

# ETHOS URBAN

## Clause 4.6 Variation Request

23-35 Atchison Street, St Leonards  
Mixed Use Development

Submitted to North Sydney Council  
On behalf of TWT Global

22 July 2020 | 2190823



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# Contents

1.0	Introduction	2
2.0	Development Standard to be Varied	3
3.0	Nature of Variation Sought	3
3.1	Planning Context	3
3.2	Maximum Building Height	4
4.0	Justification for Contravention of the Development Standard	6
4.1	Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances	6
4.2	Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard	9
4.3	Clause 4.6(4)(a)(ii): the proposed development will be in the public interest	11
4.4	Other Matters for Consideration	12
5.0	Conclusion	13

## Figures

Figure 1	Exceptions to Development Standards Map – Sheet CL 1_001 (site outlined red)	4
Figure 2	NSLEP 2013 height compliance diagram	5
Figure 3	Section showing height plane and proposed development	5
Figure 4	Section showing Planning Proposal section (Revision AB)	5

## Tables

Table 1	Consistency with the objectives of the B4 Mixed Use zone	11
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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of TWT Global. It is submitted to North Sydney Council (the Council) in support of a development application (DA) Council for a new mixed use building at 23-35 Atchison Street, St Leonards.

Clause 4.6 of the *North Sydney Local Environmental Plan 2013* (NSLEP 2013) enables the consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation request relates to the development standard for height of buildings under clause 4.3 of the NSLEP 2013 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 22 July 2020.

We are aware that the relevant Height of Building control has only been recently created as a result of the Planning Proposal (PP\_2018\_NORTH\_003\_00). However, the Planning Proposal scheme that did not provide adequate provisions for adequate lift specifications and structural requirements which has increased the building overall height by 700mm. The Planning Proposal allowed a lift overrun of 4m and the proposed development includes a lift overrun of 4.5m.

The only exceedance of height is the lift overrun and building services area.

This clause 4.6 variation request demonstrates that compliance with the height of buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the height of buildings development standard:

- The objectives of the standard are achieved, particularly in that the proposal is compatible with its context, given the number of tall buildings in the vicinity of the site and transitioning nature of the St Leonards precinct;
- There are sufficient environmental planning grounds to justify the variation as the proposed height is a result of the substantial topographical change, it does not comprise any habitable space;
- The Planning Proposal for the site (PP\_2018\_NORTH\_003\_00) has been gazetted which will amend the maximum building height from 20m to 56m and therefore while the proposal will result in a minor variation, the amendment has been thoroughly investigated and analysed as part of the Planning Proposal process;
- The site provides a substantial public benefit through appropriate building articulation and the provision of mixed uses as well as a new through-site link, consistent with the objectives of the B4 Mixed Use zone.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the NSLEP 2013.

## 2.0 Development Standard to be Varied

This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the NSLEP 2013. Clause 4.3 provides that the height of a building on any land is not to exceed the maximum shown for the land on the Height of Buildings Map. It is noted that the Planning Proposal for the site (PP\_2018\_NORTH\_003\_00) has been gazetted and will amend the building height shown on the Height of Buildings Map from 20m to 56m (NSLEP 2013 amendment no.27).

Clause 4.3 of the NSLEP 2013 is reproduced below in its entirety.

- (1) *The objectives of this clause are as follows—*
- (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
  - (b) *to promote the retention and, if appropriate, sharing of existing views,*
  - (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
  - (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
  - (e) *to ensure compatibility between development, particularly at zone boundaries,*
  - (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*
- (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.*

## 3.0 Nature of Variation Sought

### 3.1 Planning Context

As detailed in **Section 2.0** above, the site is afforded a maximum building height of 56m per NSLEP 2013 amendment no. 27. Ordinarily, clause 4.3 Height of Buildings would prevent the development of any building on the site which exceeds the mapped height. However, for specific areas, other more detailed provisions apply. In particular, the NSLEP 2013 contains special provisions for land in St Leonards (as shown on the Exceptions to Development Standards Map – Sheet CL 1\_001) under clause 4.6(8)(ca) as follows:

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
- (ca) *in relation to land identified as “Land in St Leonards” on the Exceptions to Development Standards Map—clause 4.3(2) by more than 3 metres (excluding plant rooms and similar structures),*

While this clause excludes plant rooms and similar structures like lift overruns in the consideration of ‘exceptions to development standards’, we note that regardless, the non-compliance is below the stated 3m.



