Appendix 2 – Clause 4.6 request for variation – Height of Buildings

This request has been prepared as the Applicant's Written Request for Variation to a Development Standard and is made in accordance with the provisions of clause 4.6 of the *Shellharbour Local Environmental Plan 2013* (**SLEP 2013**)*:*

The Request for Variation is made in respect of a Development Application for the construction of a five (5) storey shop top housing development including 17 apartments and 44 car spaces in ground floor and basement car parking levels.

Background and Development Description

The subject site is located within the Shellharbour Town Centre and within easy walking distance to a wide range of services. Existing built improvements over the subject site consists of a free standing item of heritage significance known as Allen's Store and a two storey Commercial building of no significance.

The building design considers the need to respect and conserve the item of heritage significance while addressing the Addison Street frontage and secondary frontage to a pedestrian laneway. The subject site will be provided with vehicular access off the existing public car park at the rear. The building design has been developed around an awkward building envelope caused by the serialisation approximately 370 sqm of a 1479.5 sqm site due to the need to preserve the item of heritage significance and allowing for suitable building setback from such item. This represents the sterilisation of approximately 25% of the subject site. Nevertheless this proposal provides a desirable visual outcome that is compatible with the local area character. This is clearly demonstrated within the Design Report prepared by Drew Dickson Architects.

Reference should be made to the design report prepared by Drew Dickson Architects submitted with this application.

Has this request for variation adequately addressed the matters required to be demonstrated by subclause 4.6(3)?

Several important matters relevant to Clause 4.6(4) have been considered by The Land and Environment Court. Of note are judgements issued by the Land and Environment Court including *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*, *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61* and *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245*. These judgements have clarified how consent authorities should apply clause 4.6 and in particular what matters must be "adequately addressed" when an applicant seeks to contravene a development standard. In short, the Court issued judgements focuses attention on the "work to be done" by cl. 4.6(4) which states:

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

(a) the consent authority is satisfied that—

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

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

That is, while clause 4.6(3) requires that the consent authority consider a written request that seeks to justify the contravention of a development standard clause 4.6(4) requires that the consent authority be satisfied that the written request has "adequately addressed" the matters required to be demonstrated by clause 4.6(3). In essence, the written request must justify the non-conformity to a sufficient extent so that the consent authority is satisfied that the request is well founded and that planning grounds to warrant the granting of a development consent that is inconsistent with a development standard has been demonstrated.

Reference should be made to the argument following which set out the applicant's written request seeking to justify that consent to contravene the height of buildings development standard is warranted by demonstrating that:

(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.

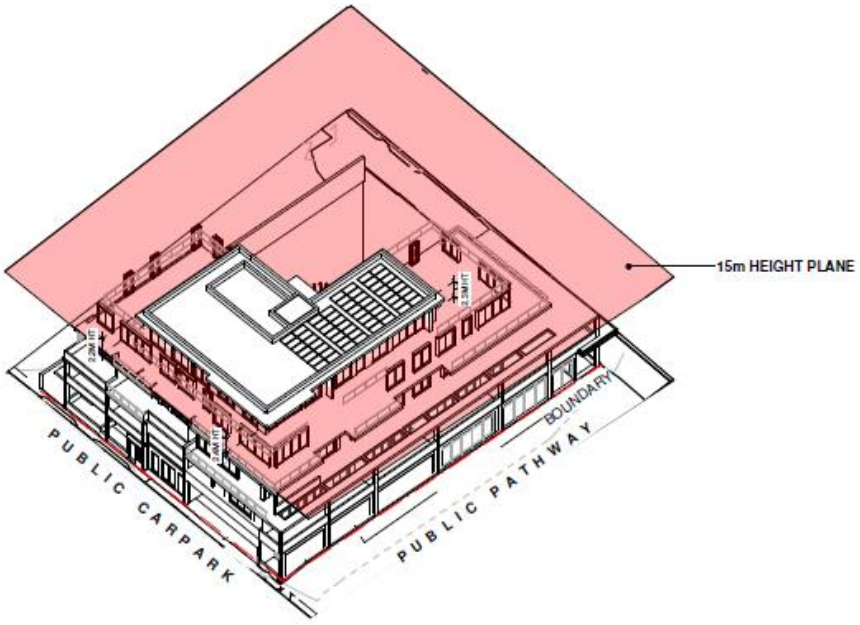
Furthermore, it is argued that this written request and supporting design documentation prepared by Drew Dickson Architects adequately address the matters required to be demonstrated by clause 4.6(3) and that the development will be in the public interest because it is consistent with the objectives of the height of buildings development standard and also the objectives of the B2-Local Centre Zone.

