



Development proposal for a concept DA for five commercial towers above a parking podium at 7-9, 14-18, 19-21 and Lot 1 DP 1260420,
Chalmers Crescent, Mascot

CLAUSE 4.6 VARIATION STATEMENT in support of a non-compliance with the maximum permissible Height of Building (HoB) for the site under Clause 4.3 of Bayside Local Environment Plan 2021

Document Control

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NOTE: This statement is prepared with reference to the architectural drawings dated 31/01/2025, Revision C, prepared by Crone Architects and needs to be read in conjunction to Statement of Environmental Effects (SEE) submitted with the Masterplan.

This variation statement refers to the questions contained in the judgements of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**), *Wehbe v Pittwater Council* [2007] NSWLEC 827 (**Wehbe**), *Project Ventures v Pittwater Council* [2005] NSWLEC 191, *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070, *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, and other relevant case law.

1 Site and locality

- 1.1 Located at 7-9, 14-18, 19-21 and Lot 1, DP 1260420, Chalmers Crescent, Mascot, the subject site comprises of properties located in Chalmers Crescent cul-de-sac. The 16 lots have a legal description of Lots 11-26 in DP29697.
- 1.2 The L-shaped site has an area of 11,485m² and the recently contracted cul-de-sac an area of 1,118m², altogether totalling 12,603m². The site falls about 0.4m east to west. Currently, the sites accommodate obsolete two-storey industrial/warehouse buildings.
- 1.3 The street is accessed through Kent Road/Coward Street intersection to the north and is between Bourke Street to the east, Alexandra Canal to the west and Sydney Kingsford Smith Airport to the south. Surrounding development immediately to the west, east and south comprises airport-related industrial and office uses, many associated with Qantas Airways. On the north side of Chalmers Crescent are visually obsolete older one and two-storey industrial buildings used for a variety of warehouse and industrial uses. No.1-5 Chalmers Crescent is a recently completed office building of 12 storeys and another office building is under construction at No.2 Chalmers Crescent.
- 1.4 Located in Zone E3 – *Productivity Support* under the *Bayside Local Environmental Plan 2021* (BLEP), the proposed *commercial development* is permissible with consent.
- 1.5 The allowable HoB on site, in accordance with clause 4.3 of the BLEP, is 44m. The proposal has a non-compliance of 2m or 4.5% resulting in a total height of 46m.
- 1.6 The permissible HoB for the site is defined by clause 4.3 of the BLEP. For the purpose of this assessment, the objectives of clause 4.3 of the BLEP are referenced in the statement.

The site in its immediate context is shown on the following map and aerial/street views.

