

**APPENDIX 1**  
**CLAUSE 4.6 – HEIGHT OF BUILDINGS**

**Prepared July 2024**

**As revised November 2024**

**WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF  
WILLOUGHBY LOCAL ENVIRONMENTAL PLAN 2012**

**452-460 WILLOUGHBY ROAD, & 1A-27 WALTER STREET, WILLOUGHBY**

**DEVELOPMENT APPLICATION FOR ADDITIONS AND ALTERATIONS TO EXISTING BUILDINGS D, E & F  
AND INCLUDING A VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM  
BUILDING HEIGHT AS DETAILED IN STATE ENVIRONMENTAL PLANNING POLICY (HOUSING) 2021**

**For:** Additions and alterations to existing Buildings D, E & F  
**At:** 1-27 Walter Street & 452-460 Willoughby Road, Willoughby  
**Owner:** Walter Projects Pty Ltd  
**Applicant:** Walter Projects Pty Ltd

**1.0 Introduction**

This written request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 18(2) of State Environmental Planning Policy (Housing) 2021.

This submission has been prepared to address the provisions within Section 35B of the *Environmental Planning and Assessment Regulation 2021*, and as discussed within this Written Request, will demonstrate the grounds on which the proposal considers the matters set out in Clause 4.6(3)(a) and (b) of the WLEP 2012.

The request relates to an application for the purposes of additions and alterations to an existing approved development comprising 5 residential flat buildings over two sites, comprising a proposed total of 180 units and retaining the approved, basement car parking spaces, landscaping, road widening, new footpath and street planting, together with the proposed provision of an additional 11.907% infill affordable housing at 452-460 Willoughby Road & 1A-27 Walter Street, Willoughby.

The site is already the subject of a recent development consent – DA-2021/300, granted on 2 February 2022, which has been subsequently modified to provide for the construction of 5 residential flat buildings as listed above.

However, since the time of that approval, amendments have been made to State Environmental Planning Policy (Housing) 2021 to incentivise the supply of housing and in particular the delivery of affordable housing, by providing for a 23.81% increase in height and floor space ratio in exchange for 11.907% of the floor space of the development being dedicated as additional infill affordable housing.

Clause 18 of the Housing SEPP does not include specific objectives or aims for the height standard and as the uplift provisions allow for any increase above the height of building standard within the Willoughby Local Environmental Plan 2012, this assessment considers the provisions of the WLEP 2012 in assessing the merits of the proposed height variation.

Clause 4.6(2) of the WLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the WLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that development consent must not be grant 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) there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request is made pursuant to the provisions of Clause 4.6 of Willoughby Local Environmental Plan 2012 (**WLEP 2012**). It is requested that that the building height development standard at Clause 18(3) of SEPP Housing be varied.

## **2.0 Development Standard to be Varied**

Clause 18 Affordable housing requirements for additional building height, of the SEPP Housing states the following:

*(2) The maximum building height ratio for the building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (3).*

*32) The minimum affordable housing component, which must be at least 10%, is calculated as follows —*

$$\text{affordable housing component} = \frac{\text{additional building height}}{(\text{as a percentage})} + 2$$

The amended development provides 11.907% of the total floor space as additional infill affordable housing, and so Clause 18(2) of SEPP Housing provides for an increase of 23.81% to the two height zones which apply to the site being 24 metres for Buildings D and 27m for Buildings E & F, as illustrated in Figure 1 below.

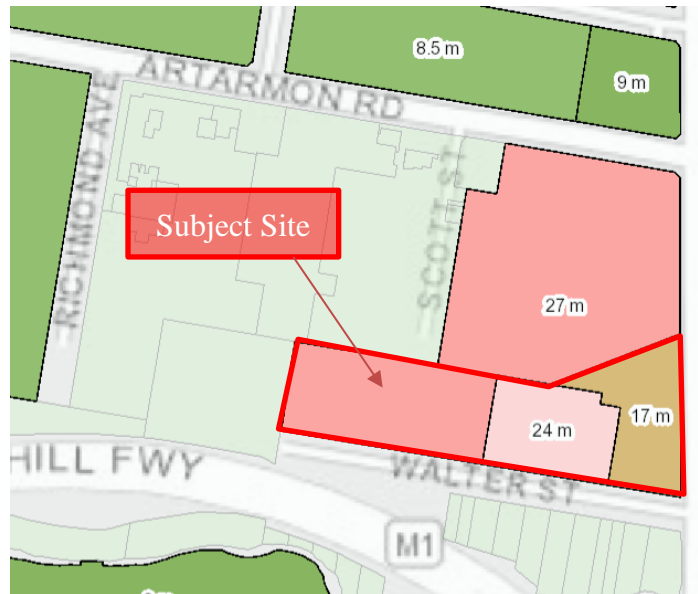


Figure 1: Extract from the WLEP Height of Buildings Map

#### Extent of Variation to the Development Standard

The proposal has the following maximum heights in the two height areas as a result of the incentivised 23.81% uplift in height available under SEPP Housing :

- Maximum allowable Height building D under the LEP  $24\text{m} \times 23.81\% = 29.71\text{m}$
- Maximum allowable Height buildings E & F under LEP is  $27\text{m} \times 23.81\% = 33.42\text{m}$

The proposal results in some minor variations to the 29.71m and 33.42m height control as a result of the fall of the site, excavation of the site for the basement car parking levels which have been constructed and also due to the lift overruns which provide access to the units.

For the purposes of calculating the maximum building height, the existing excavated level within the site and in particular the excavated lower floor level has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].

