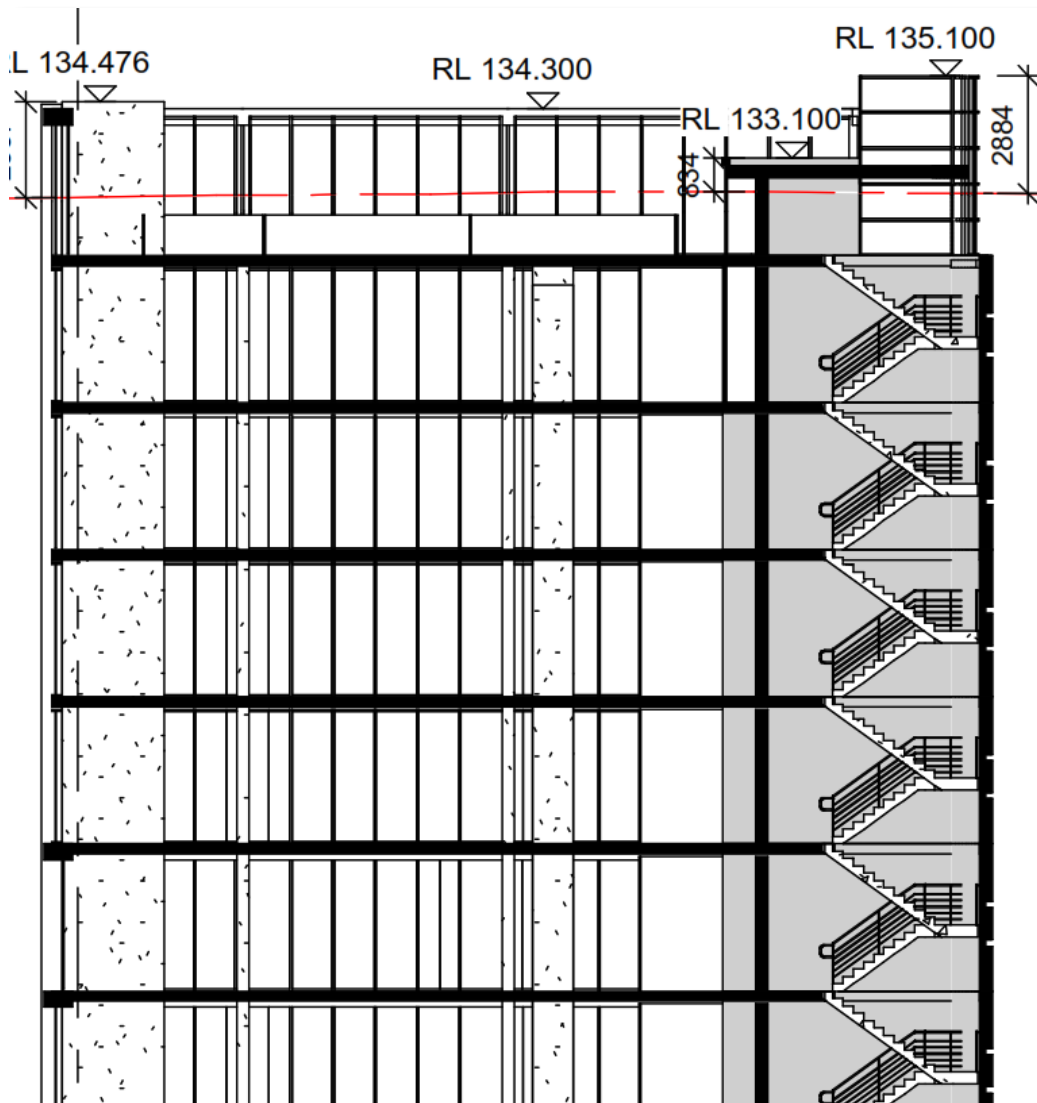


**Figure 1 – Height of Buildings Map extract of NSW ePlanning Spatial Viewer**

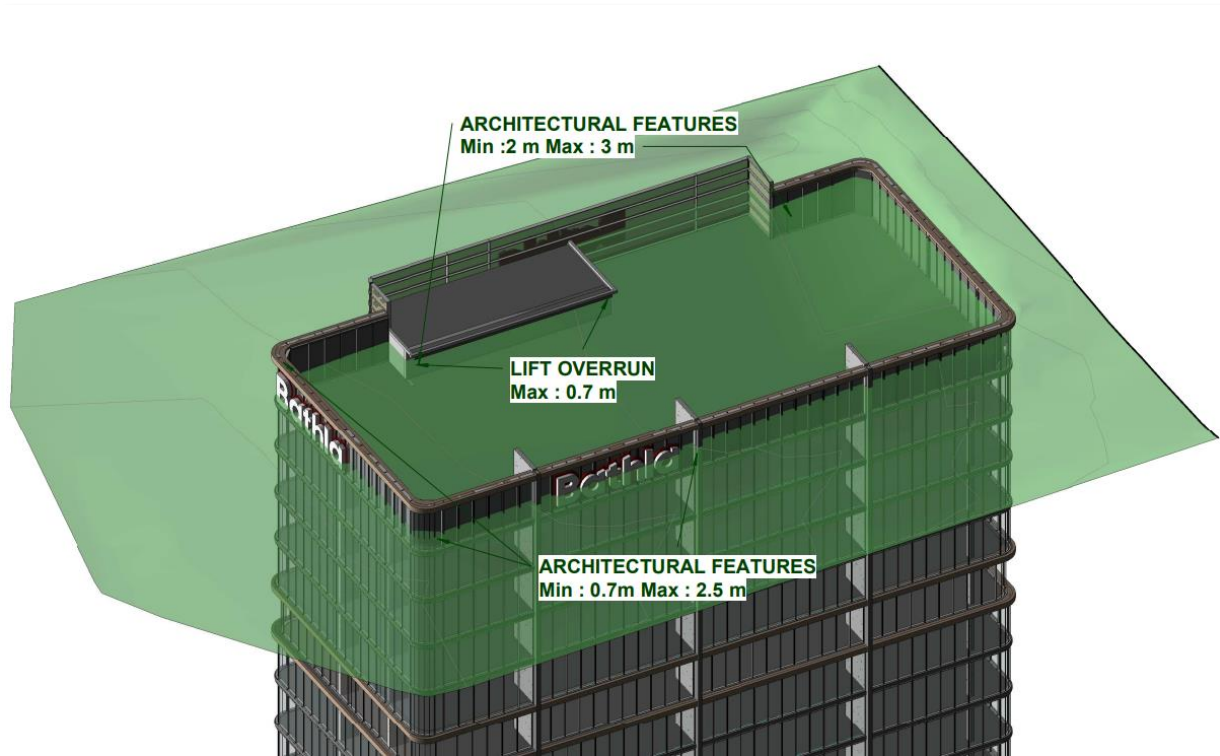
The commercial building as proposed results in a portion of lift overrun exceeding the building height from 80.54m to 80.89m with a non-compliance ranging from 0.67% to 1.12% of the development standard to the lift overrun proposed; Architectural features are also proposed on the roof level with a maximum 82.88m from natural ground level with a non-compliance of 0.95% to 3.6% to the development standard.



**Figure 2:** Section C with 80m height limit, height exceedance and proposed RLs.



**Figure 3:** Section D with 80m height limit, height exceedance and proposed RLs.



**Figure 4:** 3D height plane diagram showing height limits and structures that exceed the 80m height limit.

As shown in the 3D height Plane diagram above (Figure 4) the majority of the proposed modifications are below the corresponding height Limits, with the exception of parts of the lift overrun and architectural features indicating a non-compliance up to a maximum 3.6% to the height control of the BLEP. The development remains consistent with Council's Floor Space Ratio and will align with the desire future character of the Locality.

The provisions of this Clause 4.6 of the Blacktown LEP are addressed below in order to permit Council to vary the LEP height requirement given the minor nature of the proposed departure of less than 10% from the development standard to accommodate the lift overrun which is recessed behind the building line in a way that does not significantly increase potential visual impacts and scale of the development when viewed from the street/ground level.

### Relevant Case Law

There are a number of recent Land and Environmental cases including *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Four 2 Five v Ashfield Council* [2015] NSWLEC 1009, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386, *Moskovich v Waverly Council* [2016] NSWLEC 1015 and *Zhang v Council of Ryde* [2015] NSWLEC 1091.

In addition to the abovementioned cases, Planning commissioners judgements in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 confirmed that it is not necessary for a non-compliant development to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of the particular development standard, this particular judgement requires consideration in evaluating the merits of the height of building departure.

