



Appendix A – LEP Exception to Development Standard

Introduction

This Clause 4.6 Variation Request has been prepared to support a development application under Division 4.3 of the Environmental Planning and Assessment (EP&A) Act 1979, for new mixed-use multi-storey commercial/residential development (shop top housing) at Lot 2 DP 1262241, 36 Flinders Street, Wollongong. This request satisfies the requirements of Clause 4.6 of the Wollongong Local Environmental Plan 2009 in 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.*

This Variation Request is seeking to vary Clause 4.3(2) of Wollongong Local Environmental Plan 2009 (WLEP 2009) and should be read in conjunction with the Urban Link architectural plans provided with the DA. The proposal breaches the 32m height limit set by Clause 4.3(2). The breaches vary between 70mm and 1100mm over the height plane (maximum 3.4%) for different sections of the building roofline and lift overrun. The particular circumstances for this variation relate to the dramatic site slope (ie. notable topographic profile across the land from front to rear) and flood design constraints (ie. having to set floor levels above existing ground level for flood planning requirements).

This variation has been prepared in accordance with the NSW Department of Planning Infrastructure (DPI) guideline “*Varying Development Standards: A Guide*” dated August 2011 and addresses the ‘five-part test’ established by the NSW Land and Environment Court (LEC) to determine whether the objection is well founded.

Subject land

The subject site is located north of the Wollongong City Centre area, on the western side of Flinders Street, 75 metres north of the intersection of Flinders Street and Gipps Street. The area to be redeveloped includes Lot 2 DP 1262241. The property is known as 36 Flinders Street, Wollongong.

The site is a regular allotment of 4769m² in site area and currently contains various single and double storey commercial premises and open hard stand car parking. The site has a frontage of ~91.4 metres to Flinders Street and is bound by a drainage channel to the rear. The site has a notable cross-fall across the property downwards from east to west, with an RL difference of in the order of 3 metres from front to rear. All structures and surfaces are proposed to be demolished to support the new development.

Proposed development

The proposed development seeks demolition of existing structures and construction of a new double tower nine (9) storey mixed use building (shop top housing) consisting of two (2) commercial premises, 114 residential units and associated basement parking and amenities throughout. The proposal is detailed in the Architectural Drawings prepared by Urban Link.



Applicable Environmental Planning Instrument

The applicable Environmental Planning Instrument subject to this Variation Request is the Wollongong Local Environmental Plan 2009

The Wollongong Local Environmental Plan 2009 (WLEP 2009) provides the key development standards applicable to the development and includes the aims and objectives for the development within the Wollongong Local Government Area. This Variation Request (exception to development standards) is seeking to vary the development standard Clause 4.3(2) of Wollongong Local Environmental Plan 2009 (WLEP 2009).

Objectives of the Development Standard

To satisfy the requirements of Clause 4.6 and demonstrate that compliance with the standard is unreasonable or unnecessary, it is important to understand the intent and objectives of the development standard being varied.

The objectives of this Clause 4.3 are as follows—

- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.*

Description of the Variation

The subject site allows a maximum building height of 32m. All habitable areas within the building are located below with permitted 32m height plane. However, the proposed roofline of the two towers includes an exposed lift shaft overrun (northern tower only) and part of the roof structure (primarily western end of both towers) that exceed the 32m height limit.

The breaches vary between 70mm and 1100mm over the height plane (maximum 3.4%) for different sections of the building roofline and lift overrun. The lift overrun itself has a height breach of between 590mm and 1100mm (0.18% and 3.4%) above the 32m height plane, whilst the roof structure variation ranges between 70mm and 400mm (0.002% and 0.012%) over this development standard limit.

This breach can be seen in the height plane diagrams prepared by Urban Link and reproduced below. The components of the development that exceed this 32m height plane relate to the roof structure (primarily west) and northern building lift overrun only as aforementioned. The vast majority of the development and roof structure remains under this permitted height plane.