Purpose of Request

This Clause 4.6 variation has been submitted to assess the proposed non-compliance with the Height of Buildings (HOB) standard provided under Clause 4.3 of the SLEP2013. A maximum HOB of 15.0 metres is applicable to the site.

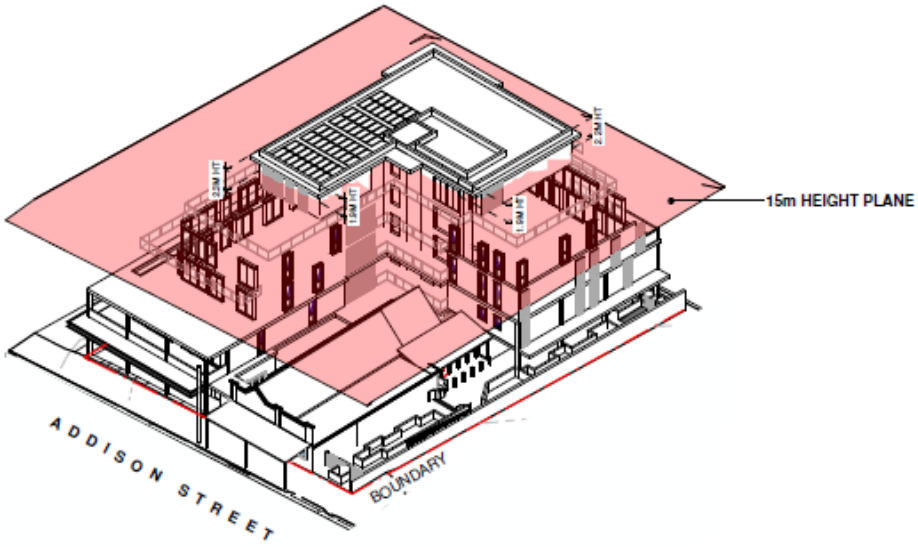
This proposal has a maximum building height of RL 36.80m to the roof and RL 37.40m to roof parapet, representing a height in meters above existing ground level when measured at the Addison street frontage of 17.565 meters, exceeding the permitted building height by 2.565 metres or 17% exceedance.

It should be noted that this exceedance only occurs over a portion of the proposed building and can be attributed to part of the uppermost level and fall across the site. Figures within this request provide a visual interpretation of the maximum building height.



