

# Clause 4.6 Variation Request

Clause 4.3 - Height of Buildings  
57-69 Strathallen Avenue, Northbridge

Submitted to Willoughby City Council  
on behalf of SJD NB Pty Ltd

5 July 2024

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## Acknowledgment of Country



**Towards Harmony by Aboriginal Artist Adam Laws**

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## Glossary and Abbreviations

Term/Acronym	Description
AS	Australian Standards
BCA	Building Code of Australia
BC Act	<i>Biodiversity Conservation Act 2016</i>
CEMP	Construction Environmental Management Plan
Council	Willoughby City Council
CPTED	Crime Prevention through Environmental Design
DA	Development Application
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
The Regulations	<i>Environmental Planning and Assessment Regulations 2021</i>
ESD	Ecologically Sustainable Development
FSR	Floor Space Ratio
GFA	Gross Floor Area
INP	Industrial Noise Policy
LALC	Local Aboriginal Land Council
WLEP	<i>Willoughby Local Environmental Plan 2012</i>
LGA	Local Government Area
NCC	National Construction Code
SEPP	State Environmental Planning Policy
WDCP	<i>Willoughby Development Control Plan 2023</i>
WLCS	Willoughby City Council Local Centres Strategy to 2036
WLEP	<i>Willoughby Local Environmental Plan 2012</i>
WSUD	Water Sensitive Urban Design

# 1. Introduction

This updated Clause 4.6 Variation Request relates to the Development Application (DA) for 57-69 Strathallen, Northbridge (site), which proposes a shop top housing development, and specifically to vary the development standard for maximum Height of Buildings under Clause 4.3 of the *Willoughby Local Environmental Plan 2012* (WLEP).

The proposed works involve demolition of the existing structures on the sites and construction of a five storey shop-top housing development with six ground level retail tenancies and 24 residential apartments above, basement carparking, associated landscaping, infrastructure works and provisions for a future through site link connecting Strathallen Avenue to Sailors Bay Road\*. The subject site to which the DA relates comprises six separate lots and the proposal includes the amalgamation of these lots to accommodate for the single shop-top housing development.

*\* **Note:** Council acknowledged that this proposed development does not (and cannot as no owners' consent has been obtained) provide legal access through the northern portion (134 Sailors Bay Road, legally referred to as Lot A in DP404929). The development does not have owners' consent for 134 Sailors Bay Road and access over that site does not form part of this application. Any treatment of the future "through-site link" is proposed within the site boundary of 57-69 Strathallen Avenue only, and to clarify, this DA does not and cannot provide any physical link through to 134 Sailors Bay Road at present.*

Clause 4.3 of the WLEP stipulates a maximum height for a development on this site is 17m. The proposed development seeks minor exceedances to the height control with the largest exceedance (constituting the lift overrun) resulting in a height of 17.91m. The departure from the standard is illustrated in Section 3 (Extent of variation) of this Request. The noted exceedances to the Height of Building's standard are limited to the lift overruns and the south-west corners of Level 04. The components that constitute these exceedances have been thoughtfully integrated into the overall design of the roof design. This request should be read in conjunction with the documents submitted in support of the DA including the Statement of Environmental Effects, prepared by Gyde, (updated post lodgement dated 04 July 2024) and architectural drawings, prepared by Bates Smart (updated post lodgement dated 28 June 2024). These documents form part of the request.

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

The prescribed Height of Building under Clause 4.3 of the WLEP are 'development standards' to which exceptions can be granted pursuant to Clause 4.6 of the WLEP. The development standard to be varied is not excluded from the operation of Clause 4.6 of the WLEP as it does not comprise any of the matters under Clause 4.6(8) of the WLEP.

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 the justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate when considering the site's context, whereas a fully compliant scheme would result in a built form inconsistent with the surrounding context.

This formal request has been prepared in accordance with Clause 4.6 of the WLEP and prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Is consistent with, and achieves the objectives of the development standard in Clause 4.3 of WLEP (Wehbe Test 1);

- Is consistent with the objectives of the E1 Local Centre zone under WLEP;
- Is consistent with the applicable and relevant state and regional planning policies;
- Provides a better planning outcome;
- Has sufficient environmental planning grounds to permit the variation; and
- The overall development will be compatible with the emerging higher-density character of the Northbridge Local Centre.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the WLEP.

## 2. Standard to be Varied

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of the maximum height of building development standard as set out in Clause 4.3 of the WLEP. Clause 4.3 states:

**Clause 4.3 Height of buildings**

*(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."*

As identified on the WLEP Height of Buildings Map (see Figure 1 below), the site has a maximum building height limit of 17m.



**Figure 1.** Height of Buildings (site outlined in red) (Source: WLEP: Height of Buildings)

The development standard to be varied is not excluded from the operation of Clause 4.6 of the WLEP.



### 3. Extent of Variation

This Clause 4.6 variation supports a DA for a shop top housing development comprising 2 levels of basement, ground floor retail, and 24 residential apartments over. This Request seeks a variation to Clause 4.3 height of buildings, which is permitted by Clause 4.6 of the WLEP.

The WLEP defines building height as:

- building height** (or height of building) means—  
(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or  
(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,  
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

