

**Amended Clause 4.6 Variation Request to the
Height of Building Development Standard
Clause 4.4 of Willoughby LEP 2012**

Proposed Residential Flat Building

691 Pacific Hwy, CHATSWOOD

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Date: 22 May, 2024

1.0 INTRODUCTION

A Concept Development Application has been lodged with Willoughby City Council on 28 June 2023, for the demolition of the existing buildings and construction of a 27-storey residential flat building, at 691-699 Pacific Highway, Chatswood. The proposal is detailed in the Statement of Environmental Effects and accompanying documents.

Two matters of relevance to this Clause 4.6 request for variation have since changed since the date of lodgement. From 30 June 2023, a substantial revision to Willoughby LEP 2012 came into effect. The revised instrument is described as Willoughby Local Environment Plan 2012 (Amendment No. 34). This LEP amendment changed the zoning and primary development standards applicable to the subject site. In order to avoid confusion throughout this submission, the amended version of the Willoughby LEP 2012 will be referred to as *WLEP Am 34*. The Willoughby LEP applicable at the date of lodgement of the CDA to Council will be referred to as the *Unamended WLEP*.

The second matter of relevance is the change to WLEP Am 34 on 1 November 2023. This amended Clause 4.6 via the Standard Instrument. Submissions for a clause 4.6 variation made after 1 November are no longer required to address the objectives of the development standard or the objectives of the landuse zone in order to satisfy the public interest test. However, the DP&E noted at the time that consideration of the objectives of the standard can be relevant to demonstrating that compliance with a development standard is unreasonable or unnecessary in the circumstances (*Wehbe v Pittwater Council* [2007] NSWLEC 827). Either way, for the sake of clarity, it is noted that the amended clause 4.6 provisions do not apply to this application as the changes only apply to development lodged after 1 November 2023. Any development application lodged but not determined on 1 November 2023 continues to be assessed under the previous clause.

The subject site was zoned R3 Medium Density Residential under the Unamended WLEP. This zoning still applies to the proposal pursuant to the savings provision, which provides that the provisions of the Unamended WLEP apply to development applications lodged but yet to be determined on the date of commencement of the WLEP Am 34.

The Unamended LEP prescribed the maximum building height for this site as 12m. The WLEP Am 34 zones the land as MU1 Mixed Use zone with a Height of Building maximum of 90m and FSR of 6:1. The proposed residential flat building complies with the WLEP AM 34 development standards, however, exceeds both the HOB and FSR development standards in the Unamended WLEP that applied on the date the application was lodged.

The applicant requests a variation to the Height of Buildings (HOB) development standard, as prescribed in clause 4.3 of the Unamended WLEP. This request is made pursuant to clause 4.6 Exceptions to Development Standards.

This Variation Request has been prepared based on the Architectural Drawings prepared by DEM Architects, dated May 2023. It should be read in conjunction with the Statement of Environmental Effects accompanying the development application.

The following is a summary of the proposal for easy reference:

Unamended WLEP	
Requirement	HOB: 12m
Proposed	Building: 90m
Is the planning control in question a development standard?	Yes
Is the non-compliance with the clause requirement a Numerical and / or Performance based variation?	Numerical
If numerical enter a % variation to requirement	Change in HOB is 78m or 650%

The following are extracts from the Concept proposal development plans that accompany the application:

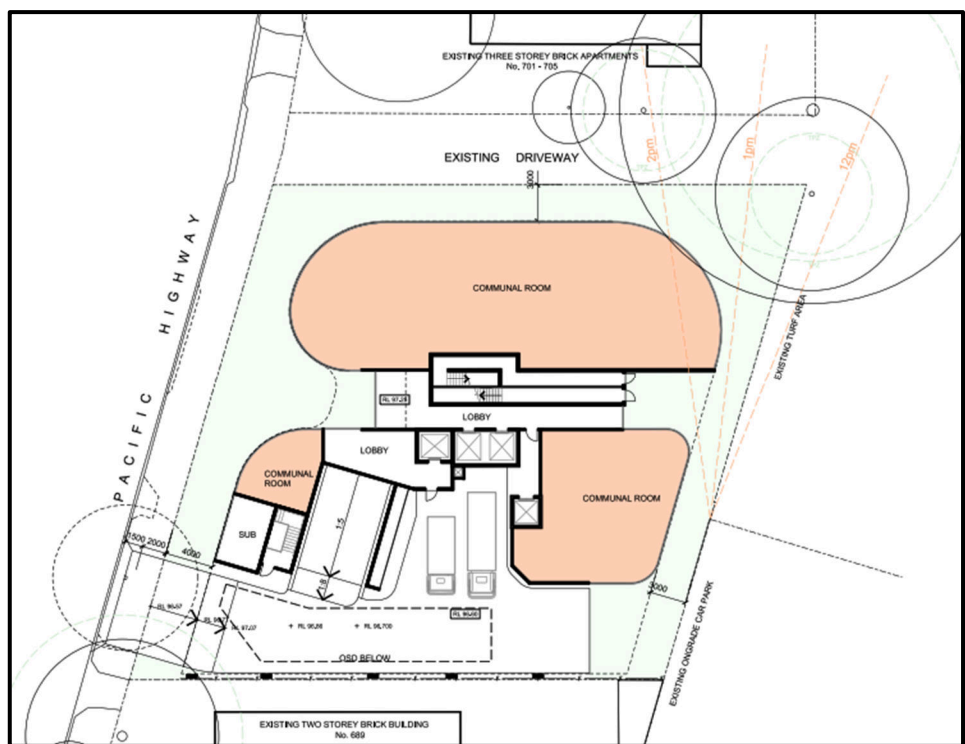


Figure 1: Proposed Site Plan

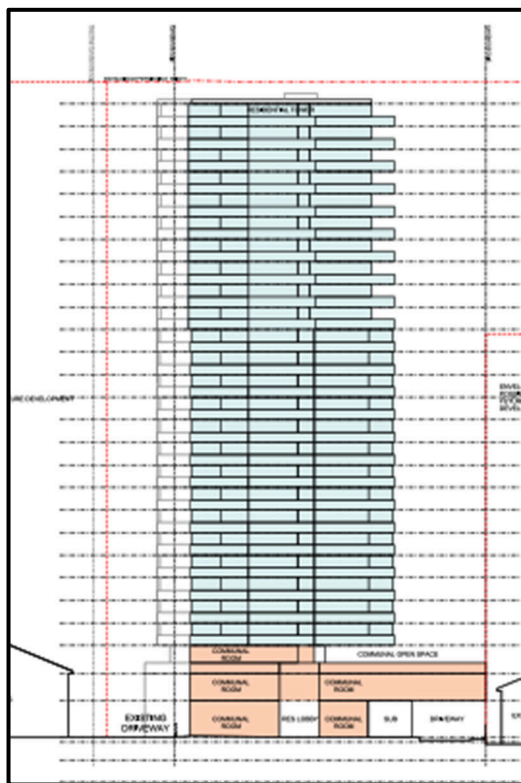


Figure 2: Proposed West Elevation of building



Figure 3: 3D Image of proposed building

2.0 WILLOUGHBY LOCAL ENVIRONMENTAL PLAN 2012 (UNAMENDED WLEP)

Clause 4.3 Height of Buildings of the Unamended WLEP relevantly provides:

4.3 Height of buildings

(1) *The objectives of this clause are as follows—*

- (a) *to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- (b) *to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (c) *to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,*
- (d) *to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
- (e) *to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*
- (f) *to use maximum height limits to assist in responding to the current and desired future character of the locality,*
- (g) *to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) *to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

(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.*

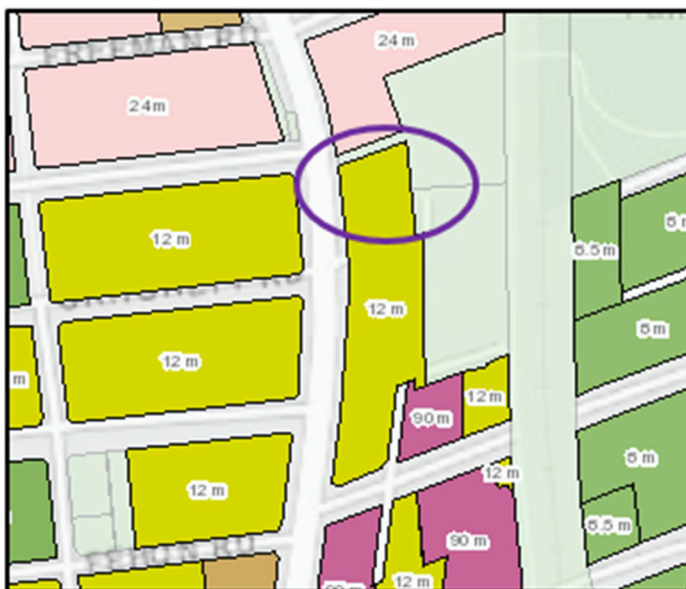


Figure 4: Extract of Unamended Height of Buildings

3.0 MECHANISM FOR A CLAUSE 4.6 VARIATION

The Unamended WLEP contains provisions under Clause 4.6 which allow for the consent authority to consider certain variations to the principal development standards listed in the LEP. The variations may only be considered reasonable where they have been suitably justified by an applicant to be ‘unreasonable or unnecessary’ in the circumstances of the case, pertaining to site conditions, surrounding character of the built form, etc.

The provisions of Clause 4.6 of the Unamended WLEP (at the time of lodgement of the application with Council) are reproduced below:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small

Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

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

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 4.3 (to the extent that it applies to land at 1–5 Broadcast Way, Artarmon, being Lots 1–6, DP 270714).

Having regard to the above, in summary a development standard can be varied if a submission is made (in writing) by the applicant justifying a contravention to the development standard on the grounds that:

- i. compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- ii. that there are sufficient environmental planning grounds to justify contravening the development standard.*

The consent authority must however be satisfied that:

- iii. the applicant's written request has adequately addressed the matters required to be demonstrated by sub-clause (3), and*
- iv. 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.*

Note: While satisfaction of No. iii is strictly required by the statutory application of clause 4.6 at the time of lodgement of the application, the amendment of cl 4.6 in late 2023 no longer requires demonstration of the public interest via satisfaction of the objectives of the development standard and the landuse zone. Any consideration of this point is therefore carried out with the knowledge of the change to the clause and the intention of that change by the NSW DP&E.