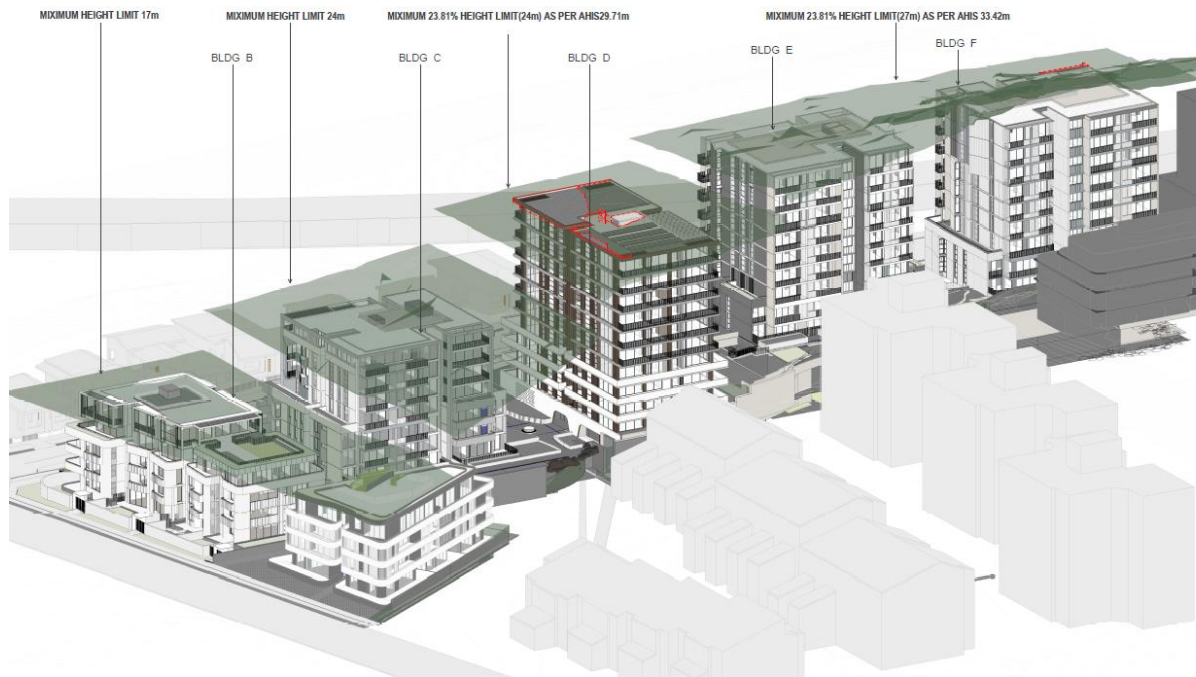
The building height variations when measured from existing ground level, being the excavated level of the basement garages are as follows:

- Building D maximum building height of 41.65 or a variation of 11.94m or 40.18%
- Building E maximum building height of 40.2m or a variation of 6.78m or 20.28%
- Building F maximum building height of 40.2m or a variation of 6.78m or 20.28%

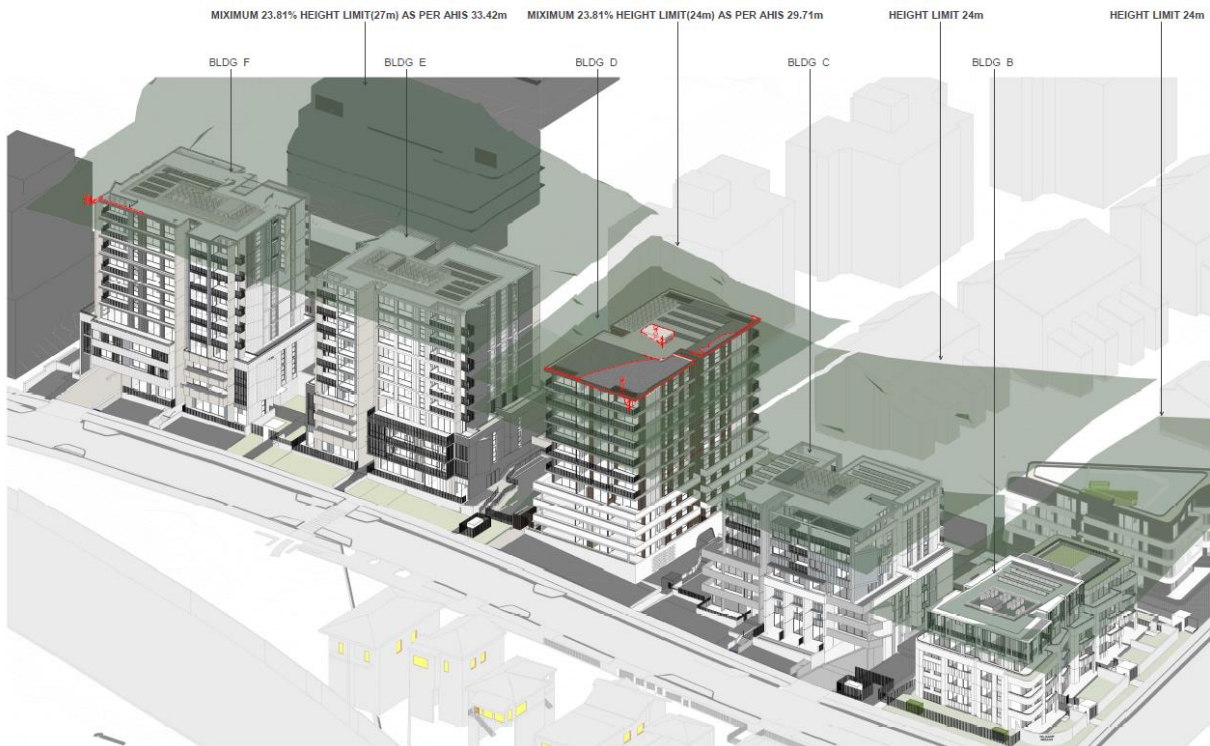
The building height variations when measured from the natural, undistorted ground level are as follows:

- Building D maximum building height of 30.95m or a variation of 1.24m or 4.17%
- Building E maximum building height of 33.42m and complies with the control
- Building F maximum building height of 33.86m or a variation of 0.449m or 1.3%

These variations to the height control are illustrated in section plans prepared by Architecture Urbaneia P/L which accompanies this application and also as illustrated in Figures 2 to Figure 6 below.



**Figure 2: Height Control extract**



**Figure 3: Height Control extract**

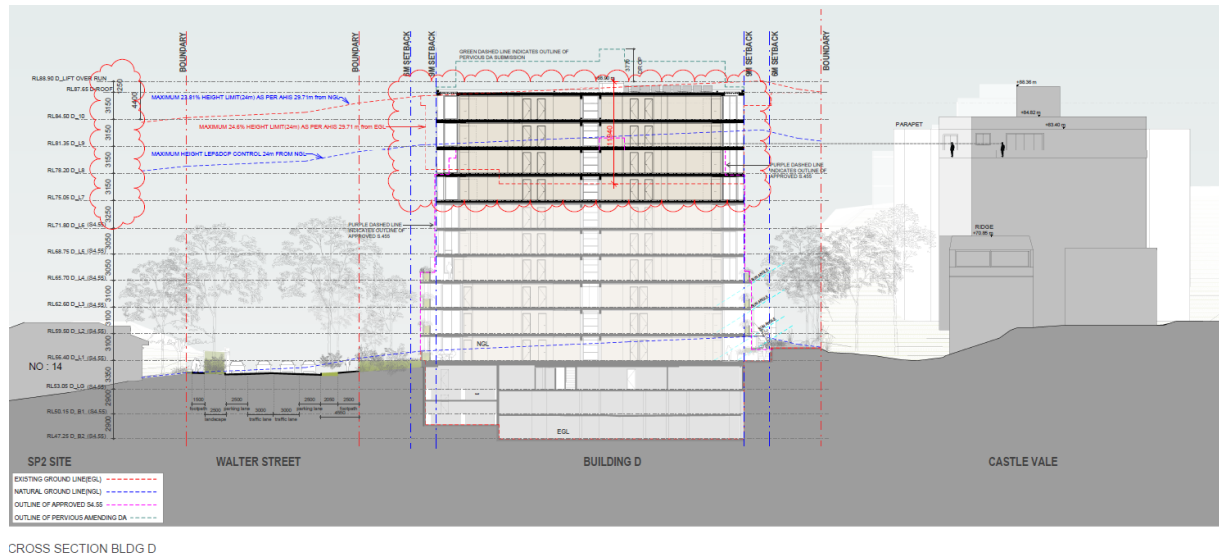


Figure 4: Building height variation Building D

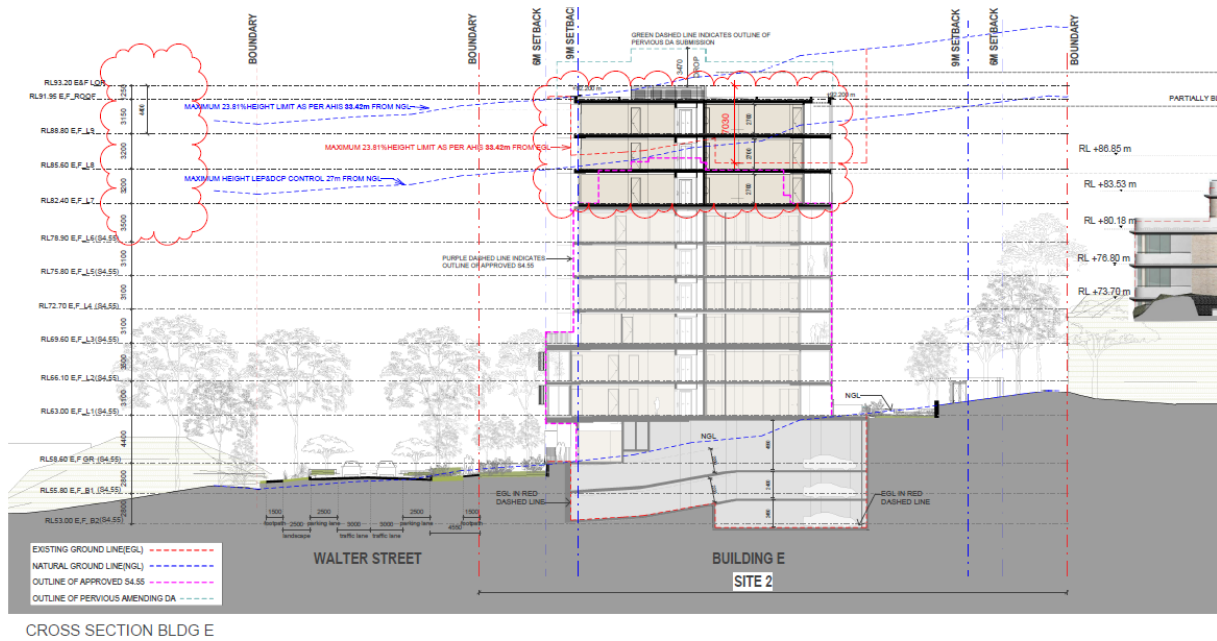


Figure 5: Building height variation Building E

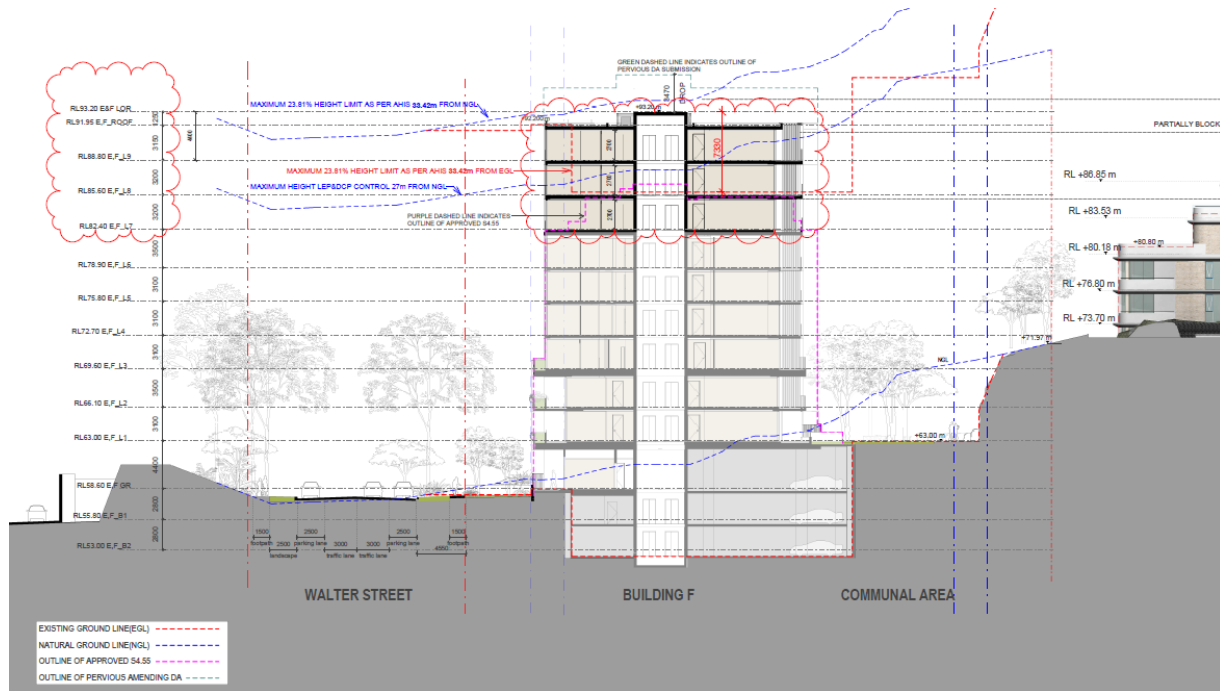


Figure 6: Building height variation Building F

The relevant maximum building height for development at the subject site is 24m and 27m, with the Housing SEPP maximum height being 29.71m and 33.42m. The maximum building height is a development standard as defined by Section 4 of the Environmental Planning and Assessment Act (EP&A Act).

For the purposes of calculating the maximum building height, the existing excavated level within the site and in particular the excavated lower floor level has been determined in accordance with the principles identified in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582 [at 73].



### 3.0 Authority to vary a Development Standard

In September 2023, the NSW Government published amendments to Clause 4.6 of the Standard Instrument which change the operation of the clause across all local environmental plans, including the Pittwater LEP. The changes came into force on 1 November 2023.

The principal change is the omission of subclauses 4.6(3)-(5) and (7) in the Standard Instrument Principal Local Environmental Plan.

The following changes have been made as a result of this:

- Clause 4.6(3) was amended such that the requirement to 'consider' a written request has been changed with an express requirement that the consent authority 'be satisfied that the applicant has demonstrated' that compliance with the development standard is unreasonable or unnecessary.