A more recent judgement in *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047 placed emphasis on whether the anticipated impacts from a numeric control is comparable to the impacts associated with the non-compliance. Given the development standard in this request is the numeric control of building height, this judgement closely links to the establishment of environmental planning grounds to justify the contravention.

The visual impacts when viewed from the street level are consistent with the desired future character of the locality (Site is in Blacktown CBD, Northside Precinct) and result in no material adverse effects to the streetscape to the existing shop top housing development to the east and commercial uses to the north and west of the Site. This is due to the fact the areas proposed in this modification to exceed the building height development standard have been carefully designed to be recessed behind the main building line to only a portion of the roof level for the purpose of roof overrun and architectural features.

The mixed use commercial building has been designed to ensure that adjoining residential privacy is not adversely affected from overlooking to the east. The upper level offices are proposed 3m recessed behind the ground, first and second level, the east facing walls and windows of the upper levels are recessed an additional 3m behind the lift/lobby area which has obscured glass to prevent eastward views into the windows/balconies of the east adjoining residential units.

Furthermore, a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The following key tests/requirements therefore arise from the abovementioned commissioners' judgements' is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (*Wehbe v Pittwater Council* "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the proposed mixed use building the key reasons tests are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating that the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance
- Demonstrating consistency with the R4 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and

To satisfy the relevantly applicable provisions of Clause 4.6 of the Blacktown Local Environmental Plan 2015.

### **Blacktown Local Environmental Plan 2021: Clause 4.6(3)**

In *Wehbe v Pittwater* [2007] NSWLEC 827, the planning Chief Judge Preston identified a variety of ways in which it could be established demonstrated that compliance with a development standard is unreasonable or unnecessary in the case. Although not an exhaustive or exclusive list. It states that:

*“An objective 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 the compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”*

While the *Wehbe v Pittwater Council* case refers to the repealed *State Environmental Planning Policy No.1 Development Standards*, the reasoning can be applied in a similar way to variations requested pursuant to Clause 4.6 of the standard instrument.

The commissioners’ judgement continues and states the following:

*“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 objectives 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).”*

The Chief Judge in *Wehbe v Pittwater Council* provides a list of at least 5 different ways in which a SEPP 1 objection may be well founded and that approval of an objection be consistent with the aims of the policy (method 1 is the method used within this request for variation):

1. *The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.*

2. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;*
3. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.*

It is sufficient to demonstrate only **one** of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

The objectives of the standard will be achieved notwithstanding non-compliance with the standard.

This Clause 4.6 variation statement establishes that compliance with the maximum building height development standard is considered unreasonable or unnecessary in the circumstances of the proposed modifications because the objectives of the standard are achieved despite the non-compliance with the development standard as further discussed in the sub-headings of the clause 4.6(4) below:

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

#### **Blacktown Local Environmental Plan 2015: Clause 4.6(4)**

In accordance with the provisions of Clause 4.6(4) of the CLEP consent must not be granted unless council is satisfied with the following:

- (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.*

The following information is provided to address the above sections of Clause 4.6(4):