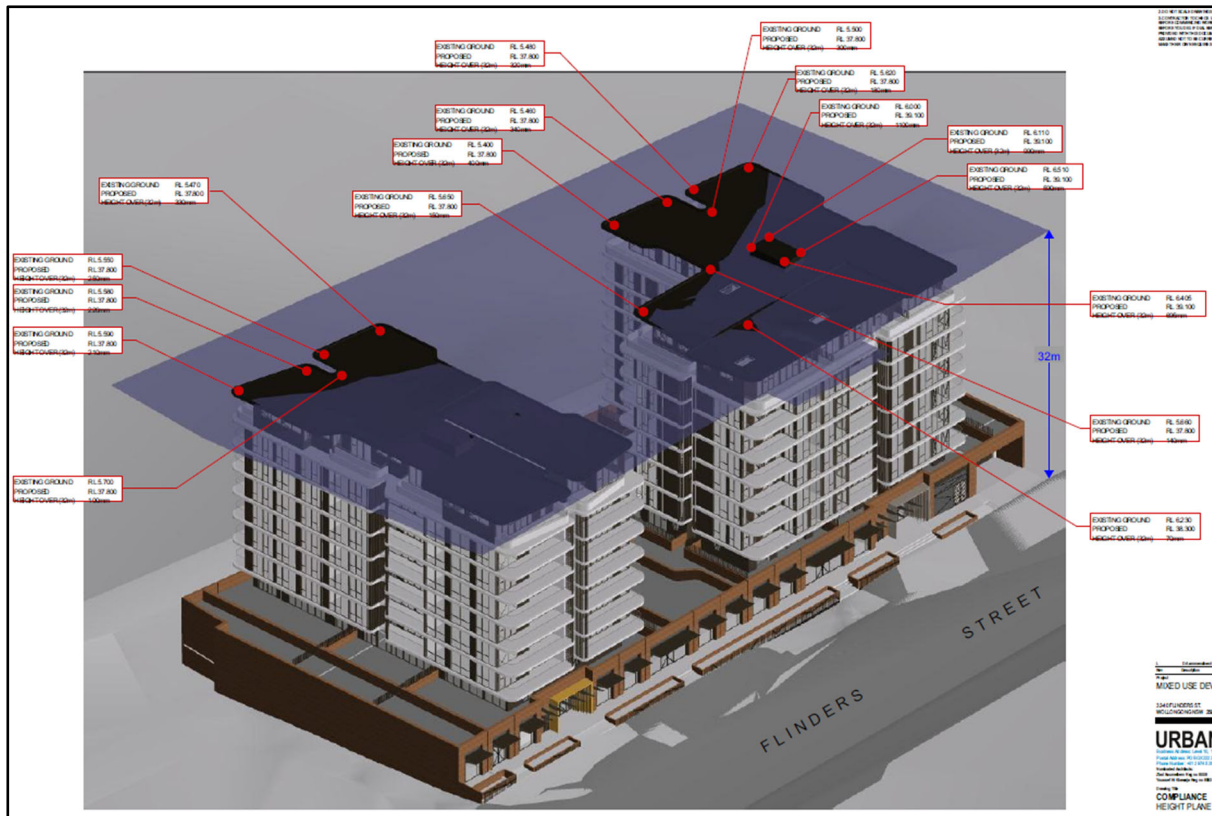


Figure 1: 3D Height Plane Diagram (Urban Link)