- Clause 4.6(4)(a)(ii) was amended such that the requirement that the consent authority must be satisfied that the proposed development in the public interest has been removed.
- Clause 4.6(4)(b) & 5 amended such that the requirement for concurrence from the Planning Secretary has been removed.

The objectives of clause 4.6 of the LEP, as amended, seek to recognise that in the particular circumstances of this case strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the development standard can be achieved as outlined below:

#### *Clause 4.6 Exception to development standard*

*(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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*



**Note—**

The [Environmental Planning and Assessment Regulation 2021](#) requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

- (4) *The consent authority must keep a record of its assessment carried out under subclause (3).*
- (5) *(Repealed)*
- (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.*

**Note—**

*When this Plan was made it did not include all of these zones.*

- (7) *(Repealed)*
- (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,*
  - (caa) *clause 5.5,*
  - (ca) *clause 4.3 (to the extent that it applies to land at 1–5 Broadcast Way, Artarmon, being Lots 1–6, DP 270714).*
  - (cb) *clause 6.24(3).*

## **4.0 Willoughby Local Environmental Plan**

### **Clause 2.2 and the Land Use Table**

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R4 High Density Residential (the R4 zone) and the Land Use Table in Part 2 of WLEP 2012 specifies the following objectives for the R4 zone:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *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*

The proposed development is for the construction of additions and alterations to an approved development comprising 5 residential flat buildings. The proposed development is permissible with consent within the R4 Zone.