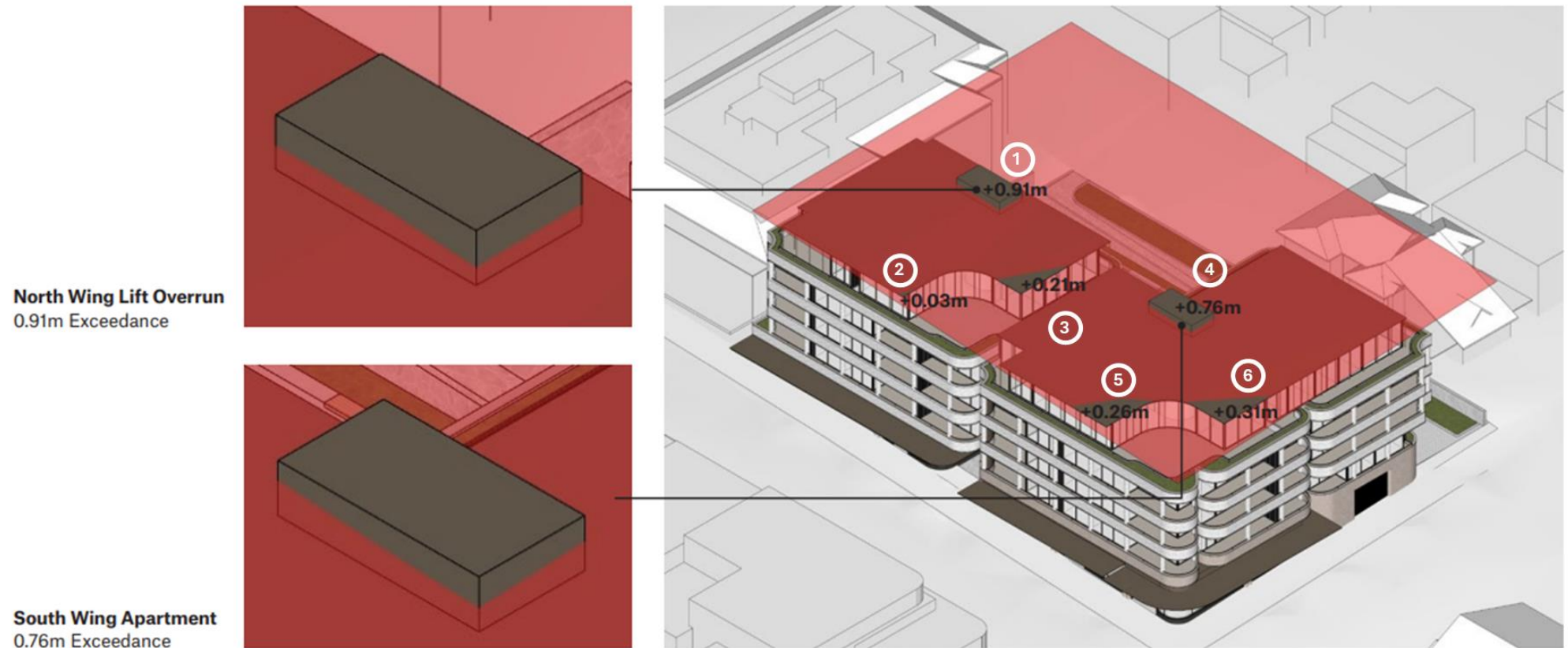
The proposed development consolidates the designated lots into a cohesive shop-top housing development. Per the Geotechnical Investigation carried out by Douglas Partners (dated 3 May 2024) and the Survey Plan, prepared by Norton Survey Partners (dated 10 November 2023) the site's topography, slopes from the northern end of the existing carpark (RL 88.5m) to its lowest point in the southwest (RL 85m).

The site has a maximum HOB of 17m, as measured from the existing ground level at the respective location. Figures 1 and 2 depict how the proposed project slightly exceeds 17m maximum building height control under the WLEP. These minor exceedances primarily occur at lift overruns and the southwest corners of Level 0-4. However, strategic setbacks and shaping have been implemented to mitigate these deviations, curbing visual bulkiness and scaling issues. The lift overruns have been specifically setback from all boundaries.

The proposed exceedances are as follows:

Reference	Area of exceedance	RL Height	Exceedance (maximum)
1	Northern wing lift overrun	RL105.550m	0.91m (5.2%)
2	Northern wing - Level 04 roof edge	Roof RL104.200m	0.03m (0.18%)
3	Northern wing - Level 04 roof edge	Roof RL104.200m	0.21m (1.23%)
4	Southern wing lift overrun	RL104.150m	0.76m (4.37%)
5	Southern wing - Level 04 roof edge	RL102.800m	0.26m (1.52%)
6	Southern wing - Level 04 roof edge	RL102.800m	0.31m (1.81%)

To accommodate both the site's sloped terrain and the height control, the building is divided into north and south wings, each served by a single core. The south wing sits 1.4m lower than its northern counterpart. Additionally, the ground-level floor-to-floor heights within retail spaces fluctuate to align with the site's slope, ensuring a harmonious integration with the surrounding environment.



**Figure 2.** Proposed exceedance to Clause 4.3 Height of Buildings (Source: Bates Smart Design Report, updated post lodgement dated 28 June 2024)

#### Clause 4.6 Variation Request

## 4. Unreasonable or Unnecessary

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the LEP.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

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


Nonetheless, we have considered each of the ways as follows.

### 4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.




The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First Test under *Wehbe*).

Table 1. Consistency with Objectives of Clause 4.3 Height of Buildings

Objective	Demonstration
<b>Clause 4.3 Height of buildings</b>	
1. The objectives of this clause are as follows –	
(a) <i>to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,</i>	<p>The proposed development is predominantly compliant with the permissible maximum 17m height control on site. The noted minimal exceedances illustrated in Figure 1 and 2 above, are limited to the lift overruns and the south-west corners of Level 04. The exceedances attributed to the lift overruns do not comprise GFA.</p> <p>The site currently contains 1-2 storey buildings, comprising the Northbridge Hotel to the south, Northbridge Village multiple retail premises central to the site, at grade car park, and a 2-storey built form consisting of a ground floor dry cleaner to the north. There are several 2-3 storey shop top housing and older style retail and commercial buildings within the local centre. This is also mixed with a number of more contemporary 4-5 storey developments located adjacent and in close proximity to the subject site. The scale and bulk of surrounding buildings and the streetscape can be seen below in Figure 4 to Figure 8.</p>

Objective	Demonstration
	<p>The proposed development provides a high-quality shop-top housing development which exhibits a built form and massing that is both in harmony with the existing development and one that responds positively to the quality and transitioning identity of the locality as envisaged under the desired future character of the Northbridge local centre. The proposed additional height sought as part of this variation and overall architectural design harmonises well with the surrounding streetscape and developments, resembling the scale and design treatment of nearby structures, including recently developed developments such as the contemporary build at 29A Baringa Road (approved by the Land and Environment Court in December 2017 – DA2016/55). 29A Baringa Road features solid balustrades, curved building edges, solid awning along the ground level street frontage, and presents visually similarly given the slope of the road from north to south (refer to Figure 4 to Figure 6).</p> <p>The proposed development is also consistent with adjacent developments in the area that consist of similar bulk, and scale including:</p> <ul style="list-style-type: none"><li>• 29A Baringa Road comprises a 4-5 storey development (Figure 4 to Figure 6),</li><li>• 130 Sailors Bay Road comprises a 3-4 storey development (Figure 7),</li><li>• 133 to 149A Sailors Bay Road comprises a 4-5 storey development (Figure 8),</li></ul> <p>(all of which appear as shop top developments with retail ground floor uses and residential units above).</p> 
	<p><b>Figure 4.</b> View west along Baringa Road to 29A Baringa Road and the existing Northbridge Hotel (57 Strathallen Avenue) (Source: Gyde)</p>