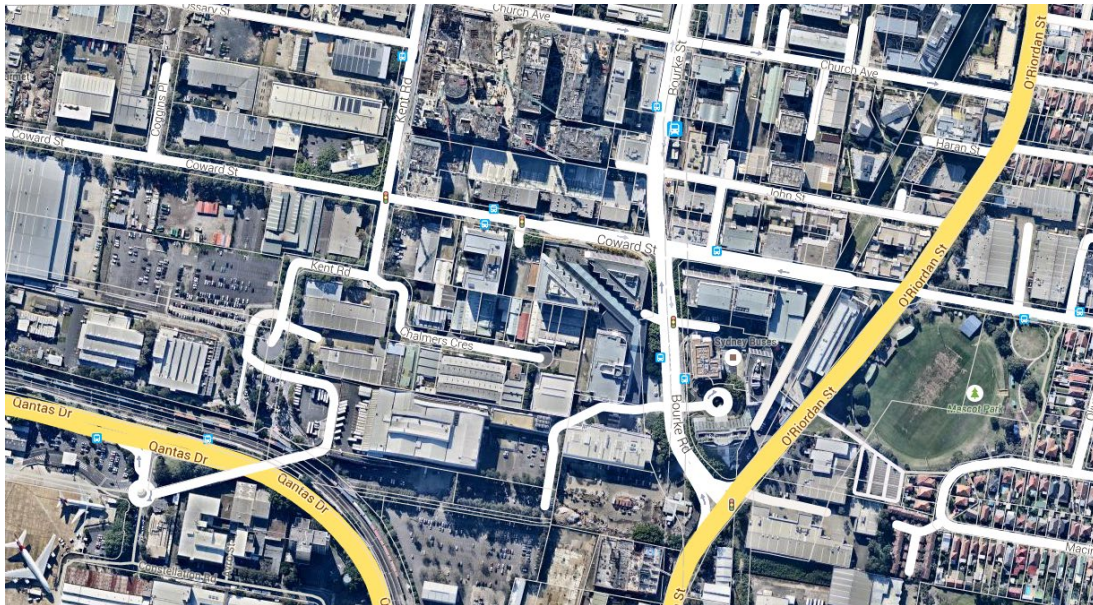


Figure 2. Subject site (red); Mascot Station Town Centre (orange). Residential development north of Coward Street has since been completed following the approval of (DA-2018/1187) Masterplan; Sydney Airport (green).

2 Requirement for a clause 4.6 Variation Statement

- 2.1 Clause 4.6 of the BLEP seeks to provide appropriate flexibility to the application of development standards in order achieve better planning outcomes both for the development and from the development. The objectives of clause 4.6 are as follows:

Clause 4.6(1) Objectives		
Clause	Control	Justification
(1)(a)	to provide an appropriate degree of flexibility in applying certain development standards to particular development	
(1)(b)	to achieve better outcomes for and from development by allowing flexibility in particular circumstances	A better outcome has been achieved for the site in general by a proposal which has increased the employment floorspace while maximising the space between buildings on the site. The proposal non-compliant over a limited area of the roof being the services structure and lift over-runs. The buildings could not be further excavated to achieve compliance due to the sandy soil and high water table of the site.

- 2.2 Under clause 4.6(2) of the BLEP, 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.
- 2.3 The development standard in question is contained in clause 4.3 of the BLEP, and clause 4.6 may be used to permit the granting of development consent in spite of the contravention of this development standard.
- 2.4 Under clause 4.6(3) of the BLEP, the consent authority must consider a written request from the applicant that seeks to justify the contravention of the development standard. The following requirements have to be addressed in the written request:
 - (3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- 2.5 The proposal has a maximum height of 46m resulting in a breach of the HoB control by 2m or 4.5%. Therefore, a clause 4.6 variation statement is required to justify the non-compliance with the HoB development standard set by clause 4.3 of the BLEP.
- 2.6 The requirements of subclauses 3 and 4 of clause 4.6 of the BLEP are addressed in the following sections of this report.

3 What is the degree of non-compliance?

- 3.1 Clause 4.3 of the BLEP establishes a maximum HoB of 44m for the subject site.
- 3.2 The proposal has a maximum HoB of 46m that results in a breach of 2m - refer to Figure 1. The extent of the breach, 2m, is limited to the lift overruns and rooftop plant rooms. It is noted that the proposal does not exceed the Sydney Airport Obstacle Limitation Surface (OLS) of 51.0 AHD, which is established by CASA to protect airspace for the safety of aircraft operations associated with Sydney Airport.