### **Clause 4.3 – Height of Buildings**

Clause 4.3 of WLEP 2012 sets out the maximum building height, as follows:

*(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) (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.*

The maximum height for the proposed development is 24.0m and 27m, as shown on the Height of Buildings Map of WLEP 2012.

The Dictionary to WLEP 2012 operates via clause 1.4 of WLEP 2012. The Dictionary 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 Height of Buildings Map specifies a maximum building height of 24m and 27m which is the vertical distance from Australian Height Datum (AHD) to the highest point of the building pursuant to the definition of building height under Clause 4.3 WLEP 2012. In the circumstances of this assessment, it is important to note that the site will be excavated to a depth below AHD.

Clause 18(2) of SEPP Housing provides for an increase of 23.81% to the two height zones which apply to the site being 29.71m for building D and 33.42m for buildings E & F.

When measured above the existing ground line being the excavated basement garage level, the buildings were present heights of up to 41.65m for Building D and 40.2m for buildings E and F respectively, resulting in a non-compliance of 40.18% & 20.28% to the SEPP Housing uplift building height.

However, when the buildings are measured above the natural, undistorted level of the land as existing prior to the commencement of the work, Building D will have a maximum height of 30.95m or exceed the control by 1.24m or 4.17%. The significant majority of the remainder of Building D comfortably complies with the maximum height control of 29.71m.

Building E fully complies with the maximum height control of 33.42m.

Building F will have a maximum height at the south-western corner of 33.86m, which exceeds the control by 0.44m or 1.3%. The significant majority of the remainder of Building F complies with the maximum height control of 33.42 m.

The non-compliances with the height control are a direct result of the sloping topography and the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve an improved outcome than a more complying development.

#### **4.0 Is Clause 4.3(2) of WLEP 2012 a development standard?**

The definition of “development standard” in clause 1.4 of the EP&A Act includes:

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

Clause 4.3 relates to the maximum height of a building. Accordingly, Clause 4.3 is a development standard.

#### **5.0 Purpose of Clause 4.6**

WLEP 2012 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

#### **6.0 Objectives of Clause 4.6**

Clause 4.6(1) of WLEP 2012 provides:

*(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.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]* where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl*

*4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

- (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.*

Clause 4.3(2) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of WLEP 2012 provides:

- (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.*

The proposed development does not comply with the maximum building height development standard pursuant to clause 18(2) of SEPP Housing which provides for an increase of 23.81% to the two height zones which apply to the site being up to 29.71m for Building D & 33.42m for Buildings E & F.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the height of buildings development standard will achieve a better urban design outcome in this instance in accordance with objective 1(b).

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of WLEP from the operation of clause 4.6.

## **7.0 The Nature and Extent of the Variation**

This request seeks a variation to the maximum height of buildings development standard contained in clause 16(3) of SEPP Housing 2021.

Clause 4.3(2) of WLEP 2012 specifies a maximum height of 24m and 27m for development at the subject site.

Clause 18(2) of the SEPP Housing 2021 with an infill affordable housing contribution of 11.907% allows for an uplift bonus of 23.81% and therefore specifies a maximum height of 29.71m and 33.42m for the development at the subject site.

The proposed development reaches maximum heights when measured above the excavated basement garage level of:

- Building D maximum building height of 41.65m or a variation of 11.94m or 40.18%
- Building E maximum building height of 40.2m or a variation of 6.78m or 20.28%
- Building F maximum building height of 40.2m or a variation of 6.78m or 20.28%

When measured above the existing ground line, being the excavated basement garage level, the buildings present heights of up to 41.65m for Building D and 40.2m for buildings E and F respectively, resulting in a non-compliance of 40.18% & 20.28% to the SEPP Housing uplift building height.

However, when the buildings are measured above the natural, undistorted level of the land as existing prior to the commencement of the work, Building D will have a maximum height of 30.95m or exceed the control by 1.24m or 4.17%. The significant majority of the remainder of Building D comfortably complies with the maximum height control of 29.71m.

Building E fully complies with the maximum height control of 33.42m.

Building F will have a maximum height at the south-western corner of 33.86m, which exceeds the control by 0.44m or 1.3%. The significant majority of the remainder of Building F comfortably complies with the maximum height control of 33.42 m.

The non-compliances with the height control are a direct result of the sloping topography and the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve an improved outcome than a more complying development.

The architectural submission prepared by Architecture Urbaneia P/L includes detailed site assessment which highlights the substantial fall on site levels through the building area, in most particularly the ongoing construction of the buildings which has provided for an excavated basement garage level which has significantly increased the height of the building when the floor level of the garage is taken as being existing ground level.

When measured above the non-distorted natural ground level of the site, the buildings Construction of the buildings which has provided for excavation and which is a significant contributor to the non-compliance with the maximum height control.

The proposed variations to the height control support a balanced approach to the fall of the land and ensure that the development is able to maximise the delivery of housing supply and in particular the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

## **8.0 Relevant Caselaw**

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

*The first and 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: Wehbe v Pittwater Council at [42] and [43].*

*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: Wehbe v Pittwater Council at [45].*

*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: Wehbe v Pittwater Council at [46].*

*A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*

*A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

*These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*



The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3(2) of WLEP 2012 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be consistent with the objectives of clause 4.3(2) and the objectives for development for in the R4 zone?

## 9.0. Request for Variation

### 9.1 Is compliance with clause 4.6(3)(a) unreasonable or unnecessary?

This request relies upon the first way identified by Preston CJ in *Wehbe*, which seeks to establish that the objectives of the standard are achieved, despite non-compliance with the standard prescribed.