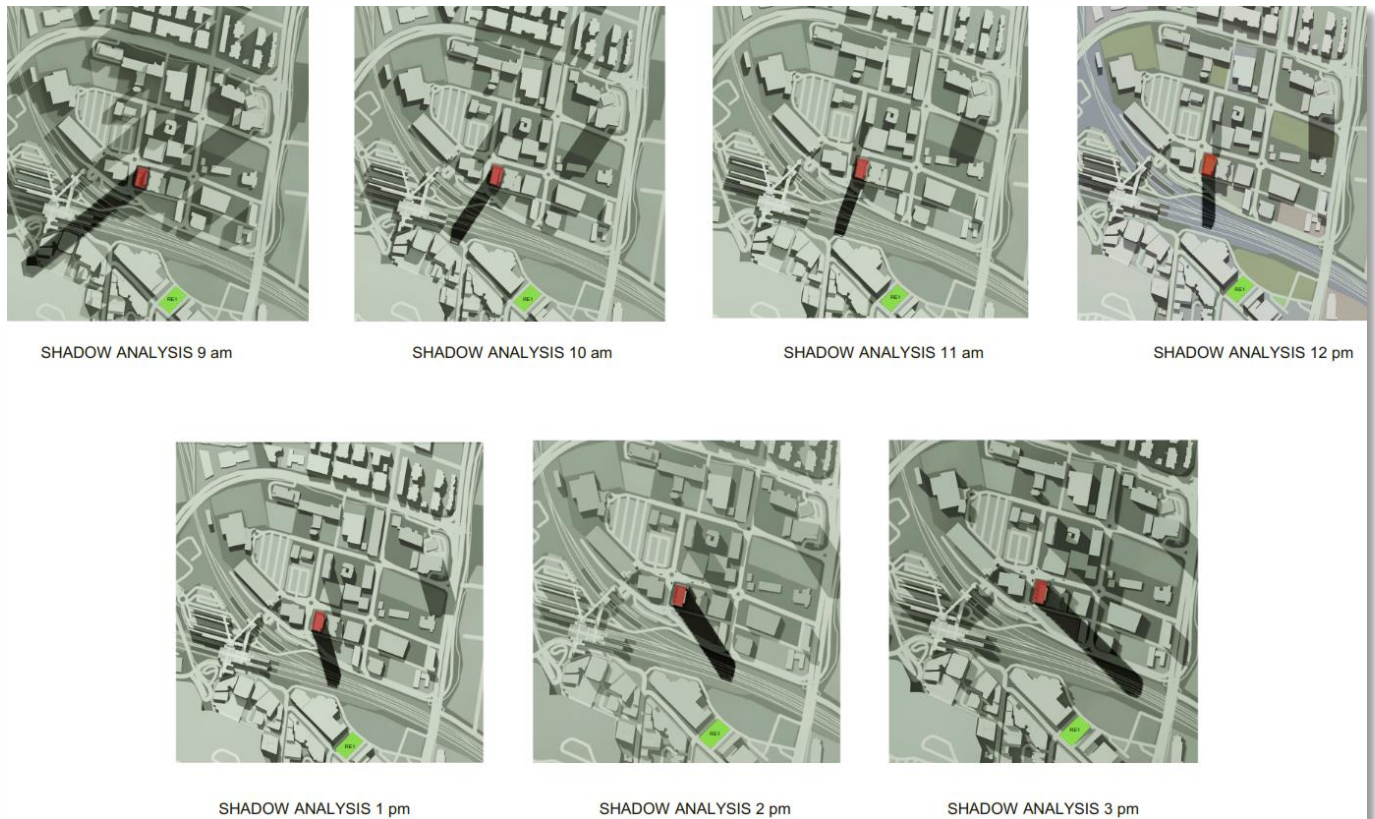
#### Matters required to be demonstrated by subclause (3)

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the maximum building height development standard. For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.

- The additional height supports the provision of appropriate lift overrun services and architectural features for the development of staff working in the upper office use levels.
- The character of the Site in the Blacktown CBD, Northside Precinct is undergoing transition to larger commercial and mixed use developments that are permitted in the corresponding B4 zone.
- Northside precinct. Part D of the DCP, Section 5.4.6 states *'This precinct is regarded as the logical future extension of the CBD, retained within the boundaries of the inner ring road. The precinct is physically isolated from the bulk of the CBD by the railway line, hence the incorporation in any development of functional pedestrian and visual links with the established CBD area is important.'* Therefore, the mixed use office building proposed is consistent with the envisioned retail/commercial nature of the B4 zone and envisioned high density of the site as located in the Blacktown Central Business District (CBD), Northside Precinct.
- The proposed development with the architectural features above the LEP Height Limit remains compatible with the desired character of the area in terms of the building presentation to the street, the materials, and mix of building heights and uses within the locality.
- The proposed architectural features provide for a better planning outcome as a compliant height could be provided with the same yield of office space be achieved by providing a building with no architectural features but provides visual interest to the architectural form of the development.
- The design of the lift overrun being recessed behind the building line mitigate amenity impacts of adjoining properties in overlooking and overshadowing. The architectural features proposed consist of mostly blue tinted glass and therefore mitigates adjoining amenity impacts of potential overshadowing from the architectural features over the LEP height limit.
- The design of the Lift overrun being recessed behind the building line mitigates amenity impacts of adjoining properties. When comparing the Shadow diagram and 3d Sun Study, the proposed lift overrun is recessed and does not cast shadows beyond the building envelopes of the mixed commercial use building proposed (See **Figure 5**).
- As noted above the architectural features consist of blue tinted glass that still allow solar access when considering the shadows cast in **Figure 5**, it is noted that the majority of shadows cast throughout the day would be on the railway line.