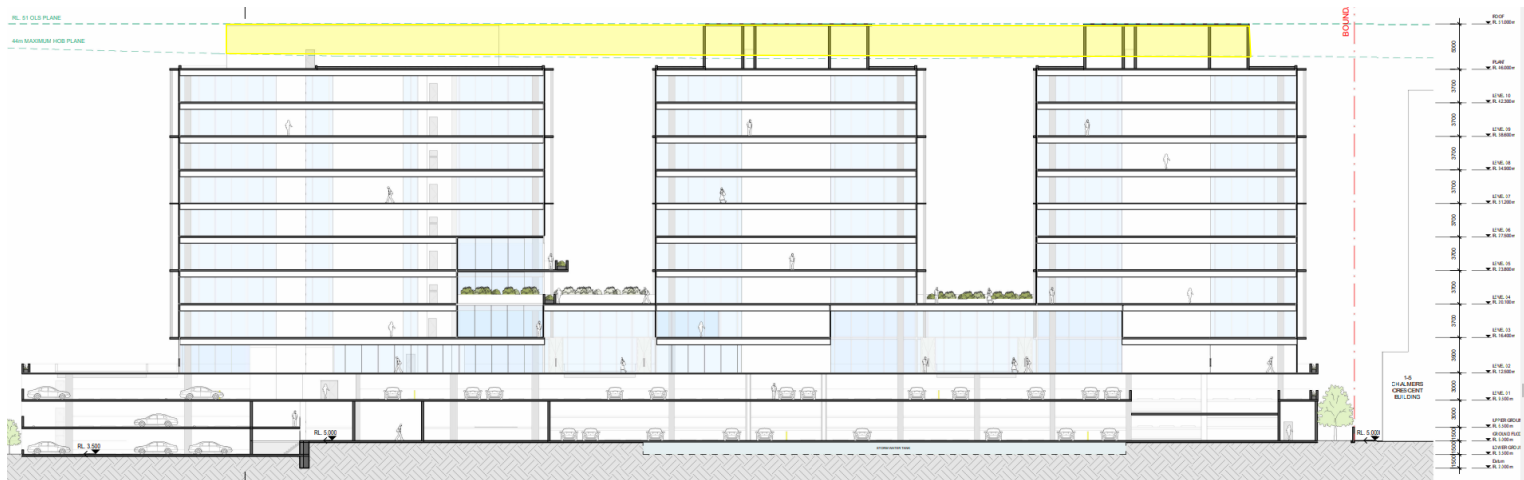


Fig 1 – Section through Towers 1 to 3 showing area of non-compliance in yellow. The lift overrun and plant room does not breach the OLS 51.0 AHD

4 Is the development consistent with the relevant aims of BLEP?

4.1 The relevant general aims of the BLEP under clause 1.2 are below. The proposal satisfies these aims as discussed:

(d) to encourage sustainable economic growth and development in Bayside,

Directed to providing business/office floorspace in support of the functions of Sydney Airport, the proposal maximises the floorspace on the site within the tight height constraints of the OLS. Growth in operations associated with the airport will place greater demands on the locality in the future. Having regard to the normal lifespan of commercial buildings, 40-50 years, the proposal must cater for a planning horizon of similar time. The additional 2m, in breach of the HoB allows an extra storey in the proposal which in turn allows for greater spacing between the towers.

(h) to encourage development that demonstrates efficient and sustainable use of energy and resources in accordance with ecologically sustainable development principles,

A sustainability report has been prepared as part of this application demonstrating the proposal's commitment to implementing sustainable practices to achieve:

- A 5.5 Star NABERS Base Building energy rating for the commercial office development
- A 5 Star Green Star Buildings v1 rating for the development, including the Climate Positive Pathway
- An all-electric building that leverages onsite and offsite renewable energy sources
- A 4 Star NABERS Base Building water rating for the commercial office development.

(i) to enhance and protect the functions and roles of the international trade gateways of Sydney Airport and Port Botany



The target market for the proposal is organisations/ corporations whose activities are central to the function of the airport and which need proximity to the airport. The proposal will enhance the functions of the airport by providing employment floorspace near the airport.

4.2 The subject site is zoned E3 - Productivity Support under the BLEP 2021. The relevant objectives of Zone E3 are:

- To provide a range of facilities and services, light industries, warehouses and offices.
- To provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres.
- To maintain the economic viability of local and commercial centres by limiting certain retail and commercial activity.
- To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones.
- To promote redevelopment that is likely to contribute to the locality, including by improving the visual character of the locality, improving access and parking, reducing land use conflicts and increasing amenity for nearby residential development.

The additional HoB of the proposal, above the development standard of 44m, satisfies the above objectives for the following reasons. The proposal will:

- Deliver an office park style development to accommodate 48,645m² of flexible commercial office space that will support the viability of Sydney Airport, Mascot Town Centre and, more broadly, Sydney's Global Economic Corridor. Proximity to the airport means that airport support facilities can be provided on this site.
- Provide a major employment hub to support Sydney Airport.
- Allow the tower buildings to be slimmer by having eight storeys instead of seven possible under the 44m HoB.
- Not adversely impact on retail uses in the Mascot Town Centre.