4.0 LEGAL PRINCIPLES

This request has been prepared having regard to various authorities on Clause 4.6, contained in the following guideline judgements including:

- *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 No. 1')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No. 2')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No. 3')
- *Bates Smart Pty Ltd v Council of the City of Sydney* [2014] NSWLEC 1001
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA
- *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583
- *Wilbec Chatswood Pty Ltd v Willoughby City Council* [2024] NSWLEC 1234

In short, cl 4.6 of the Unamended WLEP imposes four preconditions on the Court in exercising the power to grant consent to the proposed development.

The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)).

The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).

The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).

The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

5.0 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

Clause 4.3 provides inter-alia that (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.*

‘Development Standards’ has the following meaning ascribed to it under Section 4(1) of the *Environmental Planning and Assessment Act, 1979*:

“development standards” means provisions of an environmental planning instrument in relation to the carrying out of development, being provision by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of -

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point;*
- (b) the proportion or percentage of the area of a site which a building or work may occupy;*
- (c) the character, location, siting, bulk, scale, size, height, density, design or external appearance of a building or work;***
- (d) the cubic content or floor space of a building;*
- (e) the intensity or density of the land, building or work, the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles;*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment;*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles;*
- (h) the volume, nature and type of traffic generated by the development;*
- (i) road patterns;*
- (j) drainage;*
- (k) the carrying out of earthworks;*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows;*
- (m) the provisions of services, facilities and amenities demanded by development;*
- (n) the emission of pollution and means for its prevention or control or mitigation; and*
- (o) such other matters as may be prescribed;”*

The Clause relevant in this instance is:

(c) the character, location, siting, bulk, scale, size, height, density, design or external appearance of a building or work;

On this basis, it is my opinion that Clause 4.3 of the Unamended WLEP, although referred to as a local standard is a development standard and not a “prohibition” in respect of development, and one amenable to an objection under Clause 4.6. This would be consistent with Council’s intention.

6.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007), sets out 5 ways of establishing that compliance is unreasonable or unnecessary as follows:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.....

43 The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

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.....

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.....

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.....

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.....

However, care needs to be taken not to expand this fifth way of establishing that compliance is unreasonable or unnecessary beyond its limits. It is focused on “particular land” and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the particular land is found to be unreasonable or inappropriate. If the particular land should not have been included in the particular zone, the standard would not have applied, and the proposed development would not have had to comply with that standard. To require compliance with the standard in these circumstances would be unreasonable or unnecessary.

50 However, so expressed, this way is limited. It does not permit of a general inquiry into the appropriateness of the development standard for the zoning. An objection would not be well-founded by an opinion that the development standard is inappropriate in respect of a particular zoning (the consent authority must assume the standard has a purpose)

The requirement that the consent authority form the opinion that granting consent to the development application is consistent with the aims of SEPP 1 as set out in clause 3 (one of which is the promotion and coordination of the orderly and economic use and development of land) makes it relevant “to consider whether consent to the particular development application encourages what may be summarised as considered and planned development” or conversely may hinder a strategic approach to planning and development.”

Set out below is an analysis of the standard, having regard to the principles enunciated in both the *Winten* and *Wehbe* judgements as applicable.

Comments:

- The plans submitted as part of the development application demonstrate that a residential flat building is capable of being constructed on the land, in accordance with the local and State strategic planning and provisions of WLEP Am 34 which came into effect on 30 June 2023.
- The subject site is capable of accommodating the proposed residential development, including integrated design elements that provide for conversion to non-residential uses once the proposal is constructed. In this regard, areas identified as communal areas, equating to 17% of the total gross floor area, are designed to be readily adapted and converted to commercial use following grant of consent to this application. Furthermore, at ground floor, the spaces are configured in a manner that are currently and will continue to be considered as activated street frontage without any modification to the building envelope or façade.
- The variation to the Unamended WLEP HOB development standard is numerically significant but directly reflects the WLEP Am 34 development standard of 90m for the site, consistent with Council’s adopted strategy for the Chatswood CBD.
- In this instance the whole of the proposed development is the aspect of the development that exceeds the development standard. At the time of lodgement of the application on 28 June 2023 WLEP Am 34 was considered imminent and certain. This is borne out by its commencement on 30 June 2023 (*published LW 30 June (2023 No. 373)*).
- In the circumstances, the development standard has been abandoned by Council’s own actions, that is, its proactive and planned process to have the area zoned to allow for a 90m height with 6:1 FSR.

- The maximum building height applicable to the proposed development under WLEP Am 34 is 90m. The development complies with the WLEP Am 34 HOB control. In fact, post lodgement of the application the proposal complies with both the HOB (90m) and FSR (6:1) development standards under WLEP Am 34.
- The following Table 1 (list of sites rezoned during 2022) shows a number of site-specific spot rezonings where Council and the state Government supported early uplift of development potential of sites in the vicinity of the development site. The list of sites in table is not exhaustive, identifying rezonings finalised and commenced during 2022.
- The council and the State Government abandoned the controls in the Unamended WLEP in favour of the strategic vision for the future development of the whole of the Chatswood Town Centre. The new suite of landuse zonings and primary development standards are adopted via WLEP Am 34.
- By its own actions Council, and the State Government, have permanently departed from the controls in the Unamended WLEP, making compliance with those FSR and HOB standards unnecessary and unreasonable in light of the commencement of the WLEP Am 34 changes.