This request addresses the five methods described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

#### **Method 1 the objectives of the standard are achieved notwithstanding non-compliance with the standard**

There are no stated objectives associated with the control or Clause 18 in general. However, there is an objective for the entire Division at Clause 15A which is as follows:

*The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.*

Due to the fall of the site, along with the provision of additional in-fill affordable housing there are some height variations as a result of the lift overruns and associated building elements which provide lift access throughout the buildings.

The total proposed floor space is below the maximum achievable for the site under the Housing SEPP uplift provisions.

The variation to the height control promotes a fair handling of the sloping land and guarantee that the project can optimise the provision of housing, particularly new affordable housing, catering to the requirements of households with very low, low, and moderate incomes.

Consequently, these slight modifications to the height controls align with the goals of the incentivised height control.

As there are no objectives listed in the SEPP Housing 2021, the objectives can be inferred from the Willoughby Local Environment Plan.

The objectives of the WLEP are as follows:

Each objective of the maximum height of buildings development standard and reasoning why compliance is unreasonable or unnecessary is set out below:

- a. to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,*

Comment: The proposal comprises of five individual built forms which now range from 5 to 10 storeys as you move along Walter Street.

The built form compromises of a 5 storey built form at the corner frontage increasing to a 10 storey tower form as you move along Walter Street to minimise bulk and differentiate between the built form components.

The five built forms continue to use architectural modulation and a varied external material palette to create appropriate building articulation and setbacks. The elevations of all 5 built forms provide the same consistent building setbacks as the original approval, and generous separation between buildings allows for appropriate access to natural light, and ventilation.

The height variations of buildings D, E and F when considered in the context of the entire site, and the multiple examples of multi-level residential development in the immediate area means the development is not visually dominating, nor is the additional height identifiable from the surrounding public view. Accordingly, it is considered the development is visually consistent with surrounding existing and future development.

The integrated landscape design integrates the built form with the public space and neighbouring sites to create greater harmony in the locality by including native vegetation of all sizes and heights (including large canopy trees) which allows for increased amenity and the provision of higher density living in a bushland setting for future residents and surrounding neighbours.

It is important to note that while the height variations presented when the existing ground level being the excavated basement garage level is utilised for the measurement, the proposal presents variations of 40.18% for Building D and 20.28% for Buildings D and F respectively.

When however the natural undistorted level of the land is taken as a reference point for the calculation of the height control, the variations are significantly less as Building D is 4.17%, Building E will fully comply with the control and Building F has a variation of 1.3%.

The overall height is in harmony with the surrounding residential area and will provide a positive contribution to the streetscape via a modernised and contemporary design consistent with the strategic planning outcomes.

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

Comment: The planning proposal established an appropriate urban design framework for the site including preferred building layouts and heights, considering a range of environmental factors.

The non-compliant height within the development does not result in any unreasonable adverse impacts upon the amenity of nearby or adjoining properties with regards to views, solar access or privacy.

There are no unreasonable additional solar access impacts caused by the height variation. The neighbouring and future occupants will have direct access and sufficient exposure to direct sunlight, natural air flow while maintaining a landscaped outlook.

The proposal continues to protect the privacy of the occupants unit dwellings and the surrounding neighbouring dwellings through the provision of sufficient building separation, unit layouts,

privacy screen, orientation of windows and the provision of high windows. Additionally, extensive tree canopy is provided on the ground level and to further minimise overlooking.

While the proposal demonstrates a non-compliance with the height control, it is considered the development minimizes impacts on the surrounding area where appropriate, and continues to revitalise the site by delivering considerable benefits, including affordable housing, while improving the pedestrian linkages, and improved large landscaped areas.

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

Comment: The scale, bulk and height is appropriate and achieve an appropriate built form for the building's purpose in terms of building alignments, proportions, building type, articulation and the manipulation of building elements.

There is no change to the mass and scaling of Buildings B and C, the two buildings closest the corner of Willoughby Road and Walter Street. The proposals new transition as you move along Walter Street for buildings D, E and F display the height variations, however the height change from the original approval when viewed in context of the entire site is not visually jarring or readily identifiable as you move along the in Walter Street site

The use of articulation, façade recesses, colours, and materials further enhances the development's visual appeal while minimising its perceived bulkiness. The scheme demonstrates a high quality design, incorporating a rich pallet of natural materials (brick, concrete), neutral colour tones and a high quality apartments.

The visual impact of the development is to be softened by extensive landscaping, particularly within all boundaries which will further assist in mitigating any adverse impacts upon the amenity of neighbouring dwellings.

Overall, the design, coupled with a sensitivity to the site's topography and surrounding context, ensures that the development will blend harmoniously with its surroundings without causing any visual disruption to the locality. This approach reflects a balance between functional considerations and aesthetic principles, ultimately contributing to the enhancement of the urban environment.

The height non-compliance does not diminish the high visual quality of the development.

- 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,*

Comment: A view analysis of potential surrounding views has been undertaken to assess if there will be any adverse impacts from the proposed development inclusive of the height variation.

Most dwellings surrounding the site do not have any notable high value views or vistas. The exception to this is the taller residential buildings to the north of the site, who have views and district outlook across the subject site. For the views from the residential buildings directly to the north of the site, there will be minimal impact on views/outlook, however these outlook and very distant view lines of North Sydney and the City are susceptible to obstruction due to the significant

distance. However, it is considered reasonable views are maintained due to the sufficient setbacks ensure view corridors are maintained with the proposal exhibiting appropriate view-sharing.