1 15m HEIGHT ANALYSIS SOUTH WEST CORNER

Figure 1: 15 metre height plane – South Western Corner



2 15m HEIGHT ANALYSIS NORTH WEST CORNER

Figure 2: 15 metre height plane – North Western Corner

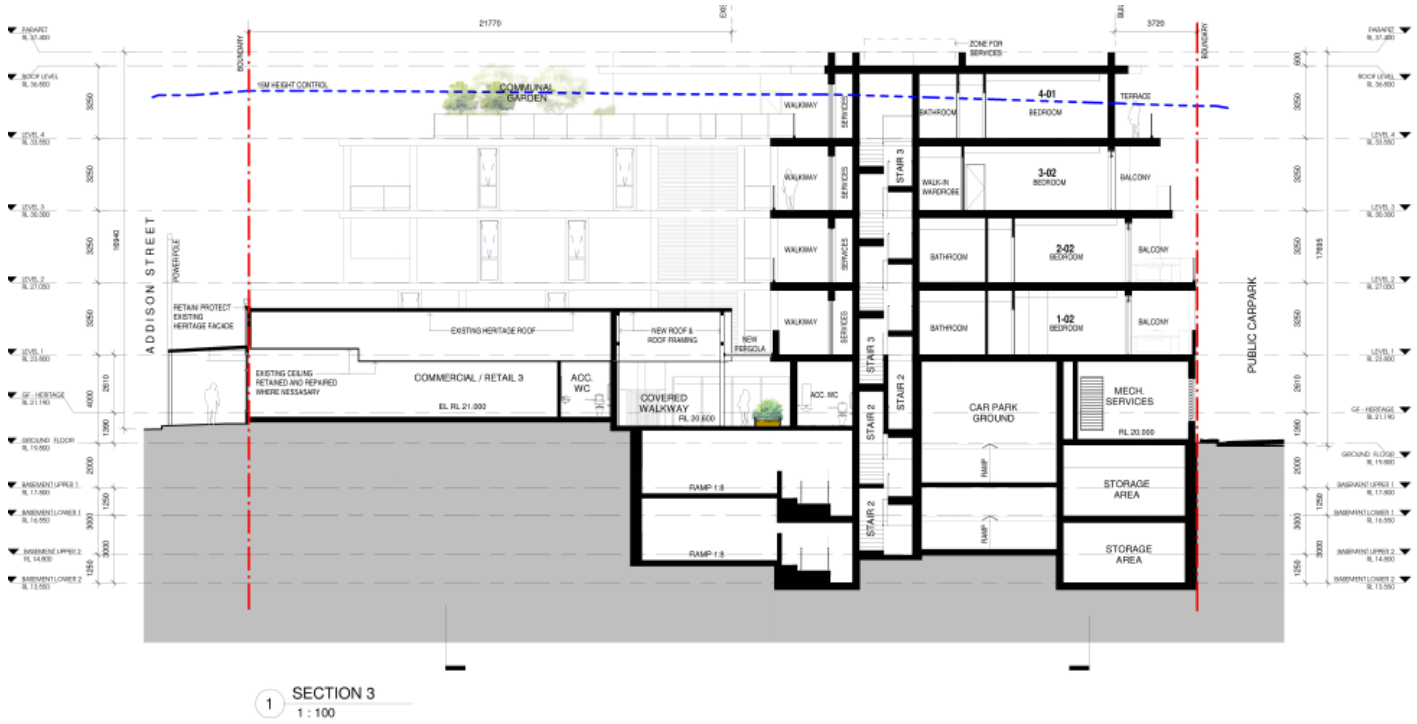


Figure 3: Long section showing exceedance in building height

Whilst the NSW Department of Planning and Environment includes a requirement to identify the percentage variation in its *Guide to Varying Development Standards* there are a number of case law examples that demonstrate that there is no constraint on the degree to which a consent authority may depart from a numerical standard.

The following examples relate to Floor Space Ratio and Height of Buildings development standards and assist in demonstrating that the degree of exceedance alone is not determinative in assessment of a Request for Variation to a development standard.

Clause 4.6 of the LEP is in similar terms to SEPP 1. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. This means that there is no constraint on the degree to which a consent authority may depart from a numerical standard.

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

(a) In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court 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 per cent**.

(b) In *Amarino Pty Ltd v Liverpool City Council* [2017] NSWLEC 1035 the Land and Environment Court granted development consent to a mixed use development on the basis of a clause 4.6 request that sought a **38 per cent height exceedance over a 15-metre building height standard**.

(c) In *Auswin TWT Development Pty Ltd v Council of the City of Sydney* [2015] NSWLEC 1273 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a **28 per cent height exceedance over a 22-metre building height standard.**

(d) In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a **21 per cent height exceedance over a 18-metre building height standard.**

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

How is strict compliance with the development unreasonable or unnecessary in this particular case?

The matter of Wehbe v Pittwater Council [2007] NSWLEC 827 (21 December 2007) sets out five ways in which strict compliance with a development standard can be demonstrated to be unreasonable or unnecessary in the circumstances of the case.

The 5 ways are:

1. *if the proposed development proffers an alternative means of achieving the [development standard] objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served);*

2. *the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary*

3. *the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable*

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*

5. *"the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.*

Compliance with a development standard might be shown as unreasonable or unnecessary in circumstances where the development achieves the objectives of the development standard, notwithstanding non-compliance with the development standard. Demonstrating that the development

achieves the objectives of the development standard involves identification of what are the objectives of the development standard and establishing that those objectives are in fact achieved.