Objective	Demonstration
	
	<p><b>Figure 5.</b> View west on Strathallen Avenue to 29A Baringa Road (5 storey development) and 54 Strathallen Avenue (four storey development) (Source: Gyde).</p>
	
	<p><b>Figure 6.</b> View of 29A Baringa Road from the south toward Strathallen Avenue (5 storey development) (Source: Google Streetview)</p>
	
	<p><b>Figure 7.</b> View of development at 130 Sailors Bay Road, adjoining the subject site to the north (Source: Gyde)</p>



**Figure 8.** View of 133 to 149 Sailors Bay Road (4-5 storeys setback) from Sailors Bay Road looking north (Source: Google Streetview, May 2024)

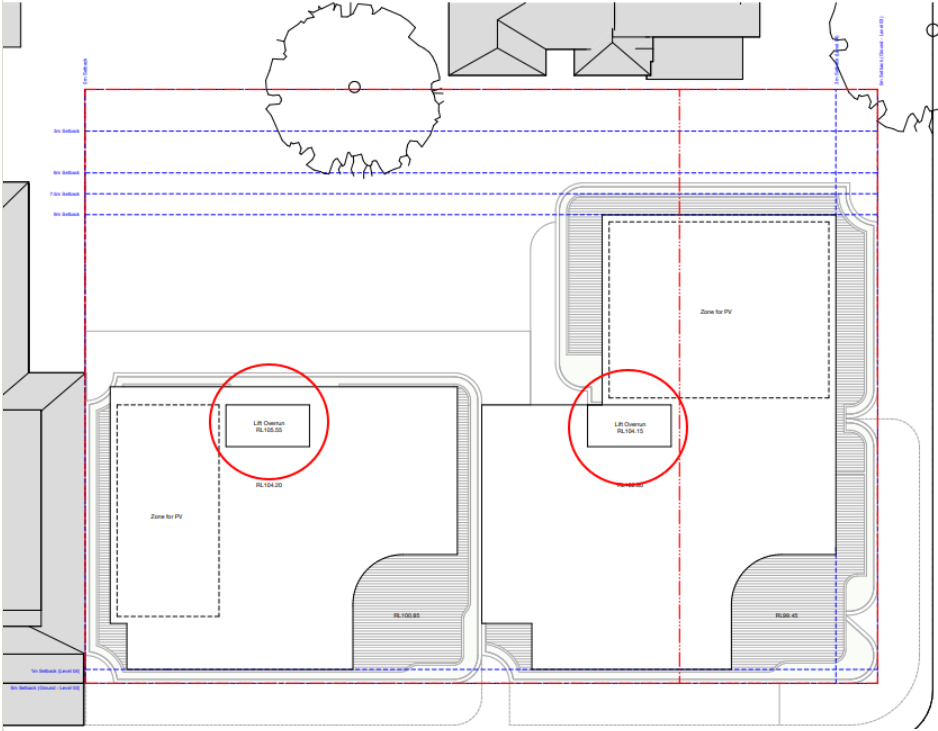

Fully compliant with the requirements set out in the ADG and WDCP, setbacks along Strathallen Avenue and Baringa Road, as well as at the rear of the site, coupled with high-quality streetscape elements, ensure a smooth transition with neighbouring buildings and character features. High quality streetscape elements include:

- the treatment of landscaping and light toned permeable paving consistent with the area,
- awnings that run the length of the active street frontage consistent with those in the area,
- 5 street trees (Tristanopsis Luscious 'Water Gum') provided along Strathallen Avenue and Baringa Road,
- retail units and active street frontages along Strathallen Avenue and Baringa Road that feature high quality materials such as dark bronze steel shopfront framing and clear curved shopfront glazing.


The proposed variation to the standard will have a negligible impact to the buildings within the surrounding character area. Nor will it impact the development's potential to harmonise with the bulk and scale of surrounding buildings and the streetscape.

The envisioned structure will typically present itself as a 4-storey building, with the uppermost level (Level 04) intentionally recessed from all perspectives. This design choice aims to create a visually lighter top, contributing to its overall aesthetic appeal while ensuring it appears recessive in comparison to the lower levels. This further contributes to an appropriate transition between the large to medium scale developments to the north and west of the site and lower scale residential dwellings to the south and east.

The proposed building is contemporary in form with well-articulated elevations that add visual interest to help break up the massing. The predominant brick finishes are sympathetic in colour and materiality to the setting of the surrounding residential development. The bulk of the proposed lift overruns have been minimised where possible, designed and have been located to be aesthetically recessive in nature. The lift overruns that produce the largest extent of height variation (of 0.91m and 0.76m), are centrally located to the site, refer to Figure 2 on Page 5 and Figure 9 overleaf. These lift overruns are not proposed to be visible from the street level, and CGIs prepared by Bates Smart illustrate this (refer to Figure 10 to Figure 11). The other