The proposed height variation will not increase the visual impact of the development further than has already been assessed. Additionally, the visual impact is considered reasonable and acceptable considering the needs of affordable housing. The design also incorporates a range of measures to avoid and minimise any potential significant adverse view and visual impacts such as spatial separation and stepping of the buildings.

- 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,*

Comment: The proposed development provides for the most appropriate distribution of floor space on the site, noting that the development is compliant with the maximum FSR and minimum landscaped area calculations prescribed.

The area of building height non-compliance is a direct response to the NSW State Government drive to provide additional delivery of affordable and residential housing while remaining consistent with expected building height and scale context.

The proposal will continue to step up in height when viewed from Willoughby Road and Walter Street, particularly as you move along Walter Street with generous spatial separation and areas of landscaping to reduce the visual bulk of the development.

Accordingly, as a result of the SEPP Housing 2021 incentives the proposal forms part of the Willoughby area that is anticipated to include high density developments in the future of similar building height to the proposed building.

- f. *to use maximum height limits to assist in responding to the current and desired future character of the locality,*

Comment: The proposed development has been designed to respond to the existing and future character of the precinct with regard to height, bulk and scale. The SEPP Housing 2021 incentivise an increase in height, accordingly, is therefore anticipated the desired future character of the Willoughby area will include high density developments of similar building height to the proposed building.

Specifically, while buildings D, E, F present building heights pursuant to the SEPP Housing which provides for an increase in the building height. The proposed heights on the overall site have been designed to transition down the sloping topography of the site. The proposed variations to Building D, E and F do not impact the relationship of the proposed development with the surrounding building heights since the stepped form is maintained and the height variation on the upper level is not the overall maximum height of the development when excavation is included.

When viewed from Willoughby Road and Walter Street the buildings step up in height as you move along Walter Street with generous spatial separation and areas of landscaping to reduce the visual bulk of the development, consistent with the desired future character of the locality.

The proposed building heights do not alter the general bulk and scale of the buildings for their presentation to the street and the surrounding properties from the original Development Application.

Therefore, the additional building height within Building D, E and F while increasing the built form, are generally in accordance with the approved Planning Proposal and meets the objectives of the Housing SEPP to provide additional affordable housing and planning vision for the area.

The proposed built form and scale will define the public domain and contribute to the character of the streetscape, which features medium density housing of varying scales, and styles.

- 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,*

Comment: Not applicable – the site is not in Chatswood.

- h. to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.*

Comment: Not applicable – the site is not in a business or retail centre.

Strict compliance with the 29.71m & 33.42m maximum height development standards of WLEP 2012 is considered to be unreasonable and unnecessary as the objectives of the standard are otherwise achieved.

**Method 2: the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.**

The fundamental goals and intent of the height control are pertinent to the proposed project. Moreover, the proposed development and building height aligns with these goals by proposing a variation to the height control that will enable the creation of new in-fill affordable housing for very low, low, and moderate income households.

Additionally, the project will harmoniously integrate with the current and future scale of neighbouring structures and will fit well within the site's context, without causing significant negative effects on adjacent properties.

**Method 3: the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable**

The core aim of the standard is to encourage and facilitate the provision of new in-fill affordable housing for very low, low, and moderate income households. Strict adherence to this standard would hinder this objective as it would simply lead to a reduction in housing supply, particularly affordable housing, without offering any public benefit.

Conforming strictly to the height control would not significantly diminish the impact of the development on the streetscape or neighbouring properties, nor would it enhance the quality of life for residents of the development. Therefore, it is believed that strict adherence would likely undermine the fundamental aim and purpose of the incentivized height control by promoting a less favourable outcome for the site.

**Method 4: the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.**

The development standard has not been virtually abandoned.

**Method 5: the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.**

Key reasons why strict compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case are as follows:

- The additional height variations are motivated by the intention to enhance the quality of life within the development through the introduction of additional infill affordable housing and the inclusion of central lift access cores.
- The scale of the development as proposed is compatible with the desired future scale and character for the locality which envisages high density residential development.
- A solar analysis prepared by Architecture Urbaneia P/L accompanies the subject application and demonstrates that the proposed areas of non-compliance do not result in any significant difference compared to a compliant height in relation to solar
- The Visual Impact Assessment prepared by Urbaine Design Group considers the view loss impacts which result directly from the elements of the building which exceed the maximum height control and concludes that appropriate view sharing and retention of views towards key elements of the view where available, are generally maintained. Curb prepared by Urbane
- The building height non-compliance ultimately enhance the overall functionality and amenity of the development, while also enabling the provision of affordable housing (notably, well below the maximum combined Floor Space Ratio for the site). These variations are expected to deliver a more favourable outcome compared to strictly compliant development
- There are no other impacts to adjacent sites resulting from the proposed variation to the height control which would warrant strict compliance



**9.2 Clause 4.6(3)(b) Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

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

The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:

- The proposed development maintains the general bulk and scale of surrounding contemporary residential flat buildings and maintains architectural consistency with the prevailing development pattern which promotes the orderly and economic use of the land (cl 1.3(c)).
- Similarly, the proposed development will provide for a high level of amenity within a built form which is compatible with the character of the locality, which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed development is considered to promote good design and enhances the residential amenity of the buildings’ occupants and the immediate area, which is consistent with the Objective 1.3 (g).
- The non-compliance primarily arises as a result of historical excavation undertaken to provide for the lower floor level of the existing dwelling. In accordance with the findings of the NSW LEC in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to

the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.