Reference should be made to figures 1, 2 and 3 above, for a clear understanding of site topography and extent of minor height exceedance. Furthermore, reference should be made to figures 4 and 5 below that demonstrate the extent of land sterilisation caused by the conservation of the heritage item of significance.

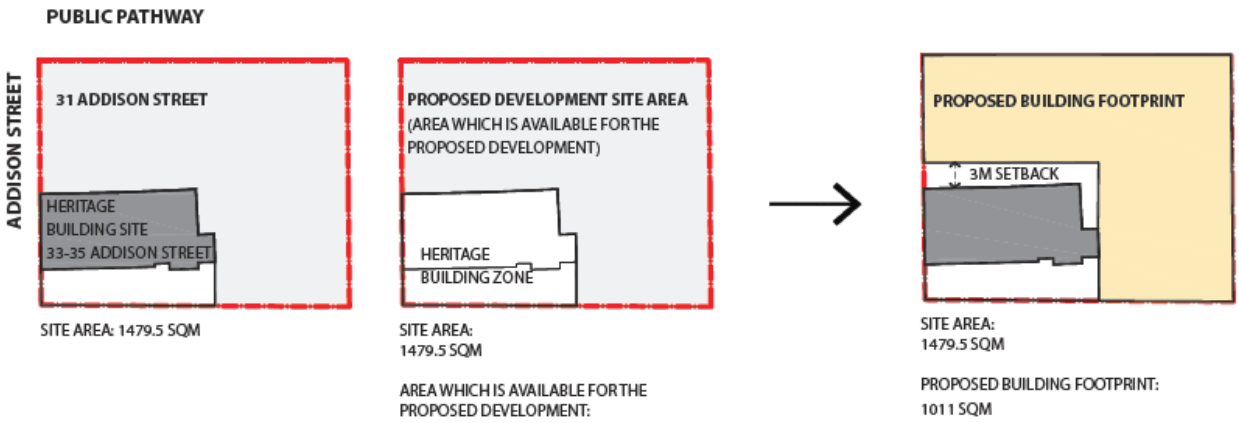


Figure 4: Setbacks from item of heritage significance – awkward building footprint