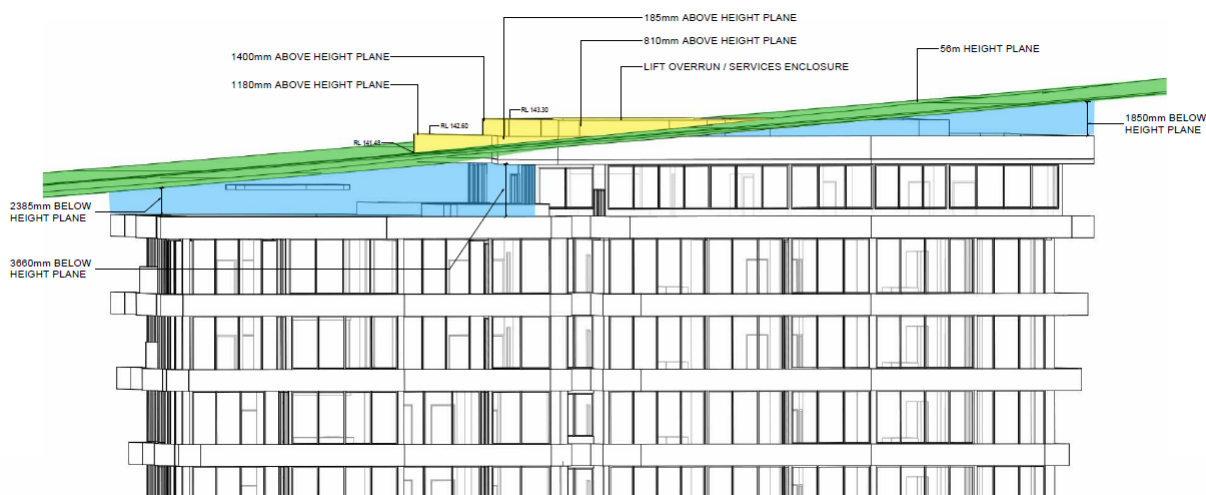
**Figure 1** Exceptions to Development Standards Map – Sheet CL 1\_001 (site outlined red)

Source: NSLEP 2013

### 3.2 Maximum Building Height

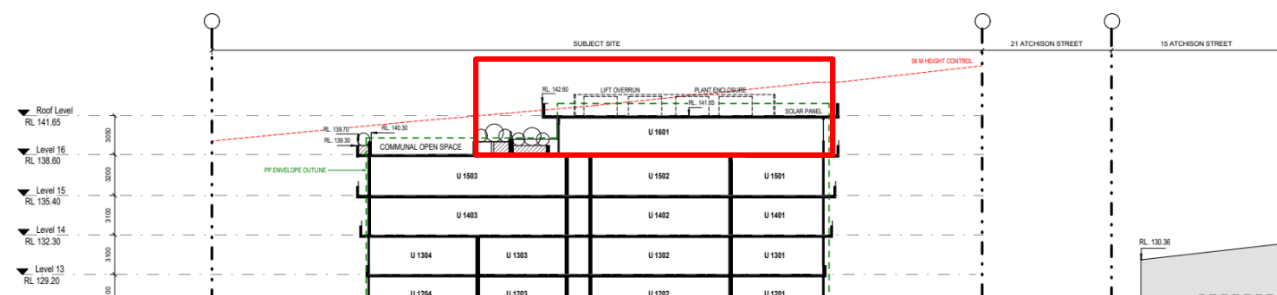
The proposed maximum building height is 57.85m which exceeds the mapped maximum building height control (amendment no. 27) by 1.85m or 3.3% for only a small part of the site. Importantly, given the existing ground level creates a sloping height plane across the site this has resulted in the minor exceedance, however it only comprises the lift overrun and mechanical plant as illustrated in **Figure 2** and **Figure 3** below.

Notwithstanding this, as discussed in **Section 3.1**, clause 4.6(8)(ca) of the NSLEP 2013 allows a development to exceed the mapped maximum building height control for land in St Leonards by no more than 3m (excluding plant and similar structures). Therefore, the proposed variation to the maximum building height control is considered to be consistent with clause 4.6, with this variation request prepared to provide absolute clarity.