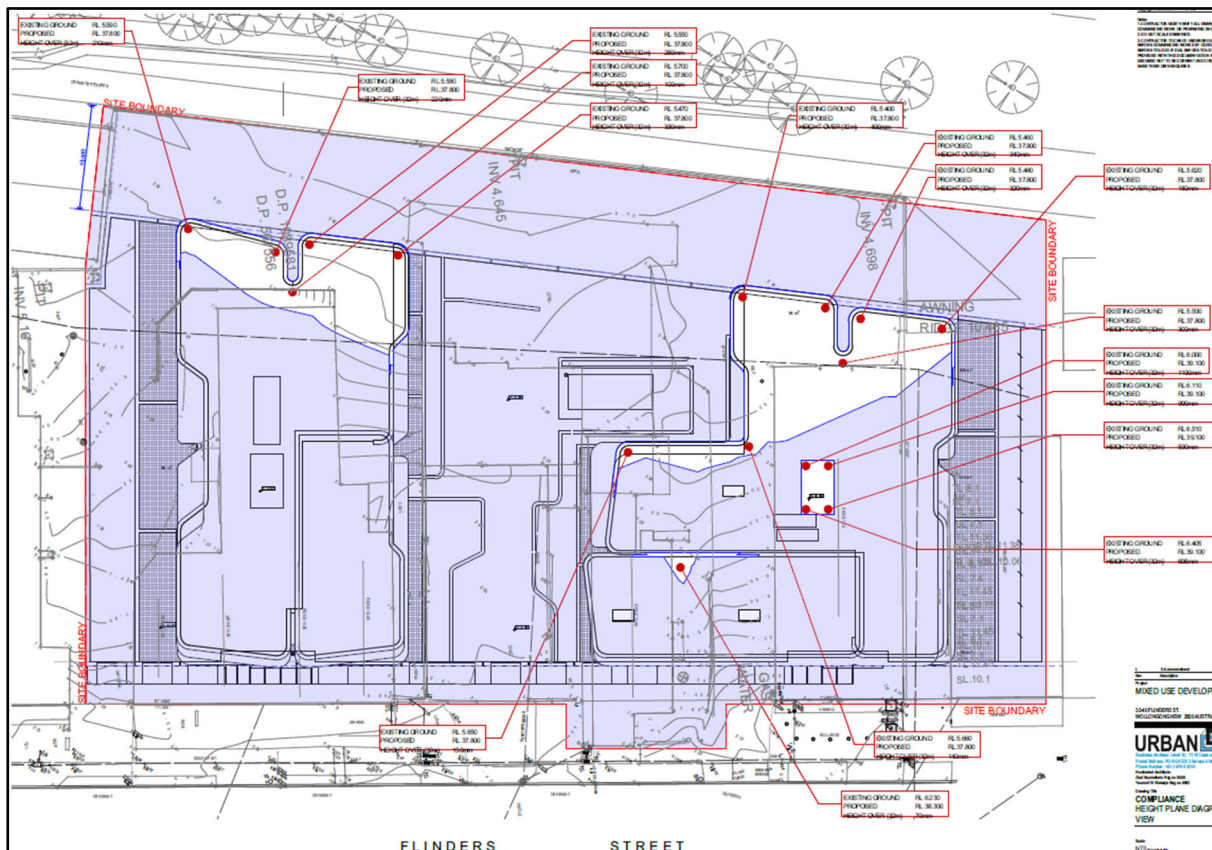


Figure 2: 2D Height Plane Diagram (Urban Link)



How is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

In *Wehbe v Pittwater Council* [2007] NSWLEC827 (Wehbe), Preston CJ identified five (5) ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. While *Wehbe* related to objections pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under Clause 4.6 because subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

The five (5) ways outlined in *Wehbe* include:

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

Additionally, of note, in the judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the standard was unreasonable or unnecessary, rather that the applicant's written request adequately addresses the matters in Clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, this written request establishes and adequately addresses the matters in Clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary because the objectives of the standard are achieved irrespective of the non-compliance and accordingly justifies the variation pursuant to the **First Way** outlined in *Wehbe*, as follows.

Objectives of the Development Standard (First Way):

Under WLEP 2009, Clause 4.3(2) has the following objectives in relation to the Maximum Building Height development standard:

- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*

- (b) to permit building heights that encourage high quality urban form,
 (c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.

Correlation between the height and the floor space.

Clause 4.4A provides a maximum FSR for residential purposes of 2.5:1, whilst an FSR of 3:1 is permitted for non-residential purposes. The site has an area of 4769m² and includes a GFA of 1034.9m² (8.53%) of commercial and a GFA of 11091.1m² of residential (91.47%). As such, the calculable formula proposes an FSR of 2.54:1 (or total GFA of 12092m²). The proposal complies with the applicable development standard in this regard.