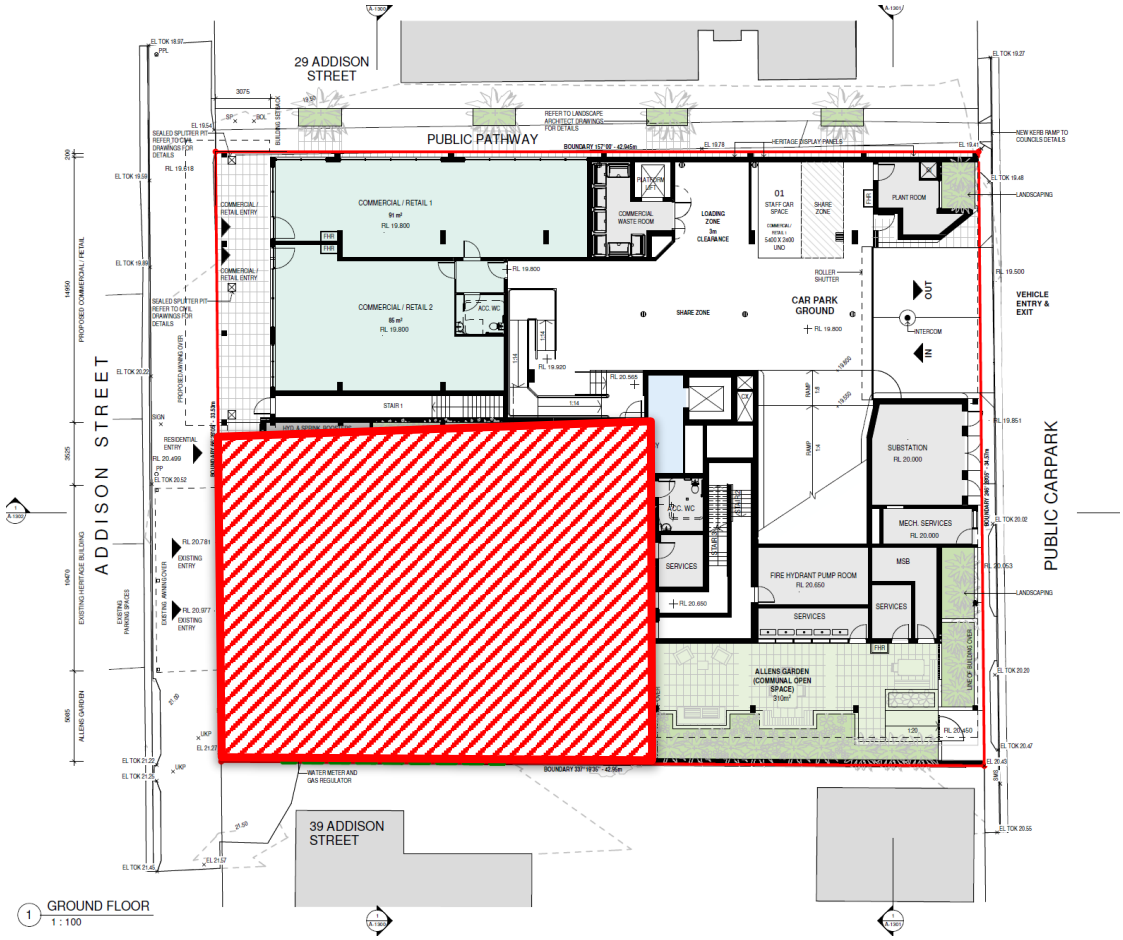


Figure 5: Sterilisation of 25% of site – approx. 370 sqm

Strict compliance with the HOB development standard is considered to be unreasonable and unnecessary in the circumstances of the case for the following reasons:

The proposal achieves the objectives of the Zone.

As detailed above, this proposal achieves the objectives of the zone. That is, this proposal will provide new residential accommodation in the form of a shop top housing and additional employment generating land uses in a location where this form of development is permitted. As demonstrated in the figures below, this proposal is designed to be compatible with the existing and future development in the locality.

Figure 6: Building aligned with two storey elements – upper levels set back

Figure 7: Building aligned with two storey elements – upper levels set back

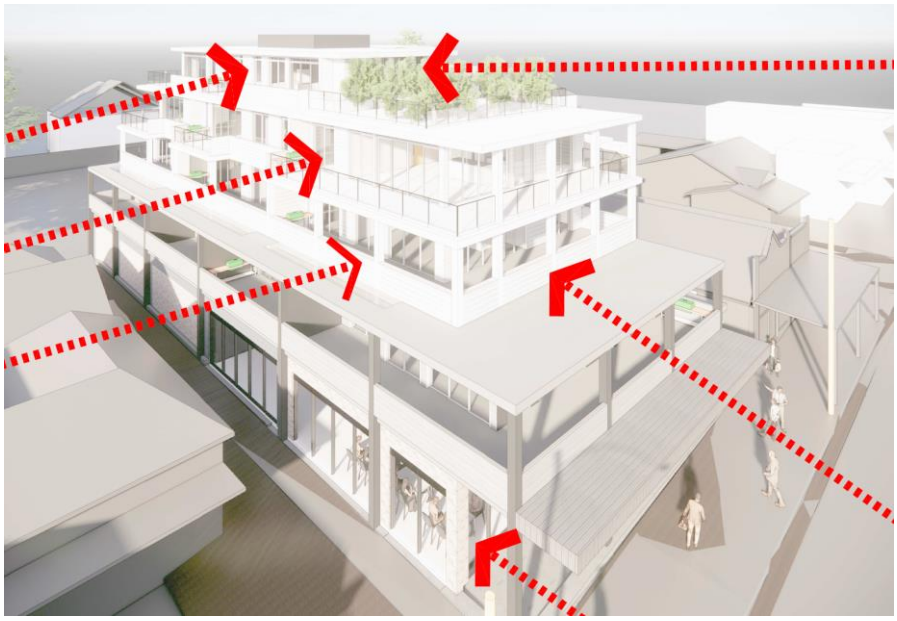


Figure 8: Upper level setbacks

As figures above demonstrate, the proposed building has been designed to fit well within the street scape notwithstanding the exceedance in permitted building height. Furthermore, the building at the upper levels, has been significantly setback to minimise shadow and preserve privacy.