Table 1: Approved Spot Rezonings – commenced during 2022

Planning Proposal	Proposal	Address	Commenced
PP-2021-5704	Mixed Use Development HOB: 90m FSR: 6:1	9-11 Nelson St, Chatswood	Published LW 18 November 2022
PP-2021-4170	Mixed Use Development HOB: 44m FSR: 4.5:1	3 Ellis St, Chatswood	Date of Publication 25/06/2022
PP-2021-2923	Mixed Use Development HOB: 90m FSR: 6:1	621-627 Pacific Highway, Chatswood	Date of Publication 07/10/2022
PP-2021-3476	Mixed Use Development HOB: 90m FSR: 6:1	44 - 52 Anderson St, Chatswood	02/08/2022
PP-2021-2470	Mixed Use Development HOB: 90m FSR: 6:1	629, 637-639 Pacific Highway Chatswood	07/10/2022
PP-2021-2417	Mixed Use Development HOB: 90m FSR: 6:1	5-9 Gordon Avenue, Chatswood	25/03/2022
PP-2021-2404	Mixed Use Development HOB: 90m FSR: 6:1	871-877 Pacific Highway, Chatswood	06/05/2022
PP-2021-2396	Mixed Use Development HOB: 90m FSR: 6:1	753 Pacific Highway & 15 Ellis St, Chatswood	04/05/2022

7.0 IS IT CONSISTENT WITH THE OBJECTIVES OF THE STANDARD?

The Land and Environments Court’s recent position in considering consistency with objectives, is the adoption of Pearlman J in *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21 where, Her Honor expresses the following opinion [at 27]:

“The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, not even that it is compatible.”

Notwithstanding the fact that clause 4.6 has been amended since 1 November 2023 wherein the requirement to satisfy the objectives of the standard is no longer required in order to achieve part of the public interest test, the objectives of the development standard remain relevant to the consideration of whether the strict compliance with the standard is unnecessary and unreasonable. Statutorily and on a merit consideration basis the following assessment is provided.

The objectives of the Maximum Height of Buildings standard (both under the Unamended WLEP and WLEP Am 34) are:

- (a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*
- (b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,*
- (c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores, (d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,*
- (e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,*
- (f) to use maximum height limits to assist in responding to the current and desired future character of the locality,*
- (g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,*
- (h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

Comment: Addressing each objective as follows:

(a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape

Clause 4.6 of both the Unamended WLEP and the WLEP Am 34 allows an applicant to request a variation to a development standard. The proposed development exceeds the HOB permitted under the Unamended WLEP however, it complies with the adopted HOB standard in the WLEP Am 34. The proposed development has an HOB of up to 90m.

In terms of this objective and creation of ‘harmony’ by the proposal, this matter was considered by Commissioner Walsh, in *Wilbec Chatswood Pty Ltd v Willoughby City Council [2024] NSWLEC 1234 [at 53]*. That case considered two large bulk and scale related variations to a new tower development on Archer Street in the Chatswood Town Centre. The Commissioner found:

53 In relation to Objective 4.3(1)(a), I do note, and as put in the written requests, the test here is one of being “in harmony”, rather than have some equivalence with “the surrounding buildings and the streetscape”. In harmony would essentially require the proposed development to provide an agreeable or pleasing combination with that which exists. Given that the proposed built form can be understood as a desirable outcome in terms of current planning ambitions for this part of Chatswood, and noting that the same objective applies to the current 90m control, I can find that the development is consistent with this objective.

The same consideration applies the subject site, wherein the proposed built form can be understood as a desirable outcome in terms of the recently adopted planning ambitions for this part of the Chatswood Town Centre. Figure 5 below shows the WLEP Am 34 HOB map for the southern area of the Town Centre, including where significant building height changes have been adopted along the Pacific Highway, north of Mowbray Road.

The concept building envelope minimises any overshadowing, addresses potential loss of privacy and view sharing for the neighbouring properties consistent with the objectives of this clause. The proposal presents as a building envelope that will comply with the new maximum height for buildings in this location which is the desired and likely future character of the locality.

Other spot rezonings in the immediate vicinity of the site, dating back to as recently as 2022, also serve to establish that the anticipated bulk and scale of development was going to change such the lower scale contained in the Unamended WLEP was longer reflective of the built form scale and intensity for development of the area. Change was already occurring in the area and was imminent for the subject site at the time of lodging the subject application.

It is considered that the height of development is appropriate to the condition of the site and its context.

It is considered that the proposal meets this objective of the standard.