- The proposal has a height and scale that generally reflects the controls that apply. The area is characterised by a variety of housing types and the proposal contributes to this variety.
- The non-compliances with the height control ultimately improves the overall functionality and amenity of the development, as well as facilitating the supply of affordable housing (noting that the proposed housing is still well below the maximum combined FSR for the site) such that they will achieve a better outcome than a complying development
- Non-compliance associated with the upper roof form is attributed to the slope of the land and required excavation to meet the existing street level of Walter Street.
- The remainder of the breaches in height due to the desire to optimise the amenity within the development by providing lift access to all apartments, and a roof top common open space area for building D. The lift overruns to access the apartments and the rooftop facility are centrally located and not readily visible from the public domain. The roof top communal open space areas provide a very high level of amenity for residents that could not be achieved where the communal open space areas limited to the ground floor.
- The non-compliance associated with the roof line within is not readily perceivable as the minor variation only affects a limited volume of the roof element with the remaining building height complying at all other areas along the street frontage.
- The non-compliance also sufficiently setback from the northern boundary so to not adversely impact upon the adjoining property to the north.
- The non-compliance does not detract from consistency with the objectives of the height of buildings development standard.
- The minor building height non-compliance will have no adverse effect to direct sunlight, natural air flow or outlook for the future occupants, their guests or neighbouring sites.
- The bulk and scale of the development is consistent with that of other medium to high density development that adjoin the site (particularly to the north).
- The proposal has been designed to sit comfortably within the R4 context, with particular care taken to ensure that the multi-level development provides appropriate transitions to neighbouring developments in terms of setbacks and scale.
- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- The visual presentation of the proposed development is not offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.

- Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSW LEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the particularly minor departure from the SEEP Housing 2021 building heights and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Overall, the proposed design promotes the orderly and economic development and use of the land, and good design and amenity of the built environment, consistent with Objects 1.3(c) and (g) of the EP&A Act.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development and the subject site.

### **9.3 Is the proposed development consistent with the objectives of clause 4.6(4) and the objectives of the R4 zone?**

Section 7.1 of this written request suggests the first test in *Wehbe* is made good by the development, in so far as the objectives of 4.6(4) of WLEP 2013 are satisfied.

It is considered that notwithstanding the breach of the maximum building height, the proposed development will be consistent with the individual Objectives of the R4 zone as follows:

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

Comment: The proposed development supports a balanced approach to maximise the delivery of housing supply and in particular the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.

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

Comment: The proposed development comprises of a range of housing options including in-fill affordable housing to meet the needs of very low, low and moderate income households. Accordingly, the development contributes to the diverse housing supply within the wider R4 zone.

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

Comment: Not applicable – the application proposes residential development.

- *To accommodate development that is compatible with the scale and character of the surrounding residential development.*

Comment: The bulk and scale of the development is consistent with that of other high density development within the area, which is becoming more prevalent as the area utilises the incentivised height control under SEPP Housing 2021. The height and scale of

the work is compatible with surrounding newer development in the immediate vicinity which are under construction or recently completed.

- *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.*

Comment: The density of the proposed development does not result in any adverse impacts upon the safety or efficiency 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.*

Comment: The proposed development will provide a high level of amenity for future occupants without resulting in any adverse or unreasonable impacts upon the amenity of adjoining properties.

The above discussion demonstrates that the proposal development 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.

Furthermore, there is no material public benefit in maintaining the standard generally or in relation to the site specifically as a variation as proposed has been demonstrated to be based on sufficient environmental planning grounds in this instance.

Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the incentivised height control because it would encourage a less desirable outcome for the site.

#### **9.4 Has the Council considered the matters in clause 4.6(5) of WLEP 2012?**

The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is specific to the design of the proposed development for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

As the proposed development complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard in this particular instance.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior outcome by eliminating a large contribution to new in-fill affordable housing, that would contextually be essentially no different from the approved development and would not result in any benefit for the provision of affordable housing. Alternatively, if the proposed levels are retained, strict compliance would simply result in a loss of much needed housing supply and in particular affordable housing.

## 10.0 Conclusion

This development proposes departures from the maximum building heights determined by Clause 18(2) of the SEPP Housing 2021. Strict compliance with the height of buildings development standard contained within clause 18 of SEPP Housing has been found to be unreasonable and unnecessary in the circumstances of the case.

The underlying objective and purpose of the standard relates to aims to incentivise and facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households. This objective would be prevented by strict compliance because it would simply result in the loss of housing supply and in particular affordable housing, without any public benefit.

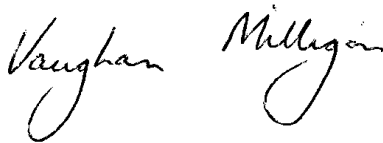
Accordingly, it is considered that strict compliance would likely result in the defeat of the underlying object and purpose of the incentivised height control because it would encourage a less desirable outcome for the site.

The variation is considered acceptable largely due to the minor nature of the non-compliant roof structures, which is integral to the design and for amenity for residents. The non-compliance is not considered to result in excessive bulk and scale, will be satisfactory in the streetscape and will not result in adverse shadow, views or amenity impacts on surrounding properties.

This exception request to the building height is considered to be well founded and Council as the consent authority can be satisfied for the reasons outlined, that the proposed development will be consistent with the objectives of the standard and the objectives of the zone.

This written request to vary to the maximum building height development standard specified in Clause 16(3) of the SEPP Housing 2021 adequately demonstrates that the objectives of the standard will be met.

In summary, the proposal satisfies all of the requirements of clause 4.6 of WLEP 2012 and SEPP Housing 2021 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.



**VAUGHAN MILLIGAN**

*Town Planner*