The breach of the maximum height is due to the slope of the land and the need to increase the ground floor level to provide a flood planning level for the building and comply with 1% AEP freeboard flood levels. This means only a small portion of the roof (west end) and lift overrun (northern tower) breaches the 32m height plane on the site, which does not contribute to the floor space development standard.

In this regard, the below Urban Link diagrams also show this extent of breach in terms of non-GFA volume above and below this 32m height plane. That is, given the sloping site, the part of the roof structure located above the height plane, compared to the excess unused 'air space' volume available under the height plane. This demonstrates that there is a total of 873m³ in unused 'air space' that is below the 32m height plane (but above the proposed roof), compared to 149m³ of roof structure that is above the 32m height plane.

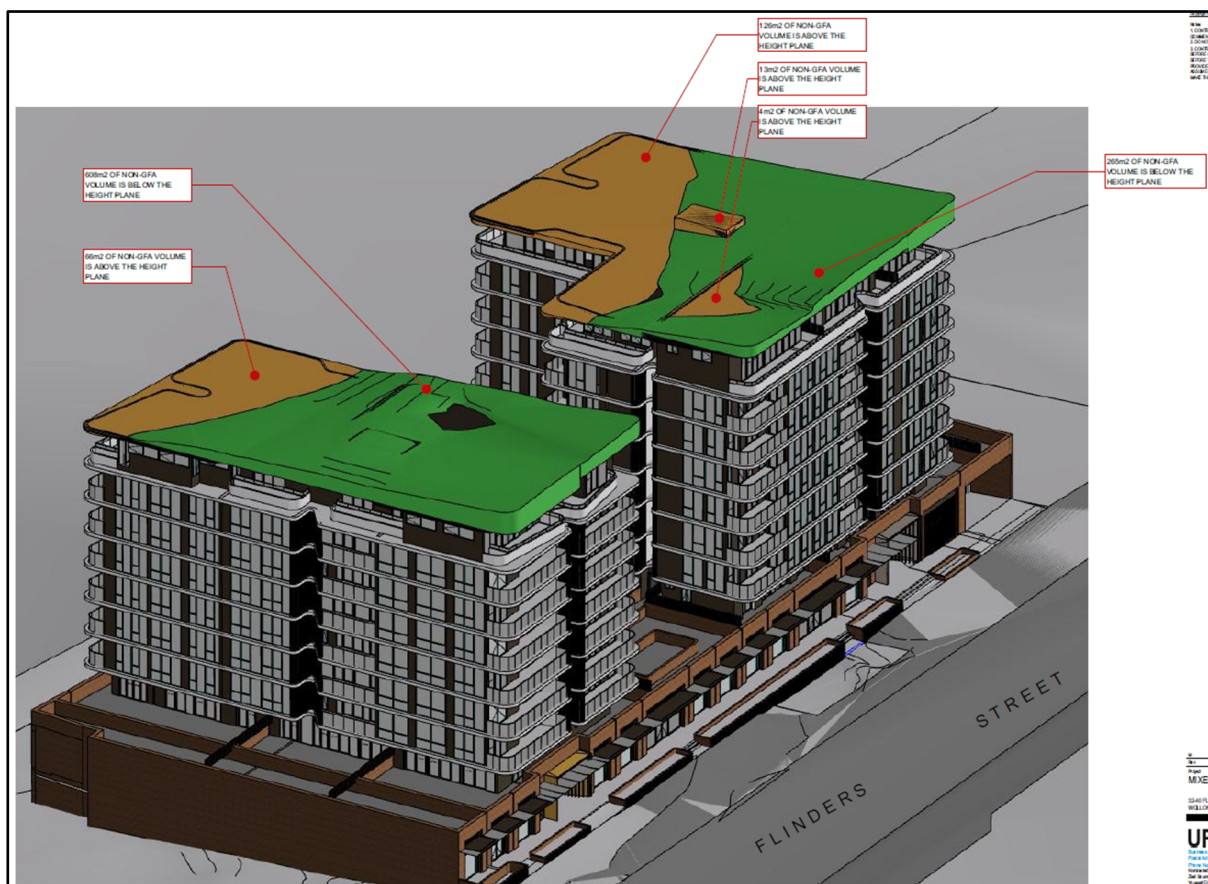


Figure 3: 3D Height Plane Diagram – Airspace Volume Analysis (Urban Link)