5 Is the development consistent with the relevant objectives of Clause 4.3 – Height of building?

5.1 The relevant objectives of clause 4.3 of the BLEP, are:

- (a) to ensure that building height is consistent with the desired future character of an area,*
- (b) to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) to nominate heights that will provide an appropriate transition in built form and land use intensity.*

5.2 The proposed development meets the objectives of Clause 4.3 of the LEP based on the following assessment:

Clause	Objectives	Justification
4.3	BLEP	
(1)(a)	to ensure that building height is consistent with the desired future character of an area,	The desired future character of Chalmers Crescent and the surrounding locality consists of commercial developments ranging from 10 to 12 storeys. The proposed development will appear generally as intended by the 44m height control as the building façade is, at the building's highest point, 1m lower than the height of building control. Whilst the proposed 12 storey commercial development results in a minor variation to the 44m height control, the exceedance at the plant and lift overrun is setback from the streetscape and will not impact the emerging character of the locality. In any case, the desired future character of the area is controlled by the mandatory OLS height limit.
(1)(b)	to minimise visual impact of new development, disruption of views, loss of privacy and loss of solar access to existing development,	Whilst the proposal results in a minor variation of 4.5% to the 44m height control, the breach is limited to the plant and services room at the top of each tower. The street facades at the buildings' highest point, are 1m below the height control. The minor extent of the height variation, which is balanced by the parts of the building below the height control, is such that the variation does not result in any discernible difference in relation to visual impact. Views or privacy are not issues for commercial development. In relation to solar access, there are only non-residential uses affected by shadows from the proposal.
(1)(c)	to nominate heights that will provide an appropriate transition in built form and land use intensity.	The designated height control is an anomaly as it is approximately 2m below the mandatory OLS (governed by Federal legislation). Like other developments in the immediate vicinity and also the current approved Masterplan, the proposal comes up to the OLS which is close to the BLEP development Standard. The height of the proposal does not form a transition but rather represents a uniform building height within the locality.

- 5.3 The existing Masterplan approval is the nearest comparable approval. It was given on 15 March 2017 for a height of building of 46.4m, 2.4m above the 44m development standard. The position of the rooftop plantrooms has changed and, to the extent that survey information is available, it appears that the ground level immediately below the plantroom on Tower 5 gives the greatest building height which is 46m, 2m above the 44m standard. In any case, the maximum elevation of the plantroom roof is still at 51.0 AHD.

6 Can the consent authority be satisfied that compliance with the development standard is unnecessary or unreasonable because the objectives of the development standard are achieved notwithstanding non-compliance with the standard?

6.1 At paragraph [16] of *Initial Action*, Preston CJ states:

*As to the first matter required by cl 4.6(3)(a), I summarised the **common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary** in *Wehbe v Pittwater Council* at [42]-[51]*

And although the above referenced *common ways* were said in the context of an objection under SEPP 1 – Development Standards in *Wehbe*, they are still applicable to the purpose of an application under a clause 4.6 variation statement.

Preston CJ further notes in [17] of *Initial Action*:

the first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary, because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

- 6.2 The site is subject to an Obstacle Limitation Surface height limit of 51.0 AHD equivalent to a building height of 46m with which the proposal complies. The OLS height control is mandatory, allowing no variation except on a temporary basis for construction and then subject to Federal aviation authority permissions. The proposal does not exceed this height limit and is the same height as the current Masterplan which was approved by CASA. Given the proposal maintains the height of building originally approved by CASA and complies with the OLS standard, compliance with the development standard is unnecessary for the purposes of clause 4.6(3)(a) of the BLEP.
- 6.3 The proposal satisfies not only the relevant objectives of clause 4.3 for the HoB development standard, but the proposal also complies with the general aims of the BLEP and the objectives of zone E3, in which the site is located. If all the relevant objectives are met, the numerical development standard has no further work to do and is thus unnecessary.
- 6.4 Additionally, as all the relevant objectives are met, it is also unreasonable to apply the development standard in this case as the impact is negligible and arises only as a consequence of not being able to excavate the site due to foundation conditions. Compliance with the relevant standard is therefore unreasonable for the purposes of clause 4.6(3)(a) of the BLEP.
- 6.5 The bulk and scale of the proposal is in keeping with the emerging and future character of the area to the extent that the planning controls reflect such character. There are a number of examples of buildings of similar height (within 2m). Considering that the bulk and scale is largely consistent with surrounding new commercial development in the near vicinity, the proposal presents an acceptable design and demonstrates compliance with the first test under *Wehbe*, quoted above.