The proposal achieves the objective of clause 4.3

As detailed above, this proposal achieves the objectives of the development standard. That is, the proposal has been designed to be compatible with the character of the locality. The bult form has been guided by the expert design and heritage input that establishes a building envelope that enables the delivery of an elegant building while ensuring that the item of heritage significance remains central to the overall development of the site.

Furthermore, the amenity of adjoining premises has been considered in the design process ensuring that this proposal does not impact on views nor does the built form cause unreasonable levels of overshadowing to adjoining premises. Figure 9 below shows the extent of the additional shadow caused by the portion of the building above 15 metres.

Figure 9: Additional shadow (in red) caused by building mass above 15 mtres

Sufficient environmental planning grounds to justify contravening the development standard

The term "environmental planning grounds" is not defined in SLEP2013 nor any other environmental planning instrument. It is also not defined in the Department of Planning's Guide to Varying Development Standards

Nevertheless, given that demonstration of sufficient environmental planning grounds is a separate test under clause 4.6(3) to the test of "unreasonable or unnecessary in the circumstances of the case"; and that case law relevant to SEPP 1 such as Wehbe v Pittwater Council [2007] NSWLEC 827 (21 December 2007) and Winten Property v North Sydney (2001) 130 LGERA 79 deal with demonstration of "unreasonable and unnecessary in the circumstances of the case", it must therefore be concluded that "environmental planning grounds" are a different test which cannot necessarily rely on the same methodology as laid down in SEPP 1 relevant Court decisions.

The matter of Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (30 January 2015) provides some helpful guidance on the subject of "environmental planning grounds", however it is in fact limited to defining some factors which are not environmental planning grounds.

Paragraph 60 of Commissioner Pearson's decision states:

> *The environmental planning grounds identified in the written request are the public benefits arising from the additional housing and employment opportunities that would be delivered by the development, noting (at p 5) the close proximity to Ashfield railway station, major regional road networks and the Ashfield town centre; access to areas of employment, educational facilities, entertainment and open space; provision of increased employment opportunities through the ground floor retail/business space; and an increase in the available housing stock. I accept that the proposed development would provide those public benefits, however any development for a mixed use development on this site would provide those benefits, as would any similar development on any of the sites on Liverpool Road in the vicinity of the subject site that are also in the B4 zone.* ***These grounds are not particular to the circumstances of this proposed development on this site****. To accept a departure from the development standard in that context would not promote the proper and orderly development of land as contemplated by the controls applicable to the B4 zoned land, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the "environmental planning grounds" referred to in cl 4.6(4)(a)(i) of the LEP. (emphasis added)*
>
> 30. On Appeal in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (3 June 2015), the Court considered whether the Commissioner had erred in law in confining environmental planning grounds to those particular to a site or proposed development. The Court held at [29] and [30] that this was a matter which the Commissioner was entitled to consider in her exercising of discretion:
>
> > *Turning to the first ground of appeal, it refers to a finding of the Commissioner at [60] in relation to the environmental planning grounds identified in the written request, as required by cl 4.6(3)(b). The Commissioner concluded that the grounds referred to were not particular to the circumstances of the proposed development on the particular site. Firstly, it is debatable that this ground of appeal couched as the misconstruction of subclause (4)(a)(i) does identify a question of law. The Commissioner's finding, that the grounds relied on in the written report were not particular to the circumstances of the*

proposed development on this particular site, is one of fact. That informed her finding of whether the grounds put forward were sufficient environmental planning grounds.

To the extent the issue raised can be described as a question of mixed fact and law, the Commissioner is exercising a discretion under subclause (4)(a)(i) in relation to the written report where the terms in subclause (3)(b) of sufficient environmental planning grounds are not defined and have wide import,

From this we interpret that particular circumstances of the site or development is an appropriate (although not exclusive) filter through which to view the sufficiency of environmental planning grounds.

In the absence of a legislative or other definition we adopt a definition for "environmental planning grounds" as 'any matter arising from consideration of either Section 4.15 of the EP&A Act 1979 or its Objectives which in the circumstances of the particular development on the particular site, warrants variation from the development standard'.