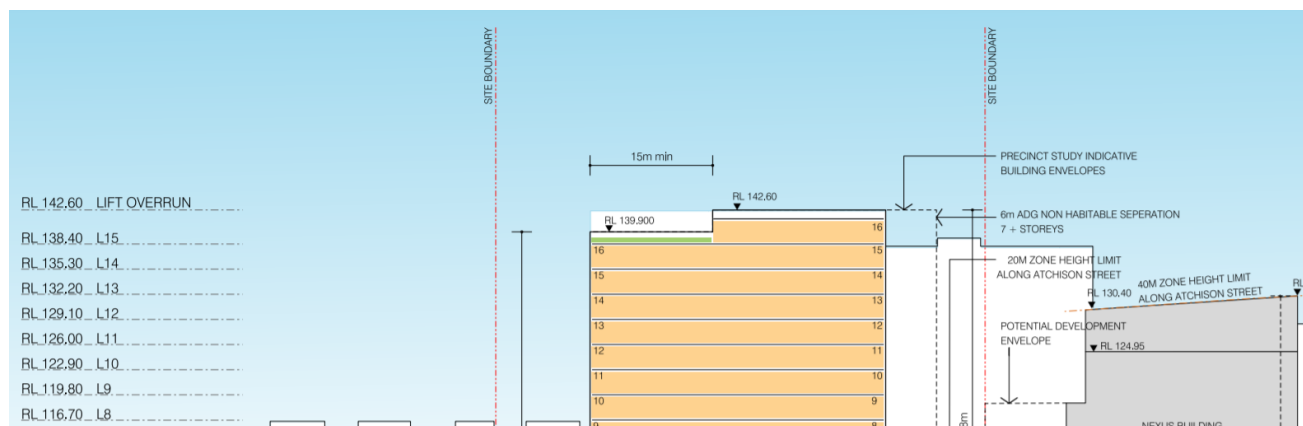
**Figure 2** NSLEP 2013 height compliance diagram

Source: Aplus Design Group



**Figure 3** Section showing height plane and proposed development

Source: Aplus Design Group



**Figure 4** Section showing Planning Proposal section (Revision AB)

Source: AJ+C

## 4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the NSLEP 2013 provides that:

### 4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the NSLEP 2013 provides that:

- (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.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the NSLEP 2013, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

### 4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the NSLEP 2013 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).



- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the **First Method**.

#### 4.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.3 of the NSLEP 2013 are:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) to promote the retention and, if appropriate, sharing of existing views,*
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) to ensure compatibility between development, particularly at zone boundaries,*
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

The proposal is assessed against the objectives for the height of buildings development standard below.

#### 4.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

##### ***Objective (a): to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient***

The St Leonards Precinct slopes from the west to the east. The existing scale of development predominantly reflects this with building heights tapering down towards the east of Atchison Street towards Cammeray.

The building mass has been appropriately distributed across the site and the incorporation of a podium and tower with the roof level stepped back appropriately reflects the prevailing scale of development scaling down towards the east.

It is as a result of this topography that the minor height exceedance occurs.

##### ***Objective (b): to promote the retention and, if appropriate, sharing of existing views***

The proposed development has been designed to minimise overshadowing on the surrounding locality through the incorporation of increased setbacks along Oxley Street, Albany Lane and the provision of a 6m wide publicly accessible through site link connecting Atchison Street and Albany Lane. It is worth noting that the proposal is as a result of a recent LEP amendment that required a well documented building form upon which to base the planning controls and analysed overshadowing to great detail.

The surrounding development is primarily characterised by a variety of medium to high density development, predominantly comprising residential and commercial / retail uses. It is noted that some view loss from surrounding buildings is unavoidable within a highly urbanised area and is generally accepted by Council in such circumstances that development within a Strategic Centre is not stifled.

While the proposal will be most notable when viewed from the south and east along Atchison Street and Oxley Street, it is considered that it provides an appropriate transition in built form, while contributing high quality architectural design and public domain improvements. Importantly, given that the proposal will only result in a 1.85m variation to the maximum building height, this is considered negligible with regard to impact on views given that the Planning Proposal to amend the height from 20m to 56m has been gazetted and thorough view impact analysis has been undertaken. Where the proposal results in a variation to the 56m height control, this is not considered to

reduce or impact the sharing of existing views from neighbouring properties particularly from that which was previously assessed.

Considering the context of the site in a Strategic Centre, some level of view loss is to be expected.

**Objective (c): to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development**

As demonstrated in the overshadowing analysis submitted with the SEE, the proposed development will maintain an acceptable level of solar access to existing dwellings, public reserves and streets. A Planning Study was also undertaken for 21 Atchison Street, which illustrated that through the incorporation of the 6m wide publicly accessible through site link, an 8 storey mixed use building could be accommodated (in the future), with the capacity to achieve the relevant amenity provisions contained in the ADG. Therefore, the proposed development will not result in any adverse solar impacts to existing or future development.