The lift overrun itself has a height breach of between 590mm and 1100mm (0.18% and 3.4%) above the 32m height plane, whilst the roof structure variation ranges between 70mm and 400mm (0.002% and 0.012%) over this development standard limit. The nature of the areas of concern are such that they are not capable of being converted to GFA, and therefore are also not capable of being attributed to FSR.

The breach of the standard therefore does not result in an inconsistency with this objective.

High Quality Urban Form

The external details have been carefully considered with Urban Link undertaking a comprehensive site analysis not only in terms of built form but also materials to ensure that the development, will integrate with the existing setting but also provide a benchmark for future development in the area.

The proposal will partially impact on existing view corridors given that the proposal involves the construction of a nine (9) storey development in place of the double storey development. However, the site is zoned to permit high density development and these impacts are essentially unavoidable due to the orientation, topography and location of adjoining development (without effectively sterilising the site). In this regard, the proposed development adopts a single storey podium, to provide a continuous and active streetscape. Above ground level, the development is split into two (2) tower forms enabling view corridors through the site at the northern, southern and middle sections of the site (when viewed east-west). This acknowledgement of site analysis to maintain views where possible is representative of a high quality urban form.

The proposal has been designed to comply with key planning controls and the development has included basement parking, ground floor active commercial space, street facing apartments above ground level, and podium communal open space. The land is suitable for the proposed shop top housing development and is compatible with the surrounding land uses. The site layout and arrangement responds to the trafficable environment of Flinders Street and will improve the streetscape at this location.

The proposed bulk, massing and modulation of the building is acceptable and does not result in any unreasonable loss of amenity to any of the adjoining properties. The proposed street frontage heights are considered appropriate having regard to the surrounding context and scale of development, and the recent multi-level serviced apartment development approval received for the site immediately south at 46 Flinders Street (ie. DA-2021/1342/A).

The proposal will have no significant adverse environmental impacts in terms of sustainability, wind and/or reflectivity. Overshadowing and solar access has been addressed in detail by Urban Link Architects, particularly in response to the height breach and to the approved 46 Flinders Street development (which is discussed below). Relevant details have been provided in this regard to enable a full assessment (i.e., shadow diagrams, BASIX certificates etc).

Access to the site has been carefully considered in a variety of forms (i.e., for pedestrians, motorists, and cyclists alike), to ensure suitable provisions for service access and circulation. The proposed development will have a positive impact on the public domain.

The breach of the standard does not result in an inconsistency with this objective.

Views and Solar Access

The proposed new nine (9) storey development will replace a double storey development and as such, will partially impact the adjoining development to the east in terms of views. The likely view impacts arising as a result of the development are unavoidable, without unnecessarily restricting the development potential of the site. However, the variation proposed will in no way contribute to any notable view loss. As above, the proposed development adopts a single storey podium, to provide a continuous and active streetscape. Above ground level, the development is split into two (2) tower forms enabling view corridors through the site at the northern, southern and middle sections of the site (when viewed east-west). This acknowledgement of site analysis to maintain views where possible is representative of a high quality urban form.

80 of the total 114 residential apartments (i.e. 70%) receive a minimum of 2 hours sun to living area glazing and private open space in midwinter. The SEPP65 and ADG design criteria nominates 70% as a minimum. There are 14 units which fall into the 'no sun' category defined by the ADG (12%). The ADG criteria nominates 15% as a maximum and therefore the ADG design criteria for solar access are fully satisfied.