Based on that methodology, the environmental planning grounds which support variation to the HOB standard in this instance are:

Environmental Planning Ground 1 – Heritage Conservation

This proposal responds to the desire to conserve heritage which results in a significant reduction in developable site area. This proposal is supported by detailed heritage impact assessment and has been devised with the benefit of heritage architectural input and demonstrates that by setting back from the item of heritage significance the proposed development enables and facilitates the conservation of the heritage item. The design of this proposal, including the submitted Statement of Heritage Impact demonstrates that the proposed development will not adversely affect the item of heritage significance. This proposal is supported by a Statement of Heritage Impact and a schedule of conservation works. Furthermore, a Conservation Management Plan is under preparation for the consideration of the Council. Restoration works will occur as an integral part of the redevelopment of the subject site.

The applicant is committed to the carrying out of all defined conservation works and the Council is able to impose the necessary conditions of development consent requiring the satisfactory completion of works. However, it must be acknowledged that, conserving heritage requires significant building refurbishment works at considerable cost.

Permitting the additional height as proposed is considered to be a reasonable offset to the reduced developable portion of the land, ***noting that while additional height is proposed, compliance with floor space ratio development standard is not compromised***.

Environmental Planning Ground 2 – Negligible amenity or visual impacts

Numerically, the HOB exceedance is not considered excessive or unreasonable in the context of the site or surrounding locality. This is especially the case given the exceedance in height is restricted to a portion of the upper most level.

It is argued that the exceedance in height does not cause impact and satisfies the objectives of the standard. As such, it is considered that the particular design delivers appropriate and sufficient environmental planning grounds to support the additional HOB which is proposed.

Environmental Planning Ground 3 – Street Character

The proposed development represents an excellent design outcome. The particular design, in the context of this particular site means that the excess HOB is not perceived from the public domain and therefore does not have any adverse impact on the streetscape or urban form otherwise anticipated by the controls.

Furthermore, the environmental planning grounds which support variation to the standard in this instance are that the particular design in the context of this particular site means that the non-complying building height is not obvious and therefore does not have adverse effects on the streetscape or urban form otherwise anticipated by the controls. The HOB exceedance allows for the achievement of each of the zone and HOB objectives.

Public Interest

The proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the zone. As the Court recently reminded in *Initial Action* (2018) at [26] – [27], this is what is required, rather than broad statements about general 'public interest' considerations at large.

The arguments outlined earlier in relation to consistency with clause 4.3 and B2 zone objectives of the SLEP 2013 are relied upon as detailed above.

Secretary's Concurrence

It is understood that the Secretary's concurrence under clause 4.6(4) of SLEP 2013 has been delegated to Council. Nevertheless, Council may wish to consider the concurrence requirements, being:

> (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
>
> (b) the public benefit of maintaining the development standard, and
>
> (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

In this matter, for the reasons outlined above – and particularly having regard to the minimal adverse amenity impacts stemming from the non-compliance – there is nothing about this proposed variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. There are no other relevant matters required to be taken into consideration before granting concurrence.

Conclusion

For the reasons outlined above, the objection to Clause 4.3 of SLEP 2013 is considered well-founded on the basis that the development in fact demonstrates achievement of the objectives of the development standard and the objectives of the B2 zone. In this regard, strict compliance with the development standard is considered unreasonable or unnecessary, particularly noting the following:

- the proposed development appropriately respects heritage conservation and will facilitate the conservation of a heritage item, thereby satisfying the conservation incentives in cl. 5.10(10);
- there are no unreasonable impacts associated with the proposed development with respect to overshadowing, amenity and privacy concerns;
- the proposed development is consistent with the existing and future character of the area in relation to the building bulk, form and scale; and,
- the proposed development does not result in an exceedance in floor space ratio standard.

As demonstrated within this submission, design report and the Architectural plans, the overall massing, scale, bulk and height of the proposed development is considered appropriate to the locality.

Council can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standards.

It is therefore requested that the Council not withhold development consent for the proposed development due to a noncompliance with the HOB development standard caused by a portion of the uppermost floor.