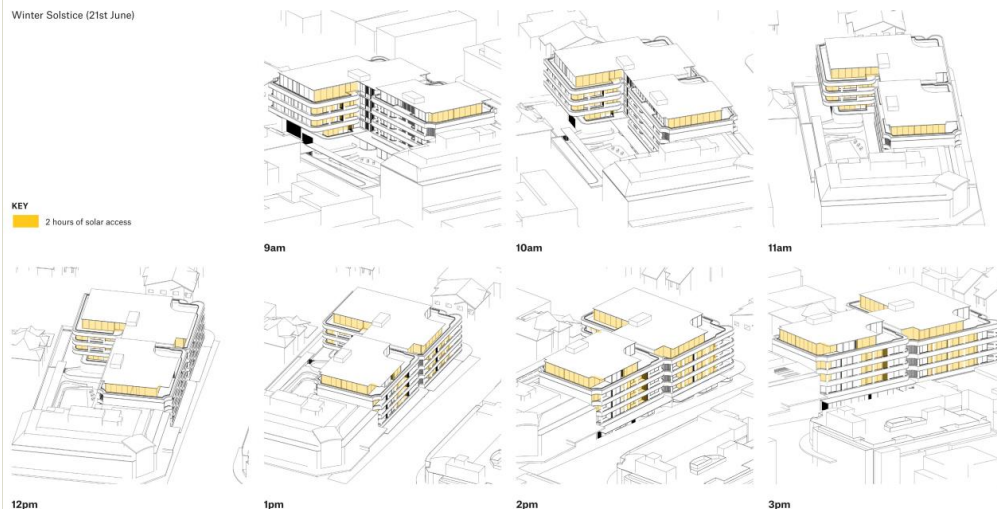
Objective	Demonstration
	<p>minor compliances are visible from the street level however, minor, and not resulting in negative visual impact, as this 4.6 variation demonstrates.</p>  <p><b>Figure 9.</b> Extract of drawing no. A03.105 prepared by Bates Smart showing the roof plan and the central location of the lift overruns (Source: Bates Smart Design Report, , updated post lodgement dated 28 June 2024)</p>  <p><b>Figure 10.</b> CGI of the proposed development from the corner of Strathallen Avenue and Baringa Road (Source: Bates Smart Design Report, , updated post lodgement dated 28 June 2024)</p>



Objective	Demonstration
	<div></div> <p><b>Figure 11.</b> CGI of the proposed development from Strathallen Avenue looking south east (Source: Bates Smart Design Report, updated post lodgement dated 28 June 2024)</p> <p>The proposed density is consistent with the desired future character of the locality as envisaged under the recently updated WLEP controls and WDCP provisions.</p>
<p>(b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,</p>	<p><u>Overshadowing</u></p> <p>The Shadow Studies in the Architectural Design Report (refer to Figure 13 to Figure 15), prepared by Bates Smart (updated post lodgement dated 28 June 2024), have assessed the overshadowing impact from the proposed built form. To prevent impact to the neighbouring residences and developments, the lift overruns located on the northern and southern wings are setback from the building edge and the additional overshadowing attributed to the height exceedance will be minimal and manageable. Minor shadows cast from the proposed development and the height variation fall to adjacent properties, however, the maximum time period of overshadowing to any one property is of 1-2 hours. Furthermore, the Shadow Analysis Diagrams ‘View From The Sun’ (drawing no. A21.002 prepared by Bates Smart), clearly show that the proposed development does not impact any neighbouring properties ability to receive at minimum 2 hours solar access. Refer to Figure 12.</p>

Winter Solstice (21st June)

KEY  
2 hours of solar access



**Figure 12.** Extract of drawing no. A21.002 Shadow Diagram Views from the Sun (Source: Bates Smart, , updated post lodgement dated 28 June 2024

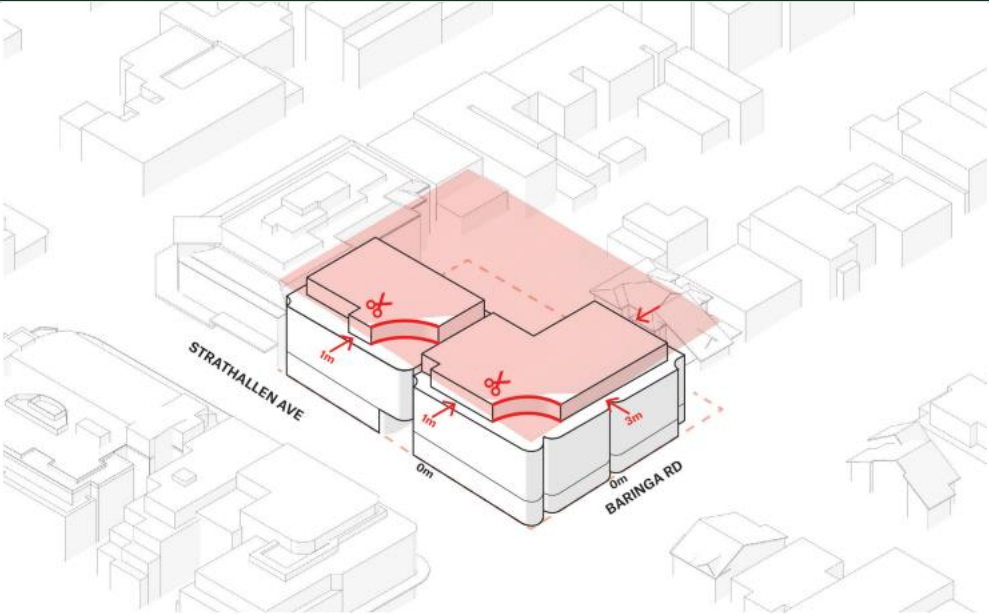
Overall, the shadows during mid-winter from the overall development are largely cast onto Baringa Road and Strathallen Avenue, moving from the west onto Strathallen Avenue in the morning to the west onto Baringa Road during the afternoon. The proposed development will not restrict future surrounding dwellings from achieving solar access, as the proposed development primarily casts shadows onto existing roads. Minor overshadowing falls to adjacent dual occupancy (31A Baringa Road) to the west from 3pm, however, an acceptable level of solar access is achieved from 9am to 2pm and any overshadowing is minor. It is also noted that this adjacent property does not have windows along its western facade, therefore no impact to the living amenity of these properties due to this minor overshadowing is proposed.


The exceedance attributed to the south-western corners of Level 04 are minor and is a result of the sloping topography of the site. These minor exceedances have been minimised as far as possible through setbacks and curved cutouts (Refer to Figure 16 As shown in the Shadow Diagrams, the extent of the variation caused by the portion of the development above the height building control causes negligible additional overshadowing. Minor overshadowing falls to the property south of Baringa Road (53 Strathallen Avenue) between 9am and 11am, however moves further east from 12pm. An acceptable level of solar access is achieved from 11am to 2pm, and any overshadowing is minor.