The impacts of the lift overrun and small portion of the roof form and lift overrun that is above the 32m height plane will not dramatically contribute to any solar access loss or overshadowing for adjoining properties. The southern tower form proposed is modest in width and depth, and is setback 9m from the southern boundary. As demonstrated by Urban Link in the Shadow Diagrams provided, the difference for shadow cast between the proposed development and a compliant height development is virtually insignificant.

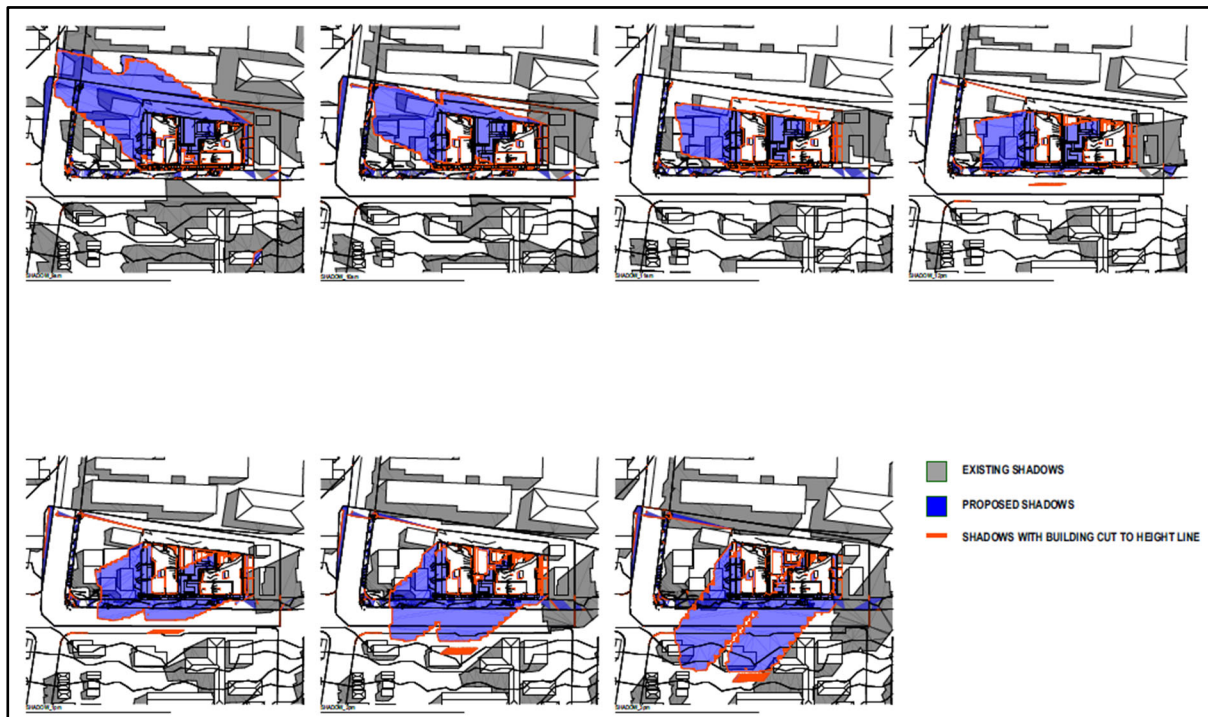


Figure 4: 3D Shadow Diagrams (Urban Link)



As can be seen, the effect this breach of height will have on the adjoining developments/sites, and in particular the recent multi-level serviced apartment development approval received for the site immediately south at 46 Flinders Street (ie. DA-2021/1342/A), will be inconsequential. The design of DA-2021/1342/A by ADM Architect already accounted for the proposed development in the solar access modelling undertaken for the serviced apartments, adopting a minimum 11.25m setback of the nearest north facing balcony proposed that interfaces with the common boundary of the subject site.

Overall, the proposed height is compatible within its context and will not result in any adverse impacts to surrounding properties. The breach of the standard allows for a building that achieves a high-quality built form. The breach of the standard allows a built form that is consistent with the urban design principles established Wollongong City Centre and in the E3 Productivity Support zone.

The breach of the standard does not affect consistency with this objective.