- The lift portion of the building has been set 3m from the east property boundary and the east facing walls and windows a further 3m from the lift overrun (6m from the boundary). This stepped building design to the east side of the building allows additional morning to midday solar access to maintain amenity to the east adjoining shop top housing residents in the proposed as shown in the Shadow diagram below (See **Figure 5**).



**Figure 5: Shadow Diagram 9am to 3pm**

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

Consistency with objectives of the standard, the applicable zones and the public interest.

Clause 4.3 of the Blacktown Local Environmental Plan 2015 provides the following objectives for the height of buildings development standard.

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

The proposed modifications are consistent with the relevantly applicable objectives for height of buildings based on the following reasons:



- The proposed lift and lobby area of the office levels are proposed with non-vision obscured glass set recessed 3m behind the eastern side of the proposed building. The east facing windows proposed for the office levels are recessed 3m behind the lobby area to prevent direct eastward views to the adjoining shop top housing apartment balconies. The lift overrun and architectural features do not facilitate area for staff to overlook into adjoining apartment windows or balconies therefore the proposal is consistent with the objective to *minimise loss of privacy to surrounding development*.
- The steps in building line on the eastern side ensure the east adjoining shop top housing building have sufficient solar access with morning sun from 9am to 12pm. The lift overrun and architectural features over the LEP height limit do not increase shadows cast on the adjoining shop-top housing apartments therefore the proposal with the lift overrun and architectural features over the LEP height limit is consistent with the objective to *minimise the loss of solar access to surrounding development*.
- The character of the locality is in transition to increase building heights and density of commercial uses in the Northside Precinct as described in part D of the DCP as *'the logical extension of the CBD'* and the design utilises the building height control in part D of the CBD *'For land on the northern side of First Avenue and all relevantly zoned land to the south down to the railway line - more than 20 storeys is permissible.'* Therefore the proposed development with the lift overrun to facilitate the 20 storey commercial building is consistent with the objective to *ensure buildings are compatible with the height, bulk and scale of the surrounding commercial centre within the City of Blacktown*.
- The proposal results in an increased commercial density in the Blacktown CBD within walking distance of the Blacktown railway station therefore, the proposal is consistent with the objective to *define focal points for denser development in locations that are well serviced by public transport, retail and commercial activities*.
- As noted above the structures proposed over the height limit are architectural features as well as lift overrun to facilitate lift access to the 20<sup>th</sup> floor for office use floor area therefore the proposal *ensures sufficient space is available for commercial and retail uses*.

As outlined above the proposal remains consistent with the underlying objectives of the controls and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

As clause 4.6(4)(a)(ii) requires, the Consent Authority must also be satisfied 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'*

The objectives of the B4 Mixed Use zone are as follows:

#### **Zone B4 Mixed Use**

##### **Objectives of zone**

- *To provide a mixture of compatible land uses.*
- *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.*

The proposed commercial component on the Site remains consistent with the relevantly applicable objectives as:

- The mixed commercial uses proposed with the application include ground floor shops, first and second floor function centres and an indoor recreation facility on the third floor therefore the proposal *provides a mixture of compatible land uses*.
- The Site is located within approximately 140m walking distance of the Blacktown Railway Station with use of existing pedestrian corridors through Boys Avenue therefore retail/commercial uses on

the ground floor as well as ground floor lobby area access to the function centres and office uses encourages staff, customers and guests to use the existing public transport therefore the proposal *integrates suitable business, office and retail development in accessible locations to maximise public transport patronage and encourage walking and cycling.*



**Figure 6:** Walking distance from Site to Blacktown Railway Station (Source: SIXmaps)

The departure from the control is acceptable in the circumstances given the underlying objectives of the Height of building development standards and underlying objectives of the B4 Mixed Use zone are achieved and will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

For the abovementioned reasons, it is considered that the consent authority would be satisfied the development is in the public interest.

#### Concurrence of the Secretary

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2021. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

## Conclusion

The proposed mixed use commercial building meet the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts. The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The justifications are well founded and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

Strict compliance with the prescriptive maximum height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances. The proposal with the lift overrun and architectural features meet the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts and improves the overall functionality of the development through provision of lift service to the top office floor and will result in positive contribution to the streetscape through the building articulation, variation of external colours/materials and provision of the lift overrun recessed behind the building envelope to prevent any visual impact from the streetviews. Therefore the proposal will not have any negative impact and overall enhance the amenity of the development.

The justifications are well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including the departure to the maximum height control.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the envisioned character for the site. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.