Objective	Demonstration
	<div><div>Figure 13.</div><div>Shadow diagrams – Winter Solstice (21 June) – 09:00am (Source: Bates Smart, , updated post lodgement dated 28 June 2024)</div><div><div>12pm</div></div><div><div>Figure 14.</div><div>Shadow diagrams – Winter Solstice (21 June) – 12:00pm noon (Source: Bates Smart, , updated post lodgement dated 28 June 2024)</div><div><div>3pm</div></div><div><div>Figure 15.</div><div>Shadow diagrams – Winter Solstice (21 June) – 03:00pm (Source: Bates Smart, updated post lodgement dated 28 June 2024)</div></div></div></div>

Objective	Demonstration
	<div></div> <p>Figure 16. Illustration of Level 04 setbacks and roof amendment and cutouts to mitigate impacts and provide appropriate setbacks (Source: Bates Smart, updated post lodgement dated 28 June 2024)</p> <p><u>Views</u></p> <p>In determining if the view loss for the adjoining or nearby properties is reasonable or unreasonable, we have given consideration to <i>Tenacity Consulting v Warringah Council</i> (2004) NSWLEC140 (Tenacity), whereby the Land and Environment Court established a set of Planning Principles on view sharing and what Councils should take into consideration in assessing view loss impacts. Those things that should be considered include an assessment of whether view impacts are negligible, minor, moderate, severe, or devastating. The Planning Principles involve a four-step process for considering the impact of a development on views. This involves:</p> <ol style="list-style-type: none"><li>1. An assessment of the value of views to be affected by reference to their nature, extent, and completeness.</li><li>2. A consideration of how views are obtained and what part of the property the views are obtained from.</li><li>3. A qualitative assessment of the extent of the impact in terms of severity particularly as to whether that impact is negligible, minor, moderate, severe, or devastating.</li><li>4. An assessment of the reasonableness of the proposal causing the impact particularly in terms of compliance with applicable planning controls and whether a different or complying design must produce a better result. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.</li></ol> <p>The subject site is located within a street block that is bounded by Strathallen Avenue, Sailors Bay Road, Baringa Road, and Gunyah Street. The development in this street block is predominantly orientated to the front in response to the north-south subdivision pattern.</p> <p>The proposed design, including the height variation, represents an appropriate built form in terms of building alignment, modulation, and articulation. The built form is</p>

Objective	Demonstration
	<p>appropriate in that it is predominantly compliant with the height controls, is consistent with those 4-5 storey buildings in the Northbridge area, and the built form is envisaged by the controls in which this development is largely compliant with. The proposal will improve the streetscape, activation, and landscape quality of the area. The variation does not result in a built form that is inappropriate in terms of building alignment, modulation, and articulation.</p> <p>The proposed exceedances will not result in any additional view losses over a compliant development to the adjoining residential developments east of the site. It is noted that the adjoining development at 31 Baringa Road comprises no windows on its western elevation.</p> <p>The site that will be most impacted in terms of view loss will be the shop top housing developments at 29A Baringa Road and 54-56 Strathallen Avenue located on the western side of Strathallen Avenue (see Figure 4 above). However, the proposed development does not impact the southern views that are maintained to surrounding developments along Baringa Road and located further south. The topography of the area, falling from north to south from Sailors Bay Road, allows a view of North Sydney in the background (refer to Figure 17).</p> <p>The current views are not considered to be significant views in the locality, are not iconic, and are largely distant background views of St. Leonards to the southwest and views to North Sydney and the Sydney CBD to the south. The CBD views at night, are often considered desirable and valuable in terms of geographical reference points and skyline features. The noncomplying element of the building which varies from the height limit will have little to no impact on the views from the adjoining buildings.</p>  <p>Figure 17. Main view line at intersection of Sailors Bay Road looking south down Strathallen Avenue (Source: Google Streetview)</p> <p>The view losses associated with the additional height exceedances to these properties are considered low value based on the Planning Principles established by <i>Tenacity Consulting v Warringah Council (2004) NSWLEC 140 (Tenacity)</i>. Considering the existing height of these developments and the proposed height</p>

Objective	Demonstration
	<p>permissible on site, view lost for this building as result of the height non-compliance relates to open sky towards the east, which is considered low value. The key views from this development to the south to St Leonards to the south-west and views to North Sydney and Sydney CBD to the south will be unimpacted.</p> <p>Overall, considering the setbacks of the lift overruns and minor encroachments to roofline at Level 4, the additional height will not provide any significant additional obstruction of views from these properties than would otherwise be experienced from a building envelope strictly in accordance with the 17m development standard.</p> <p><u>Privacy and visual intrusion</u></p> <p>The proposed areas attributed to the height exceedance do not constitute windows, apartments or additional balcony floor areas and therefore will not cause additional privacy or visual intrusion impacts to neighbouring or adjoining properties.</p>
<p>(c) <i>to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,</i></p>	<p>The proposed development includes a material palette that is reflective of the residential dwellings in the vicinity of the site. The development presents from the street as a 4-storey development with Level 04 being setback and constituting a lighter facade expression to help reduce visual bulk and scale of the overall building. The built form comprises compliant setbacks and the roof terraces are fringed by landscape, benefitting the residents, and visually softening the top level of the building when viewed from both the street and neighbouring properties. The lift overruns will be of a colour that is recessive in nature yet complementary to the materiality proposed on the development. The proposed lift overruns that exceed the height plane will not be visible from the street.</p> <p>Due to the topography of the site and development in the area, the proposed development is not visible from waterways, foreshores, or key public reserves/parks.</p>
<p>(d) <i>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,</i></p>	<p>The proposed additional height sought under this variation is minor and carefully designed to minimise disruption to existing views and maintain reasonable view sharing from adjacent developments or public open spaces largely consistent with the built form envisaged on site. The lift overruns, which are the main contributors to the height increase, have been strategically set back from the street frontages. Additionally, the south-west corners of Level 04 have been set back and shaped in a manner to minimise exceeding the height limit and reduce visual bulk and scale of Level 04. The exceedance in height in this area is 0.26m and 0.31m, which will not be discernible when standing in Strathallen Avenue and/or Sailors Bay Road. This design approach aims to mitigate any adverse impact on existing views.</p>
<p>(e) <i>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,</i></p>	<p>The maximum height control of 17m has been established for the site under Clause 4.3 of the WLEP. Clause 4.3 is a standard to which can be varied under Clause 4.6.</p> <p>The proposed elements exceeding the height control have been minimised where possible. The exceedance is largely attributed to the sloping topography of the site and in response, the building has been split into a north and south wing, each served by a single core. The south wing is 1.4m lower than the north wing. The Ground Level floor to floor height varies within each retail tenancy, with the floor levels varying as the site slopes. Residential levels typically have a floor-to-floor height of 3.15m, or 3.35m when a roof is above which are compliant with the ADG.</p> <p>Despite the variation, the height is consistent with other buildings along Baringa Road and Sailors Bay Road of 4-5 storeys within proximity to the site. The overall site complies with the permissible FSR and exceeds landscaping requirements, so the additional height does not result in any additional density.</p>