- 6.6 The circumstances giving rise to the small additional height in breach of the 44m control are a combination of building separation and the desire to reduce the bulk of the towers. For these reasons, strict application of the height standard would be both unreasonable and unnecessary. Setting back the element which breaches the HoB to the middle of each tower, away from the street facades, reduces the apparent height when seen from the street and thus reduces the impact of the non-compliance.

7 Are there sufficient environmental planning grounds to justify contravening the development standard?

- 7.1 Pain J held in *Four2Five vs Ashfield Council [2015]* NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 request must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.
- 7.2 Preston CJ noted in *Initial Action*, that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under clause 4.6, the aspect of the development that contravenes the development standard should be the focus (as opposed to the development as a whole) of any analysis.
- 7.3 Pursuant to clause 4.6(3)(b) of the BLEP, there are sufficient environmental planning grounds to justify the variation to the HoB because:
- The proposed design is generally compliant with the bulk, scale and maximum height allowed on site. As a result, the part of the proposal which breaches the HoB standard does not generate any significant or material adverse environmental impacts on adjoining sites. In fact, it cannot be seen from the public domain in Chalmers Crescent. The lack of material impact is an environmental ground sufficient to justify the very minor contravention (2m) of the development standard on the roof at the planter room and lift overrun.
 - The majority of the street facades are below the 44m height control by a maximum of 1m. The variation is proposed predominantly to achieve an optimal architectural outcome for the building by having an additional storey that allows the tower footprints to be smaller/skinnier.
 - The areas which exceed the height control, the rooftop plant rooms, do not contribute to gross floor area. It is established that the breach in height for the plant room and lift overrun is not for the purpose of achieving a greater yield.

- The scale of the building is as anticipated by the planning controls and the proposed development has a consistent number of storeys with other nearby recently approved office buildings. Accordingly, the scale of the development in terms of its three-dimensional size will not be perceived as inappropriate or antipathetic in a streetscape and urban design context.
- The general compliance of the proposed development with the applicable controls under the SEPPs and Bayside Development Control Plan (BDCP), ensures the potential adverse environmental impact of that part of the proposal which breaches the HoB standard is within the acceptable limits established by the planning controls.
- With respect to impact on solar access, there are no residential uses affected by shadows from the proposal. In any case, shadows from the non-compliant rooftop part of the plantrooms sits within the shadows of the compliant towers and cause no additional impact.
- The lack of any material or discernible adverse impact resulting from the minor non-compliance of the proposal with the height control must be counted as a positive environmental planning ground (*Randwick v Micaul Holdings* [2016] NSW LEC 7). Achieving strict compliance would not achieve an improved outcome for the development as it would diminish the architectural outcome of slimmer towers.
- The proposed development will generate additional employment opportunities both during the construction phase and after completion, which should be an important factor in considering the variation request. Rejecting the proposal and requiring the removal of commercial floor space in this strategically located and thoughtfully designed project would result in a missed opportunity for the community and the city at large. The impact of the exceedance is minimal, primarily due to the non-habitable roof elements involved.
- The areas which exceed the maximum permissible height control do not contain gross floor area and will not achieve a greater yield.
- The design of the proposal exemplifies high standards of urban and architectural quality, showcasing design excellence despite the non-compliance. The design has been refined through a detailed site analysis, multiple design iterations, and careful consideration to ensure the best outcome. The character of the existing and planned streetscape in the area has played a key role in shaping the design, making the non-compliance a suitable and deliberate response to the surrounding context.
- The topographic constraints make it unsupportable to have an underground basement as sand is located beyond 2.6m on the subject site. The breach is a result of the car park having

to be located above ground to ensure the towers have a stable foundation in addition to maintaining the Botany aquifer.