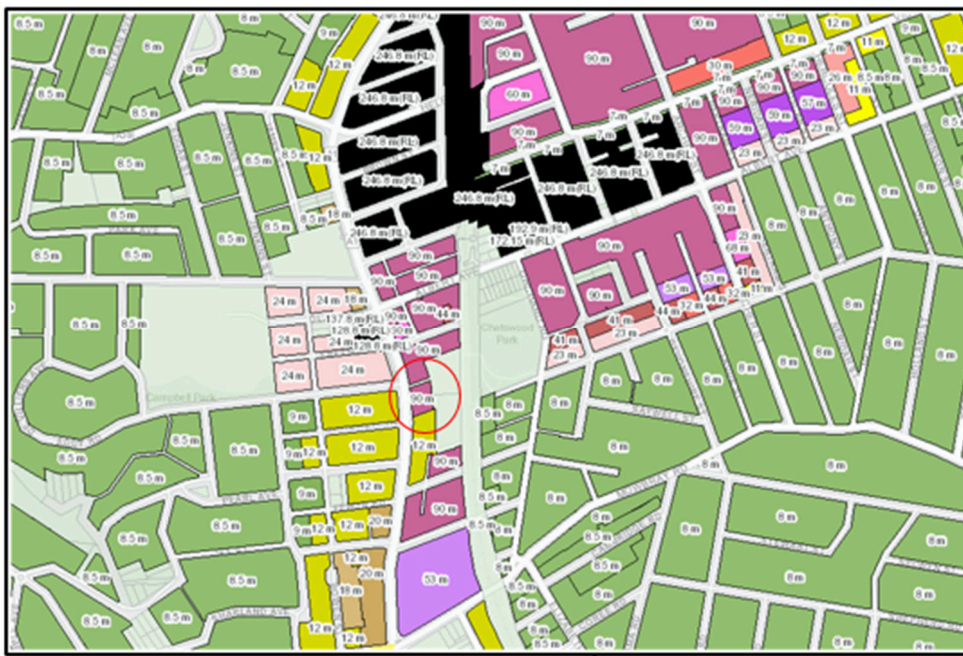


Figure 5: HOB map for southern Chatswood CBD area

(b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion

These matters are addressed within the design of the proposal. The setbacks, unit orientation, location of the indoor and outdoor living spaces and communal open space areas have taken into consideration the siting, size, scale and orientation of likely future adjoining and adjacent development. Compliance with setback and separation controls as well as considered strategic designing of internal layouts as well as provision for screening options via physical screens, highlight windows or translucent glazing. This objective can be achieved via design, layout and external elements.

It is not anticipated that any significant view loss arises from the proposal given the siting of the building and the proposed boundary setbacks. The tower form effectively sits well setback from the street edge and is considered to have minimal view impacts, considering its overall building envelope.

Notwithstanding that the proposed building is ‘tall’ when compared to existing development in the area, the tower building is oriented on the site such that shadows move across neighbouring properties (albeit more properties due to the building height) and the building is compliant mid-winter. The building envelope has been setback from the boundaries, as required by Council’s development controls and generally complies with the SEPP 65 design principles and ADG design controls.

It is not anticipated that any significant view loss arises from the proposal given the location of the site and the lower rise existing development that has not been able to take advantage of district views. Height and aspect are needed to achieve these in this location.

Overall, the tower form effectively sits well setback from the street edge and is considered to have minimal view impacts. The building envelope is well sited within the boundaries and design controls for the site.

The tower form is broken into two volumes - one facing east and one facing west. This break helps articulate the north and south facades and relates the building massing to the internal planning.

The southern blank wall on the common boundary is architecturally and aesthetically treated to provide visual relief and interest and is limited to a second level element only with the main building above podium well setback.

Whilst overshadowing will occur, the planning controls envisage such impacts. In regard to the sites to the south, the impact arises from a compliant built form built to the existing height standard.

As discussed in detail in ***Project Venture Developments v Pittwater Council [2005] NSWLEC 191***, when considering compatibility with reference to harmony. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance.

“It should be noted that compatibility between proposed and existing is not always desirable. There are situations where extreme differences in scale and appearance produce great urban design involving landmark buildings. There are situations where the planning controls envisage a change of character, in which case compatibility with the future character is more appropriate than with the existing. Finally, there are urban environments that are so unattractive that it is best not to reproduce them.”

This objective is satisfied.

(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores

The proposal consists of an envelope for a residential tower and whilst façade detailing is to follow, has all the essential base ingredients to create a building with high levels of architectural integrity and visual quality. External cladding and materials, including any screening for sun shade and/or visual privacy will be resolved with the future DA. The concept design is a sound architectural response to ensure that the building will be of high visual quality when viewed from different vantage points.

(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,

The upper-level apartments benefit from unobstructed district views and distant views towards the Sydney CBD and surrounding district and adjoining recreational areas including the Chatswood Bowling Club and Chatswood Croquet Club. No views from adjacent developments or public places will be unduly adversely affected particularly when noting the ultimate future scale of development and the opportunity to benefit from the new height limits.

(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping

The height of the proposal is considered to be consistent with the desired future character of the locality and the WLEP Am 34 HOB development standard of 90m, together with the 6:1 FSR applicable under WLEP

Am 34. The concept proposal provides an appropriate built form and land use intensity consistent with the current planning provisions for the site and adjoining properties. The proposed building envelope ensures compatibility by the CDA proposal.

The proposed development meets the other primary development standard of floor space ratio under WLEP Am 34 which applies to the site together with minimum requirements for private open space for the apartments and communal open space, setbacks and landscaping for the complex. It is considered that the proposal meets this objective of the standard. The CDA demonstrates that the proposal is suitable for the site and capable of construction.

(f) to use maximum height limits to assist in responding to the current and desired future character of the locality

The proposed development exceeds the HOB permitted under the Unamended WLEP however, it complies with the adopted HOB standard in the WLEP Am 34. The proposed development has an HOB of 90m.

In *Wilbec Chatswood Pty Ltd v Willoughby City Council [2024] NSWLEC 1234 [at 56]* Commissioner Walsh found:

56 It seems to me Objective 4.3(1)(e) and 4.3(1)(f), are examples of those objectives best understood as explanatory of the purpose of the building height standard (Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61 (Baron) at [49]). These objectives are already achieved through the prescription of the height standard itself, and its adoption in relation to floor space and landscaping restrictions.