Objective	Demonstration
	<p>The variation in height is not a result of an overdevelopment of the site, and the proposed development meets the substantial compliance with the relevant statutory controls regulating built form and landscaping that now apply to the site. Part L of the WDCP recommends buildings that define key corners, and a 5-storey development on this site.</p> <p>The Willoughby City Council Local Centres Strategy to 2036 (WLCS), establishes key principles for how the centre could grow, including.</p> <ul style="list-style-type: none"> <li>• Increase shop top housing within the centre.</li> <li>• Encourage high quality architectural ‘marker buildings’ at key locations to provide gateways to the town centre.</li> </ul> <p>The proposed development is consistent with this strategy and is consistent with the objects of the E1 – Local Centre zone contained within the WLEP (refer to Figure 18).</p>  <p>Figure 18. Extract of the indicative scale of growth for the Northbridge area set out in the WLCS</p>
<p>(f) to use maximum height limits to assist in responding to the current and desired future character of the locality,</p>	<p>Part L, Chapter 10 outlines the current and desired future character of the Northbridge Local Centre. The character statement set out in the WDCP states:</p> <p><i>“Northbridge is at an entry point to the Willoughby local government area from the south. The business precinct is focused on a major arterial route along Sailors Bay Road, Eastern Valley Way and Strathallen Avenue.....</i></p> <p><i>The Northbridge local centre lacks any significant outdoor open space area for community recreation and gatherings....</i></p> <p><i>The topography of the centre is generally flat, with Sailors Bay Road running along the ridgeline. The built form character of the centre is generally a two to four storey street frontage. While the eastern side of the centre has a smaller lot pattern, the western side of the centre is characterised by larger lots and a bulkier built form. Some recent examples of shop top housing exist in the centre”.</i></p> <p>The current character is described as an entry point to the Willoughby local government area from the south. The area currently lacks any significant outdoor open space area for community recreation and gatherings. The existing built form character of the centre is generally a two to four storey street frontage. While the eastern side of the centre has a smaller lot pattern, the western side of the centre is characterised by larger lots and a bulkier built form. Some recent examples of shop top housing exist in the centre of similar height and materials to the proposed.</p>



Objective	Demonstration
	<p>The proposal is consistent with the desired future character of the Precinct, despite the proposed breaches, for the following reasons:</p> <ul style="list-style-type: none"> <li>Consistent with the desired future character, the proposed development, with the minor exceedance of height, ensures that the development is capable of achieving the controls under Clause 10.3 and 10.4 of the WDCP, which are:</li> </ul>
Table 2	Relevant WDCP controls (Clause 10.3 and 10.4)
	<p><b>10.3 Master plan for the Northbridge local area</b></p> <p>Any future development in Northbridge local centre must have regard to the following key features of the adopted master plan. The numbers below refer to actions to be carried out by Willoughby City Council and/or developers to achieve the outcomes of the adopted master plan.</p> <ol style="list-style-type: none"> <li>Only commercial floor space allowed for any new development on the northern side of Sailors Bay Road between Eastern Valley Way and Harden Avenue.</li> <li>Provide new public open space above basement public car parking area.</li> <li>Create a pedestrian laneway link.</li> <li>Provide a range and mix of dwelling typologies, including opportunities for affordable housing and build-to-rent housing.</li> <li>New residential development to provide basement car parking areas with vehicular access from Baringa Road only.</li> <li>Provide streetscape improvements to Sailors Bay Road and Strathallen Avenue.</li> <li>Provide a public domain with pedestrian access at the southern end of Bellambi Street.</li> <li>Roof top gardens and communal open space to be provided for shop top housing.</li> <li>Maintain and improve laneway network for servicing and deliveries.</li> <li>Investigate opportunities for additional pedestrian crossing at existing intersections.</li> <li>Provide blisters or central refuge for safer pedestrian crossing.</li> </ol> <ol style="list-style-type: none"> <li>Not applicable</li> <li>Complies - Proposal integrates public open space in form of centralised landscaped courtyard and ensures parking is located in basement (excluding loading dock).</li> <li>Complies – Proposed development provides provisions for the future through-site link up to Sailors Bay Road. It's noted that the development does not (and cannot given no consent) provide legal access through the northern portion (134 Sailors Bay Road). Council have acknowledged and noted this in the Pre-Lodgement Meeting minutes (Appendix A to the SEE).</li> </ol> <p><b>Note:</b> Council acknowledged that this proposed development does not (and cannot as no owners' consent has been obtained) provide legal access through the northern portion (134 Sailors Bay Road, legally referred to as Lot A in DP404929). The development does not have owners' consent for 134 Sailors Bay Road and access over that site does not form part of this application. Any treatment of the future "through-site link" is proposed within the site boundary of 57-69 Strathallen Avenue only, and to clarify, this DA does not and cannot provide any physical link through to 134 Sailors Bay Road at present.</p> <ol style="list-style-type: none"> <li>Complies – Proposal includes 4% affordable housing consistent with the WLEP and includes a range of 2,3 and 4 bedroom apartment configurations. Able to comply – Access from Baringa Road is proposed.</li> <li>Complies - Basement car parking and loading dock access is only provided off Baringa Road via driveway.</li> <li>Complies – The development does not front Sailors Bay Road; therefore, streetscape improvements cannot be provided. Streetscape improvements to Strathallen Avenue include the provision of street tree planting in accordance with Council's specifications, retail units providing active street frontages, awning providing weather protection, all improving the public domain and overall streetscape and character of Strathallen Avenue.</li> <li>Not applicable</li> <li>Complies on merit – The proposal does not provide communal rooftop open space. However, 629sqm (25.9%) of communal</li> </ol>