Development Standard Variations (Fourth Way)

In relation to the 'Fourth Way' and considerations for whether the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way), it is noted that the following approvals have proposed the similar exceedances:

DA-2018/1481: 22 Robert Street CORRIMAL

Mixed Use Residential - residential flat building comprising 21 apartments above basement car parking, 13 townhouses with double garages and tree removals and Subdivision - Strata title - 34 lots

DA-2018/1517: 145-149 Princes Highway CORRIMAL

Mixed use development comprising 1 retail tenancy, 13 affordable units, 15 self-contained boarding house studios and associated car parking and landscaping works

DA-2018/313: 2 Frederick Street WOLLONGONG

Residential - demolition of existing structures and construction of a boarding house development

DA-2018/557: 4 Lindsay Evans Place DAPTO

Demolition of existing 45 bed residential aged care facility and construction of new 111 bed residential aged care facility and conversion of existing 44 hostel bed facility to 22 serviced self-care dwellings with community/ancillary spaces, reconfiguration of and additional car parking and associated landscaping and infrastructure works plus tree removals

DA-2019/96: 2-14 Cliff Road NORTH WOLLONGONG NSW 2500

Novotel Northbeach - addition of suite to existing rooftop level

L&E Court determined applying the height standard was unreasonable or unnecessary and the proposal was in the public interest. 7.55m = 31%



DA-2019/756: 65 Walker Street HELENSBURGH

Mixed use - demolition of existing dwellings and excavation works, construction of mixed use development and basement carparking

DA-2020/805: 56-64 Asquith Street AUSTINMER NSW 2515

Residential - dual occupancy and tree removal

The proposed height of 9.85 metres exceeds the height limit less than 10% (9.44%).

DA-2020/35: 22/100-104 Corrimal Street WOLLONGONG

Residential - construction of roof level cabana for Unit 22

DA-2020/1458: 6-8 Dudley Street, WOLLONGONG NSW 2500

Residential - demolition of existing structures and construction of a six (6) storey residential flat building comprising of 27 units with basement level car parking and lot consolidation

A building height of 16m applies to the site. A proposed building height of 17.96m is proposed for the lift overrun and part of the communal open space roof structure. 12.25% variation

DA-2020/605

Residential - new rooftop pergola to existing roof terrace

Proposed height of 29.32m, where 24m is permitted in accordance with Cl 4.3 of WLEP 2009.

DA-2021/775: 231 Lawrence Hargrave Drive COALCLIFF NSW 2508

Residential - alterations and additions to existing dwelling, including partial demolition and tree removal, and construction of attached secondary dwelling

The proposal proposes a height of 9.35m. The maximum building height for the land is 9m. The departure sought to the development standard is 3.9%. The departure relates to a small part of the roof towards the rear of dwelling (eastern end).

DA-2021/321: 29-431 Princes Highway WOONONA NSW 2517

Mixed Use Development comprising retail shops, gymnasium, childcare centre, basement parking and six (6) awning signs

Lift Overrun: 8.6% Roof: 3.6% Skylights: 0.13% Solar Panels: 0.7%

DA-2021/840: 51 Montague Street NORTH WOLLONGONG NSW 2500

Industrial - construction of two (2) additional warehouse units and Subdivision - Strata title - two (2) lots

Variation to building height supported as it is minor will have minimal environmental or amenity impacts. Not visible from any public place, no adverse overshadowing visual impacts. 9m max building height. Small portion of the building is over this height with maximum being 9.745m (8.27%)

DA-2021/705: 32 Foley Street GWYNNEVILLE NSW 2500

Construction of community facility SAHSSI Safe Place

Clause 4.6 provided suitably demonstrating compliance under the circumstances unreasonable and unnecessary. Sufficient planning grounds were established along with it being consistent with both the objectives of the zone and the standard (1.7%)

DA-2021/238: 105 Yallah Road YALLAH NSW 2530

Industrial - 32 units including kiosk/takeaway food premises, earthworks, installation of infrastructure, removal of trees, signage and Subdivision - Strata title - 33 lots