Again, the work undertaken for the LEP Amendment to enable this development undertook extensive shadow modelling to develop the concept envelope.

**Objective (d): to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings**

It is considered that any impact on views that would be caused by the variation to the height control are acceptable as a result of only a minor exceedance in one localised area. Given the area's growing context and the compatible scale of the development and incorporation of privacy measures within the development, we are of the opinion that the objective has been addressed.

**Objective (e): to ensure compatibility between development, particularly at zone boundaries**

The proposed development has been designed with a defined podium base and tower above that responds to the key characteristics of the area and transitioning nature of the St Leonards Precinct. The proposed development also incorporates a curvilinear modulation and a stepped building form to ensure it is commensurate in building height as it steps down towards the east along Atchison Street.

The proposed development seeks approval for a mixed use building that is compatible with the B4 Mixed Use zone objectives incorporating commercial / retail and residential land uses that will provide job opportunities, a mix of dwelling typologies and publicly accessible open space in a strategic location.

**Objective (f): to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area**

The proposed development including the height variation achieves an appropriate built form and scale outcome having regard to the vision for the St Leonards precinct expressed by local planning policy and the existing and emerging scale of development on adjacent and surrounding land.

The proposed development will achieve an appropriate balance of maintaining employment opportunities while also recognising the need to provide additional housing in a strategic location. Through the incorporation of a defined podium base and tower element, this responds to the key site characteristics to ensure the development is in accordance with the surrounding built form typologies.

#### **4.1.3 Summary**

In summary, the proposed development meets the objectives of the standard as it:

- Is consistent with its context in terms of height;
- Responds appropriately to surrounding development and the transitioning nature of the precinct;
- Is of a high architectural quality and has been integrated into the design; and
- Complies with the objectives of the B4 Mixed Use zone.

## 4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the NSLEP 2013 requires the consent authority to be satisfied that the applicant's written request has adequately addressed clause 4.6(3)(b), by demonstrating:

*That there are sufficient environmental planning grounds to justify contravening the development standard.*

The environmental planning grounds relied on in the written request under clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

There are sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

### 4.2.1 Ground 1: Clause 4.6(8)(ca) of the NSLEP 2013 – Land in St Leonards

The NSLEP 2013 contains special provisions for Land in St Leonards, including clause 4.6(8)(ca) as follows:

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following—*

*(ca) in relation to land identified as “Land in St Leonards” on the Exceptions to Development Standards Map—clause 4.3(2) by more than 3 metres (excluding plant rooms and similar structures),*

As shown in the Architectural Plans and discussed in **Section 3.2** above, the proposed development seeks approval for an exceedance to the 56m building height control by 1.85m and will only comprise the lift overrun and mechanical plant.

As noted in clause 4.6(8)(ca) the consent authority has the power to grant development consent for Land in St Leonards if it does not exceed more than 3m (excluding plant rooms and similar structures). Accordingly, given that the proposed development will only result in a 1.85m exceedance to the 56m building height control and only comprises the mechanical plant and lift overrun, the consent authority have the powers to approve the proposed development under clause 4.6(8)(ca). This forms the basis of sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it is documented in Council's LEP.

### 4.2.2 Ground 2: The site has a sloping topography

The site sits on the edge of a high point that occurs roughly at the intersection of Mitchell Street and Atchison Street and there is approximately 6m of elevation change across the site.

The development has been carefully designed to step down with the slope of the site; however, the topography has necessitated a protrusion in the centre, towards the eastern extent. This protrusion is minor in nature given it only comprises the lift overrun and will not substantially result in any additional overshadowing or any other impacts to the amenity of the surrounding buildings or public domain. The protrusion is discussed and illustrated in **Section 3.2** above.

### 4.2.3 Ground 2: the development complies with the maximum floor space ratio

The proposed development complies with the maximum FSR for the site of 6.3:1. As such, the height variation has not been driven by an overdevelopment of the site, but to allow for appropriate building separation between adjoining development and to provide appropriate amenity. The proposed development includes significant public benefits and has acknowledged the possible future redevelopment of adjoining sites, in particular 21 Atchison Street. In this way, the location of the building on the site is a result of providing appropriate separation distances and given the topography of the land this has resulted in a minor exceedance to the building height control.

Notwithstanding this, the proposed exceedance does not result in an increase in gross floor area and the proposed development therefore complies with the maximum FSR control.

#### **4.2.4 Ground 3: the recent LEP did not adequately consider detailed engineering requirements**

The proposal has been subject to detailed assessment as part of the LEP Amendment to increase the FSR and Height of Building control. However as part of this, some detailed structural requirements and adequate lift overrun heights were not accounted for.