Objective	Demonstration
	<p>open space is provided at ground level. This provision ensures that the ground level and future through site link are not isolated and creates a usable and inviting landscaped courtyard that residents can use. The development also includes private open space in the form of balconies to each residential apartment that exceed the ADG minimum requirements on levels 1-4.</p> <p>9. Complies – The proposed development provides provisions for a future through site link with intent to connect Strathallen Avenue to Sailors Bay Road. The development provides a driveway off Baringa Road for servicing and deliveries. This driveway is accessible to the communal open space and future through site link via a gate. A gate is proposed to control and manage vehicular and pedestrian interface in the driveway.</p> <p>10. Complies on merit – The development does not provide additional opportunities for pedestrian crossings at existing intersections; however, it is noted that there is an existing pedestrian crossing and island on Strathallen Avenue close to the Baringa Road intersection. The relocation of the vehicular access to the site from Strathallen Avenue to Baringa Road will support safer pedestrian movement along Strathallen Avenue to this pedestrian crossing.</p> <p>11. Not applicable</p>
	<p><b>10.4 Controls for Northbridge Local Centre</b></p>
<p>Ensure a maximum of 5 storeys for amalgamated lots in the E1 zone with a 1m setback on east and western side of Strathallen Avenue and a 3m setback on Baringa Road above the third level.</p>	<p>5. Complies – Preliminary plans provide 1m setback to glazing on Strathallen Avenue at Level 1 and 3m setback on Baringa Rd above third level (Level 4). Refer to Architectural Plans, prepared by Bates Smart (updated post lodgement dated 28 June 2024), in Attachment 4.</p> <p>6. Not applicable – Control 5 applies to the subject site and envisages a maximum of 5 storeys on amalgamated lots in the E1 zone. The proposed development does not propose a second storey of commercial use. Development proposes retail tenancies at ground level only. Proposed development is five storeys in height.</p> <p>9. Not applicable – The subject site is located east of Strathallen Avenue.</p>
<ul style="list-style-type: none"> <li>• The proposed development provides a 5-storey built form structure consistent with the WDCP, with Level 04 of the development set back and light aesthetic resulting in the built form appearing as only a 4 storey development from ground level.</li> <li>• The increased height attributed to the roof of Level 4 and the lift overruns will not unreasonably impact upon the character of the surrounding locality as there are many new and older developments within a 100m radius with varying heights. Heights fronting the streets in Northbridge range from 2 to 5 storeys, Figure 4 to</li> </ul>	

Objective	Demonstration
	<p>Figure 8 display a number of proximate developments that have a similar height and built form. The existing character of the locality is varied in terms of height of buildings and the subject application will not fundamentally affect the Northbridge local centre character.</p> <ul style="list-style-type: none"> <li>• The proposal includes sufficient setbacks to existing and surrounding buildings and includes high quality streetscape and interface, which ensures it achieves an appropriate transition and response to the surrounding key buildings and character elements.</li> <li>• The proposal provides provisions for a publicly accessible through site link (future connection), and open public domain area that can be used by the community, noting that community open space is lacking within the Northbridge Local Centre.</li> </ul> <p><b>Note:</b> Council acknowledged that this proposed development does not (and cannot as no owners' consent has been obtained) provide legal access through the northern portion (134 Sailors Bay Road, legally referred to as Lot A in DP404929). The development does not have owners' consent for 134 Sailors Bay Road and access over that site does not form part of this application. Any treatment of the future "through-site link" is proposed within the site boundary of 57-69 Strathallen Avenue only, and to clarify, this DA does not and cannot provide any physical link through to 134 Sailors Bay Road at present.</p> <ul style="list-style-type: none"> <li>• The proposal provides shop top housing of similar height, bulk, and scale to the existing shop top housing developments in the Northbridge area.</li> <li>• The proposal acts as an identifying marker of entry when entering the Northbridge Local Centre and the Willoughby LGA from the south.</li> </ul>
(g) <i>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,</i>	<p>The subject site is not located within the Chatswood City Centre and accordingly this objective is not relevant.</p>
(h) <i>to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.</i>	<p>The built form and area attributed to the height exceedance maintains an appropriate and sympathetic response to the existing context, including level changes across the site, low density residential neighbourhoods and Council's desire in their WDCP for a 'marker' on the prominent corner site. The exceedance, which is minor, combined with the setbacks from the street frontages; does not impact the proposed development' ability to apply appropriate transitions in building scale and density to neighbouring dwellings and retail uses. The proposed development integrates the following:</p> <p><u>Gradual transition in built form:</u></p>

Objective	Demonstration
	<ul style="list-style-type: none"> <li>The proposal presents well-articulated facades to Strathallen Avenue and Baringa Road and reinforces the street wall heights established under the WDCP.</li> <li>The proposed development provides a gradual transition in building scale and density from the commercial core towards residential zones. Built form setbacks consistent with the SEPP (Housing) has been implemented to ensure a respectful and sympathetic transition to the lower built forms and residential uses to the east, and south of the site.</li> <li>The proposed development is consistent with the Northbridge local centre character statement and Part L Chapter 10 of the WDCP which envisages shop top housing and a built form of a maximum of 5 storeys for amalgamated lots in the E1 Local Centre Zone. The minor additional height on site attributed to the lift overrun and Level 4 roof edges will not impede or impact the transitions or uses envisaged on site.</li> </ul> <p><u>Buffer zones</u></p> <ul style="list-style-type: none"> <li>The development includes side landscaped setbacks between the development and adjoining lower density residential uses. A large central courtyard, driveway and additional 3m wide deep soil setback has been integrated along the eastern boundary in conjunction with a stepping of built form and planters to provide screening and privacy to the residential dwellings. These areas act as a visual and functional buffer, easing the transition between different urban functions.</li> </ul> <p><u>Design sensitivity</u></p> <ul style="list-style-type: none"> <li>Ensure sensitivity to the existing built environment and neighbourhood character. Design buildings that complement the scale, architectural style, and character of both the commercial and residential areas to maintain continuity and visual coherence.</li> </ul> <p><u>Mix of uses (shop top housing)</u></p> <ul style="list-style-type: none"> <li>The development integrates a mix of uses on site including retail at ground level, residential above and communal landscaped courtyard to not only enhance the liveability of the area, integrate sympathetic mix of uses to aid in the transition of built forms but also fosters a sense of community and vibrancy.</li> </ul> <p><u>Public spaces and amenities</u></p> <ul style="list-style-type: none"> <li>The proposed development features a spacious landscaped courtyard that not only provides a setback and sympathetic transition to lower density adjoining uses</li> </ul>

As demonstrated in Table 1 above, the objectives of Clause 4.3 Height of buildings development standard under the WLEP are achieved notwithstanding the proposed variation. The above sections have demonstrated that compliance with the maximum permitted building height standard is unnecessary in the circumstances of the case. The principal purpose of Clause 4.3 of the WLEP is to impose a suitable restriction regarding the maximum height of development on site.