8.94% variation to 9m height control. Proposed height 9.805m



DA-2021/252: 10 Sturt Place BULLI NSW 2516

Residential - alterations and additions

Further amendments to the plans reduced the bulk and possible adverse impacts to the surroundings. Satisfactory compliance with the objectives for the Clause and zone. 9.7% departure

DA-2021/1308/A: 30 Bourke Street NORTH WOLLONGONG NSW 2500

Demolition of existing structures, construction of a five (5) storey residential flat building comprising 13 residential units over two (2) levels of basement car parking

The departure represents an increase (5.4%) to the overall building height for a small portion of the building at the rooftop including the lift overrun and part of the roof over the communal open space

DA-2022/449: 75-77 Corrimal Street WOLLONGONG NSW 2500

Demolition of existing structures, construction of five (5) storey building with 10 residential units and basement parking

The departure represents an increase (1.2%) to the overall building height for a small portion of the building.

Reviewing these examples, it is reasonable to say that some flexibility has been shown by Council in the past in applying the maximum height control where there are circumstances that would warrant it. Many of these examples and Council's acceptance for height plane breaches relate to the fact that exceedance has not been relative to GFA, and primarily included lift overruns, plant equipment, roof form features or pergolas et cetera. Additionally, many of these examples relate to sloping sites or flood prone sites. All of which is akin to the subject proposal.

Whether the standard has been abandoned or not is a matter for interpretation. For example, is one variation to this development standard enough to interpret as abandonment, or 100 variations. In our opinion, even though Council have approved various Clause 4.6 exceptions to building height, this does not result in the development standard being abandoned. Notwithstanding, it is clear that examples for circumstances such as this particular case have warranted Council varying the height control on such occasions. Thus, deeming strict compliance with the Height of building development standard as unwarranted (similar to the way Forth Way is applied) in the circumstances of this particular case.

Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes, there are sufficient environmental planning grounds in the circumstances of the case to justify contravening the development standard. These include:

- The site is of a sufficient width, depth and size to accommodate the proposed height, without resulting in any significant adverse impacts on the public domain or any adjoining properties;
- The particular circumstance of the site has a notable crossfall by way of topographic profile and is affected by overland flow flooding. As a result, ground floor levels are lifted up to cater for a flood planning levels, whilst the area of roof structure breach primarily relates to the western side of the site where the topographic downslope is at its maximum;



- The scale of the existing development and proposed building height is considered appropriate within the strategic planning context of the Wollongong City Centre environment and E3 Productivity Support zone, and is consistent with the relevant objectives;
- The proposal satisfies the objectives of the development standard in relation to the maximum permitted height contained within Clause 4.3 of the *WLEP 2009*;
- Non-compliance with the standard will not result in any adverse environmental impacts (visual, solar, etc.); and
- The development as proposed will allow for the orderly and economic use of the subject land.

Is the proposed development in the public interest because it is consistent with the underlying intent of the development standard and the objectives for development in the zone

Yes, the proposal will provide additional dwellings to meet the needs of the local community, particularly at a time where housing supply is necessary. The development is consistent with the underlying intent of the development standard as noted, and the objectives for development in the zone, as noted.

Does contravening the development standard raise any matters of significance for the State or regional environmental planning?

No, contravening the development standard in this case does not raise any matters of State or Regional planning significance.

Is the objection well founded?

For the reasons outlined in the previous sections above, the objection is considered to be well founded in this particular instance. Granting an exception to the development standard can therefore be supported in the circumstances of the case.

The proposed development will be consistent with the outcomes envisaged in the zoning and policy framework. The development is also compatible with the relevant objectives specified in Section 1.3 of the EPAA 1979.

Conclusion

This Clause 4.6 Variation Request has been prepared to support a development application for a Mixed Use development at 36 Flinders Street, Wollongong. This request satisfies the requirements of Clause 4.6 of the *WLEP 2009* and demonstrates that compliance with the Clause 4.3 development standard is both unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify varying this building height standard in this instance.