To the extent relevant, the development seems to me to be consistent with these objectives in that it is consistent with the development potential of the land and the desired future character.

The rezoning of the land under LEP Am 34 was the enactment of the exhaustive studies by Council which established that there is sufficient environmental capacity within the locality to accommodate the greater densities and intensities as reflected in the new HOB and FSR controls.

Application of the Court finding to this development is substantially the same. The proposal is based on the strategic planning of the Council and NSW State Government. It complies with the consequential development standards that have been adopted to enact that vision. The proposal complies with the capacity for development of the subject site, particularly in terms of bulk and scale, as enumerated by the HOB and FSR standards in WLEP Am 34. The proposed uplifting of the zoning, including in particular the FSR and HOB standards, has undergone many years of master planning accompanied by exhaustive environmental and infrastructure studies that have concluded that the area (not just the site) is capable of accommodating significant increase in densities.

It is clear that with the commencement of the WLEP Am 34, that the proposal is consistent with the objective of providing housing supply which reflects to desired future character of the area.

(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,

Refer to comments under Objective (f) above. The proposed increased density as per the Council's strategic vision and master planning will add vibrance, vitality and economic reinforcement to the city centre and core. The building, as discussed above is designed to allow for retail activities. It is considered that the proposal meets this objective of the standard.

(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas

Refer to comments under Objective (f) and (g) above. The subject site is in close proximity to the Chatswood CBD and achieves transitions in building scale and density from higher intensity business and retail centres which are defined by the new Height and FSR limits under the LEP Am 34. As per Baron, the objective is achieved by Council's defined application of its HOB sub zoning and application of the new applicable standards distributed strategically from the town centre outward. Consequently, the proposal is consistent with the transition development objective.

It is considered that the proposal meets this objective of the standard.

8.0 THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the Unamended WLEP requires the departure from the development standard to be justified by demonstrating:

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

There are sufficient environmental planning grounds to justify a flexible approach to the application of the Height of Buildings 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.

The proposal seeks flexibility in the application of the standard where the breach to the HOB control arises from a building, which is consistent in bulk, scale and height with the desired future character adopted in WLEP Am 34 and new WDCP provisions that apply to the Chatswood Town Centre precinct.

The variation is only required due to the timing of the lodgement of the application with Council and the commencement of the new planning instrument and new DCP provisions. Post lodgement the proposal fully complies with the primary development standards that enact the strategic vision and extensive strategic planning task undertaken by Council and the NSW State Government.

The construction of a new building forced to comply with the Unamended WLEP HOB control of 12m will create a long-term tooth gap and poor urban design outcome for at least 60 years (expected life of building) and stifle achievement of Council's planning objectives to create an active and sustainable strategic town centre and increased housing availability and affordability, as established by its residential housing studies and strategies, adopted Master Plan and consequential WLEP Am 34 and WDCP amendment.

The proposal seeks flexibility in the application of the HOB standard where the breach to the Height of Building control arises from a building which is compliant with the new WLEP Am 34 height and FSR standards; development standards which commenced on 30 June 2023. WLEP Am 34 was imminent and

certain at the time of lodgement and therefore able to be considered as part of the design stage of the proposal and subsequent application.

It was professionally and morally responsible of the proponent, in designing the proposal and preparing the application, to take into consideration the primary development standards of what is now WLEP Am 34. In the case of the application of the new planning provisions the proposal is found to be reasonable and suitable for this site. The concept proposal contained in the CDA plans adopts the primary standards of WLEP Am 34 thus creating the bulk and scale of development envisaged as the desired future character of the precinct by the adopted strategic planning documents. Given the timing of the application and the commencement of the new WLEP Am 34 planning provisions, it should be concluded that Council was fully intending to abandon the Unamended WLEP FSR and Height controls. It would have been a detrimental planning outcome to apply the Unamended LEP controls and create a long-term urban design scar.

It is apparent from the shadow diagrams the surrounding buildings are not significantly affected and the proposal provides good solar access and amenity with very low levels of amenity impact to the neighbours. This is considered to achieve flexibility consistent with the objectives of this clause.

The proposal provides for a better outcome in making available setbacks which benefit from high amenity and high levels of solar access and outlook. This is considered to be a better outcome consistent with the objectives of this clause.

The proposal does not significantly reduce solar access to public spaces as confirmed by the shadow diagrams submitted with the application.

A consideration of the application and the submitted shadow diagrams demonstrate that no significant overshadowing, privacy, view or bulk and scale amenity impacts arise from the proposal. It is considered that the proposal is the better planning outcome encouraged by the provisions of Clause 4.6.

The redevelopment of the site is integral to the satisfaction of the precinct controls which relies on the site to improve traffic safety along Pacific Highway by providing the principal vehicular ingress point for the precinct by way of a reciprocal right of way in favour of the properties to the south. This will only be realised by way of the proposal as the incentive to redevelop the site to comply with the Unamended

WLEP controls and provide the same level of reciprocal access rights is not viable and would not be taken up. The benefits to the future residents, and more broadly all users of the Pacific Highway, outweigh any negative argument.