#### **4.2.5 Conclusion**

There are considered to be sufficient environmental planning grounds to justify contravening the development standard as:

- Clause 4.6(8)(ca) allows for an exceedance to the maximum building height control if it is below 3m on Land in St Leonards and excludes plant rooms and similar structures;
- The site is positioned to provide appropriate separation distances between adjoining development and is located on a significant slope;
- Some detailed aspects of the development were not considered at the LEP Amendment stages;
- It is not uncommon or unreasonable to expect some minor height variation in such situations; and
- The building complies with the maximum floor space ratio.

### 4.3 Clause 4.6(4)(a)(ii): the proposed development will be in the public interest

This requirement requires consistency 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

#### 4.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the height of buildings development standard, for the reasons discussed in **Section 4.1.2** of this report.

#### 4.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use zone, as set out in **Table 1** below.

**Table 1 Consistency with the objectives of the B4 Mixed Use zone**

Objective	Comment
<i>To provide a mixture of compatible land uses.</i>	The proposed development has had regard to the existing buildings and land uses in the locality and the transitioning nature of the St Leonards precinct. The proposed development integrates commercial and retail tenancies as well as residential apartments to provide a development that provides employment opportunities and recognises the growing population and changing demographics.
<i>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.</i>	The proposed development is located in a strategic area, within 400m to St Leonards train station and 200m to the new Crows Nest Metro station. The proposal also includes bicycle storage facilities and is in walking distance to a range of services, retail and business facilities in nearby centres including North Sydney, St Leonards and Chatswood.
<i>To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.</i>	The proposed development adopts a high quality architectural and landscape design to improve pedestrian permeability along the streetscape while increasing activation in and around the site. This will create a vibrant and safe mixed use area that will be well lit and employ casual surveillance to the surrounding streetscape. While achieving this, the proposed development also achieves appropriate residential amenity in accordance with the ADG.
<i>To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.</i>	The proposed development includes Lower Ground and Upper Ground levels comprises commercial / retail floor space with residential apartments located above. This will create employment opportunities and a range of dwelling typologies to suit the growing population and changing demographics. The proposed development also maximises active street frontages and pedestrian traffic in and around the building through the incorporation of non-residential uses on the ground floor.

#### 4.3.3 Overall public interest

The proposed development represents an innovative and responsive approach to the street environment and the overall streetscape, while increasing the provision of residential and commercial floor space. It seeks to replace existing development that contributes little in terms of public domain with a development that adds significant public benefit in the form of a publicly accessible through site link from Atchison Street to Albany Lane.

Further, the proposed development improves the built form outcome on the site by establishing an envelope that responds to its surrounding context and existing building heights between Mitchell and Oxley Streets including development along the Pacific Highway and within the St Leonards Precinct.

The height exceedance will be imperceptible to the public domain or from adjoining properties and as such, is considered to not interfere with the public interest.

## 4.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (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.*

These matters are addressed in detail below.

### 4.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the height of buildings development standard does not raise any matter of significance for State or regional planning. The variation to the building separation development standard will not contravene any overarching State or regional objectives or standards or have any effect outside of the site's immediate area.

### 4.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As demonstrated above, there is no public benefit in maintaining the development standard. The additional height proposed only comprises the lift overrun and mechanical plant and generally responds to a height transition in the area and would not give rise to any adverse environmental impacts.

Accordingly, it is not considered that there would be any public benefit for the height of the building to be reduced, particularly where the key planning issues deriving from height including privacy, views and overshadowing have been appropriately resolved through high quality architectural design.

### 4.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

We are not aware of any other matters that the Secretary (or the consent authority, under delegation) is required to consider before granting concurrence.

## 5.0 Conclusion

The assessment above demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the NSLEP 2013 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the height of buildings development standard:

- The objectives of the standard are achieved, particularly in that the proposal is compatible with its context, given the number of tall buildings in the vicinity of the site;
- The height variation is due to the topographical slope from west to east and only comprises the lift overrun and mechanical plant and no habitable space;
- The height variation is as a result of the LEP Amendment that prescribed an exact building form, which, at an early concept stage – had not accounted for some minor and more detailed structural engineering requirements and lifting requirements.
- The site will provide additional residential and commercial floor space without exceeding the FSR controls and therefore does not result in the overdevelopment of the site; and
- The site provides substantial public benefit through the separation of the built form and the provision of a publicly accessible through-site link and is consistent with the objectives of the B4 Mixed Use zone.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the NSLEP 2013.