The proposed development reinforces the purpose of Clause 4.3, as it provides a built form that is consistent with the surrounding and envisaged built forms, accommodates for appropriate DDA servicing, and will not result in any adverse environmental impacts, including in relation to height-specific assessment matters such as overshadowing, visual impact, and privacy.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

**4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

**4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.**

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

**4.4 The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary.**

The standard has not been abandoned by Council in this case and so this reason is not relied upon.

**4.5 The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is reasonable and appropriate and therefore is not relied upon.



## 5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning ground to justify the departure of the height of buildings development standard are as follows:

- Despite the numerical non-compliance with the height development standard, the development provides a scale and form of development that is compatible with surrounding developments and one that is envisaged under the Northbridge Local Centre site specific WDCP provisions. The overall development will be compatible with the emerging higher-density character envisaged for the Northbridge Local Centre.
- It is in the public interest as it is consistent with the objectives of the height standard and E1 Local Centre zone, given that the proposed development provides for the redevelopment of a site, that is consistent with the preferred development typology of 5 storey development for the subject site.
  - The proposal will revitalise the existing site and improve the vibrancy and activity of the public domain with the provision of a landscaped central courtyard, 6 new retail tenancy spaces and streetscape tree planting. Furthermore, the proposed development provides provisions for a future through site link connection through to Sailors Bay Road and promotes the provision of communal open space within the Northbridge Local Centre, which under the WDCP was noted as currently lacking.

**Note:** Council acknowledged that this proposed development does not (and cannot as no owners' consent has been obtained) provide legal access through the northern portion (134 Sailors Bay Road, legally referred to as Lot A in DP404929). The development does not have owners' consent for 134 Sailors Bay Road and access over that site does not form part of this application. Any treatment of the future "through-site link" is proposed within the site boundary of 57-69 Strathallen Avenue only, and to clarify, this DA does not and cannot provide any physical link through to 134 Sailors Bay Road at present.

- The maximum extent of the proposed height variation of 0.91m metres is minor, with the elements of exceedance being setback from the street and public domains to minimise the potential for any perceptible difference in height compared to a height-compliant scenario.

The proposed design represents an appropriate built form in terms to building alignment, modulation and articulation. The proposal will improve the streetscape and landscape quality of the area. High quality streetscape improvements include:

- the treatment of landscaping and light toned permeable paving consistent with the area,
- awnings that run the length of the active street frontage consistent with those in the area,
- five (5) street trees (*Tristania lusciosa* 'Water Gum') provided along Strathallen Avenue and Baringa Road,
- retail units and active street frontages along Strathallen Avenue and Baringa Road that feature high quality materials such as dark bronze steel shopfront framing and clear curved shopfront glazing.
- The exceedances are limited to the lift overruns - which have been set back from the street frontages - and the south-west corners of Level 4 – which have been set back and shaped to minimise exceeding the height limit and reduce visual bulk and scale of Level 4.

- The proposed height exceedance will not create any significant material loss or amenity impacts with regard to overshadowing, privacy and view loss.
- The variation will not result in overlooking that would adversely impact the visual privacy of adjoining properties.
- The proposal promotes the orderly and economic use and development of land through the redevelopment of underutilised sites for an appropriate shop top housing development. It integrates an appropriate mix of housing (including affordable housing) which will provide needed housing will activate rejuvenate a currently underutilised site and aligns with the desired future character expected in the Northbridge Local Centre.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the development is consistent with the objectives of the development standard.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*.

Some examples that illustrate the wide range of commonplace numerical variation to development standards under Clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the LEC granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187%.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the LEC granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75% (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* the LEC granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42% (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council [2019] NSWLEC 1555* the LEC granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27% (1.27:1 compared to the permitted 1.0:1).
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1369* the LEC granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49% (14.16m compared to the permitted 9.5m).

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

## 6. Conclusion

This written request is for a variation to the height standard under Clause 4.6 of the WLEP. The request justifies the contravention to the height standard in the terms required under Clause 4.6 of the WLEP, and in particular demonstrates that the proposal provides a built form that achieves a significantly better relationship with the surrounding context with no significant adverse environmental impacts, whereas a fully compliant scheme would result in a built form inconsistent with the surrounding context.

This Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- Is consistent with and achieves the objectives of the development standard in Clause 4.4 of WLEP (Wehbe Test 1).
- Compliance with the height standard is unreasonable and unnecessary as the location of the height and the building design has ensured that the proposed development will deliver an outcome that better responds to the surrounding context than could otherwise be achieved through a compliant scheme.
- There are sufficient environmental planning grounds to justify the contravention and specifically in that the proposal does not result in any non-complying overshadowing, solar access and does not have any unacceptable or unreasonable impacts to highly scenic views and privacy of adjoining residential development when compared to a fully compliant building envelope.
- The development achieves the objectives of the development standard and is consistent with the objectives of the E1 Local Centre zone. Specifically, the proposed development conforms to and reflects natural sloping topography of the site and will not create any significant material loss or amenity impacts with regard to overshadowing, privacy and view loss.
- The proposal is consistent with the preferred development typology of 5 storey development for the subject site.
- The proposed density and scale are consistent with the desired future character of the locality as envisaged under the recently updated WLEP controls and WDCP provisions which seek to boost diversity of housing choice and deliver more market housing (in particular shop-top housing), activated ground planes with retail tenancy spaces, and communal open space at ground levels.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.