The proposal has undergone a voluntary competitive design competition process and the award-winning design, which now the subject of the application, has been found by the jury to exhibit design excellence under Am34 which requires inter-alia satisfaction as to the following:

- (4) In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—*
 - (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,*
 - (b) whether the form, arrangement and external appearance of the development will improve the quality and amenity of the public domain,*
 - (c) whether the development detrimentally impacts on view corridors.*
- (5) The consent authority must also have regard to how the development addresses the following matters—*
 - (a) the suitability of the land for development,*
 - (b) existing and proposed uses and use mix,*
 - (c) heritage and streetscape constraints,*
 - (d) the relationship of the development with other existing or proposed development on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*
 - (e) bulk, massing and modulation of buildings,*
 - (f) street frontage heights,*
 - (g) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*
 - (h) achieving the principles of ecologically sustainable development,*
 - (i) pedestrian, cycle, vehicular and service access, circulation and requirements,*
 - (j) the impact on, and proposed improvements to, the public domain,*
 - (k) the impact on special character areas,*
 - (l) achieving appropriate interfaces at ground level between the building and the public domain,*
 - (m) excellence and integration of landscape design.*

In the circumstances where there are sound environmental and site specific sufficient environmental planning grounds reasons for the breach to the height control it is considered to justify contravention of the control in Unamended WLEP and consequently the exception to the height control standard under Clause 4.6 is considered acceptable.

In this regard, there are sufficient environmental planning grounds to justify contravening the development standard of the Unamended WLEP. The proposed additional HOB (combined with the additional FSR) sought in this Clause 4.6 submission allows the built form on the site to achieve the desired

future character of the locality, as expressed under Council's and the NSW State Government's strategic planning and consequential WLEP Am 34 and WDCP provisions. Strict compliance with outdated planning and controls would be inconsistent with and seriously undermine achievement of Council's planned strategy and the planning instruments (LEP & DCP provisions) adopted for the development of the area.

9.0 PUBLIC INTEREST

9.1 Consistency with the objectives of the development standard

The proposed development is consistent with the objectives of the HOB development standard, for the reasons discussed in Section 7 of this submission.

9.2 Consistency with the objectives of the R3 – Medium Density Residential zone

Notwithstanding the change to the landuse zone applicable to the site, that is, from R3 to MU1 Mixed Use Zone under WLEP Am 34, together with changes to the provisions under clause 4.6 of the Unamended WLEP, this clause 4.6 submission is required to adhere to the Unamended WLEP provisions and written version of clause 4.6 as they applied at the date of lodgement of the application.

In both cases, the changes to the relevant landuse zone and cl4.6 assessment requirements have been outlined previously. The main change that is relevant in this case, is that the proponent is no longer required to demonstrate that the proposal satisfies the zone objectives as part of the public interest test under clause 4.6. This does not alter the need for this clause 4.6 variation to address these matters, but on merit, the weight given to them should be considered in light of the background and intent of the statutory changes since the lodgement of the application.

In considering the objectives of the R3 zone, as required for this application, it is accepted in planning law that the principles of consistency with objectives are considered to include:

- Development will be generally consistent with the objectives, if it is not antipathetic to them.
- It is not necessary to show that the development promotes or is ancillary to those objectives, not even that it is compatible.
- The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

- The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
- A standard or objective has been virtually abandoned or destroyed by the Council’s own actions in granting consents (or in this case by rezoning) departing from the standard and hence compliance with the standard and to be redundant objective is unnecessary and unreasonable.
- The zoning of particular land is “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 (or therefore an inherent objective) would also be unreasonable or unnecessary.

The objectives for development in this R3 Medium Density Residential zone are;

1 Objectives of zone

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To accommodate development that is compatible with the scale and character of the surrounding residential development.*
- *To allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.*
- *To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.*

Each objective is addressed in turn below.

- ***To provide for the housing needs of the community within a medium density residential environment.***

The concept proposal provides for the housing needs of the community, albeit within the context of the strategic planning studies, Chatswood Town Centre precinct planning and consequential new zone and planning provisions contained within the WLEP Am 34 and accompanying WDCP. As discussed previously it would have been professionally and morally irresponsible of the proponent to ignore the new planning provisions that were imminent at the time of designing and preparing the proposal and the application.

The planning of the future direction of the Chatswood CBD precinct took a number of years to complete, with the strategic planning documents prepared over at least a 2–5-year time period. The proposal is not considered antipathetic to the first objective of the zone, albeit within a high density, not medium residential flat building typology.

- ***To provide a variety of housing types within a medium density residential environment.***

This objective seeks a development to provide for a variety of housing types. The concept proposal provides a variety of unit types in terms of size and number of bedrooms, again within a higher density development than the R3 zone envisages. The proposal is not antipathetic to the intention of the objective, being provision of a variety, not limited housing types.

The concept proposal allows for increased residential density in an accessible location, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network in accordance with this objective.

The proposed changes to zoning redefine the living environment as a high-density residential environment as the medium density zoning has been abandoned and hence the strict application of this objective is not applicable and achieving the imminently applicable objectives would be thwarted.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

The proposal has been designed with flexible open floor plates at the lower levels to provide for outdoor facilities for residents of the building and are designed to be adaptable to enable future changes of use for commercial activities and facilities to meet the needs of residents on the locality. This objective is satisfied.