The considerations above provide strong environmental grounds justifying the contravention of the HoB standard to the small degree proposed.

7.4 As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance of a small part of the proposal as a whole.
- The environmental planning grounds relied on are sufficient to justify the breach of the development standard. The relevant items in Clause 4.6(3) of the LEP have been adequately addressed above to enable the consent authority to form the requisite opinion of satisfaction.

7.5 Further justification in support of clause 4.6(3) of the BLEP is below:

Cl 4.6(3) Justification of Contravention		
Clause	Control	Justification
4.6(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:	This clause 4.6 submission has been prepared to address the contravention of the maximum height standard and to justify the proposal's contravention.
4.6(3)(a)	That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (see the test under <i>Wehbe</i> below), an	This clause 4.6 demonstrates that compliance with the development standard is unnecessary because the proposal meets all the relevant height objectives in the BLEP in spite of the breach of the HoB standard by a minor 2m. If all the relevant objectives are met, the numerical development standard has no further work to do and is thus unnecessary. Having regard to the lack of material adverse impact due to the non-compliant section of roof, strict compliance with the HoB standard is unreasonable in the circumstances.

4.6(3)(b)	That there are sufficient environmental planning grounds to justify contravening the development standard.	Sufficient environmental planning grounds to justify the contravention of the development standard have been outlined in section 7 of this report.
	As established in <i>Initial Action</i> [23], 'environmental planning grounds' refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act. These are as follows:	
1.3(a)	to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources	The proposed development is for a commercial development and has a very positive impact on the social and economic welfare of the community. The State's natural and other resources remain unaffected as part of this proposal.
1.3(b)	to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	Energy and water consumption in occupation are managed through compliance with NABERS and Green Star Building Ratings, which mandate limits on energy and water consumption.
1.3(c)	to promote the orderly and economic use and development of land,	The development of the site for its zoned purpose represents the orderly and economic use purpose of the Act.
1.3(d)	to promote the delivery and maintenance of affordable housing,	Affordable housing is not applicable to this application.
1.3(e)	to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	No threatened or other species of native animals and plants, ecological communities or their habitats exist on site or are threatened as a result of this application.
1.3(f)	to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	No built or cultural heritage requiring sustainable management has been identified on site.
1.3(g)	to promote good design and amenity of the built environment,	The proposed commercial development is of a high standard of architectural design which will improve the amenity of the built environment of the locality. An emerging character of high quality commercial designs is already evident in Chalmers Crescent and the proposal adds to this character.
1.3(h)	to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	By meeting modern standards of construction required by the NCC, the proposal can meet the health and safety needs of its tenants.

1.3(i)	to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	Not relevant to this development application which proposes the use of the site in accordance with its zoning.
1.3(j)	to provide increased opportunity for community participation in environmental planning and assessment	Not relevant to this development application which proposes the use of the site in accordance with its zoning.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ established at least five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary.

These are examined below:

Five Tests		
Part	Test	Discussion
1	The objectives of the standard are achieved notwithstanding non-compliance with the standard and the compliance with the standard is unreasonable or unnecessary.	This is the test upon which this submission relies. It is argued above that strict compliance with the HoB standard is both unreasonable and unnecessary.
2	The underlying objectives of the standard are not relevant and compliance is not necessary.	It is not suggested that the underlying objectives of clause 4.3 of the BLEP are not relevant.
3	The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	It is not suggested that the underlying objectives of clause 4.3 of the BLEP would be thwarted or defeated if compliance were required.
4	The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.	No evidence has been found to demonstrate that Council has abandoned the HoB standard in the approvals given for commercial developments.
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.	The subject site is appropriately zoned and the standards, subject to a degree of flexibility, are appropriate.



8 Conclusion

In circumstances where there are no significant adverse impacts resulting from the 2m contravention of the 44m development standard, it is unreasonable and unnecessary to require strict compliance of the proposal with the HoB development standard of the BLEP.

<https://nurban.sharepoint.com/sites/CPWActiveProjects/Shared Documents/23238 - Mayer, Mascot/CPW reports and files/CI4.6 HoB - V3.docx>