- ***To accommodate development that is compatible with the scale and character of the surrounding residential development.***
- ***To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.***

Refer to previous comments in addressing the objectives of the HOB development standards, particularly relating to the proposal's achievement of the long-term strategic planning strategy for the precinct and compliance with the planning provisions that enact that strategic vision and direction, being the commencement of the WLEP Am 34 and WDCP amendments.

The concept proposal encourages innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping. One of the key changes introduced under LEP Am34 was the requirement for new development to undergo a Competitive Design Competition and achieving design excellence. This has been undertaken voluntarily by the applicant at their volition notwithstanding that it was not applicable under the unamended LEP and the application.

The SEE details that the proposal is consistent with the relevant environmental planning instruments and does not give rise to any adverse environmental impacts in respect to overshadowing, traffic, heritage, wind, reflectivity, stormwater, flooding, noise, waste, economic and social impacts.

- ***To allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.***

The site is located on an arterial road with good access to public buses as well as accessibility to trains. A traffic impact assessment concludes that the road network is capable of accommodating the proposal without adverse impacts on the efficiency and safety of the road network. In addition, the design allows for future access from the rear such as to reduce the number of crossings and access points onto the highway.

The proposal is considered consistent with the objectives of both the development standard and is not antipathetic to the intention of the R3 Medium Density Residential zone. On a merit assessment basis, the zone objectives in this case are focused on the provision of a variety of housing supply that increases the housing supply in the zone, with good linkages to public transport and services for the local residents. Development should reflect the desired character of the area and is encouraged to be innovative but not adversely impacting on the future living amenity of residents. The proposal, in a higher density format satisfies the intent of the zone objectives under the Unamended WLEP.

It is considered that these objectives are met by the proposal.

10.0 SECRETARY'S CONCURRENCE

Under Clause 4.6(5) of the Unamended WLEP, the Secretary's concurrence is required prior to any variation being granted. This is no longer required under the current cl4.6 in the WLEP Am 34.

For strict compliance purposes, the following section provides a response to those matters set out in Clause 4.6(5) of the Unamended WLEP, which must be considered by the Secretary.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation to the Height of Building standard of the Unamended WLEP will not raise any matter which could be deemed to have State or Regional significance. While the extent of variation sought is numerically significant in the context of the building height and FSR, the public benefit of the redevelopment of the site in accordance with the WLEP Am 34 provisions and underlying strategic planning studies and community consultation outweigh maintaining the development standard in this instance. The strategic planning for the Chatswood Town Centre area has been developed based on extensive studies, reports, planning and consultation with the NSW State Government and the community. The adoption and commencement of the WLEP Am 34 and WDCP amendments is the culmination of that strategic vision and direction.

Maintaining the HOB development standard would not result in any public benefit in this situation. As detailed within the SEE, the HOB, FSR and bulk of the proposed building responds to the surrounding urban context and the requirements of the WLEP Am 34 planning provisions and WDCP amendments.

The proposed built-form is generally consistent with the bulk and scale of the desired future character of the precinct and more broadly the town centre locality. Requiring compliance with the HOB and FSR standards would result in an inconsistent building form for this site.

The proposed development would allow the building as a whole to better meet the objectives of the WLEP Am 34 by physically responding to the desired future character and its context and reinforcing the emerging character of town centre and Pacific Highway precinct. The proposed variation to the height of

building standard therefore allows the site to meet the objectives of both the Unamended WLEP and the WLEP Am 34 and the desired future character of the area.

Therefore, to better meet the objectives of the two planning instruments, the proposal can be said to improve the development's presentation to the public domain and is in the public interest.

11.0 CONCLUSION

The assessment above demonstrates that compliance with the maximum Height of Buildings development standard contained in Clause 4.3 of the Unamended WLEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded on environmental planning grounds.

It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner and also allows for a superior outcome in planning and design terms. This Clause 4.6 variation demonstrates, notwithstanding the non-compliance with the maximum building height development standard contained in the Unamended WLEP, that:

- The development as proposed will deliver a superior built-form outcome in consideration of the site's characteristics and its location amongst the existing and likely future surrounding buildings;
- The development as proposed will provide environmental benefits particular to the site through improved amenity for future occupants of the development and for the surrounding area generally; and
- Compliance with the development standard would be both unreasonable and unnecessary in the instance because the development is not antipathetic to the intention of the objectives of the R3 – Medium Density Residential zone (as relevant) and the objectives of the Height of Building development standard.
- The Unamended WLEP applies a maximum Height of Building development standard for the site of 12m. The proposed additional HOB complies with the 90m HOB standard contained in the WLEP Am 34 and is commensurate with likely future surrounding developments and the built form anticipated and planned to characterise the locality.

- It is also consistent with the design approach applied to other buildings and planning proposals within the immediate locality and within the defined Chatswood Town Centre area.
- Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility to achieve better outcomes for and from development, a departure from the Height of Building development standard is considered appropriate in these circumstances.
- The proposal will provide environmental benefits particular to the site through the provision of improved amenity for future occupants of the development and for the surrounding area generally. On this basis, the Clause 4.6 variation to the Unamended WLEP HOB standard is considered well founded and should be supported.

In this instance it is considered appropriate to make an exception to the HOB development standard under the provisions of Clause 4.6 of the Unamended WLEP for the reasons outlined in the preceding discussion.

Joe Vescio
May 2024