

## ANNEXURE C

### Clause 4.6 Variation Request – Building Height





## Clause 4.6 Variation Statement – Maximum Height (WLEP Clause 4.3 and Housing SEPP Section 18(2))

### 1. Height of Buildings standard

Clause 4.3 of *Waringah Local Environmental Plan 2011* (WLEP 2011) relates to the maximum height requirements and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 11m.

It is noted however that this application is made pursuant to *Part 2 Development for affordable housing, Division 1 In-fill affordable housing, Section 18 Affordable housing requirements for additional building height*, subsection (2) of the Housing SEPP. Specifically, this application seeks to benefit from the 30% building height bonus under Section 18(2) of the Housing SEPP, where affordable housing is provided to at least 15% of the total gross floor area (GFA) for a minimum 15-year period. Accordingly, and per the Housing SEPP, the subject site is therefore permitted a maximum building height of 14.3m (where the 11m limit applies).

Building height is defined 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*

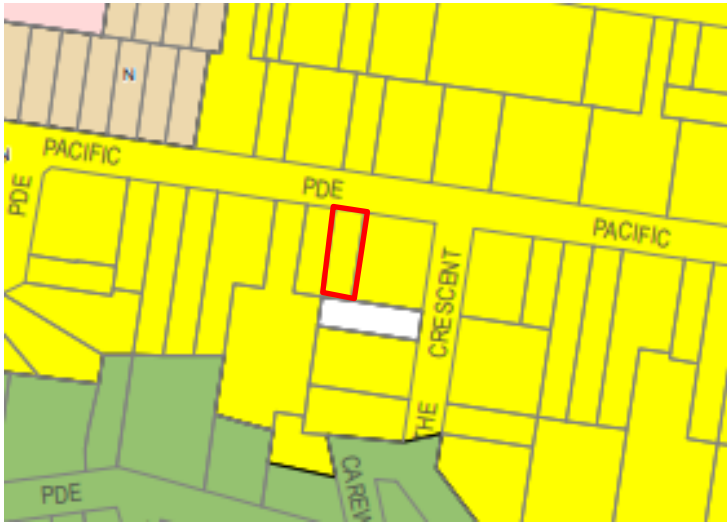
*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The relevant map (HOB\_010AB) indicates that the maximum building height permitted at the subject site is 11m, as demonstrated in Figure 14 below. As identified above, when applying the 30% building height bonus afforded by Section 18(2) of the Housing SEPP, a maximum building height of 14.3m is permitted.

The maximum height control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the LEP.





**Figure 15** Extract from Height of Buildings Map [Yellow = 11m]

## 2. Proposed variation to height of buildings development standard

The proposed development has a maximum height of 15.84m as measured to the lift overrun at the roof top from the existing ground level and is therefore non-compliant.

Accordingly, the proposal is non-compliant with the 14.3m building height development standard set by the Housing SEPP Section 18(2) and seeks for a maximum variation of 1.54m or 10.7%.

The balustrades surrounding the air-conditioning units on the roof will also extend above the building height limit. The balustrades will reach a maximum height of 15.07m and therefore represent a non-compliance of 770mm or 5.3%. The rest of the building envelope, including all habitable space, will sit below the building height limit.

**Figure 16** provides a height blanket diagram of the proposed development which clearly indicates the extent of the height non-compliance. Also shown within the diagram is the extent to which the remaining built form sits below the height limit.

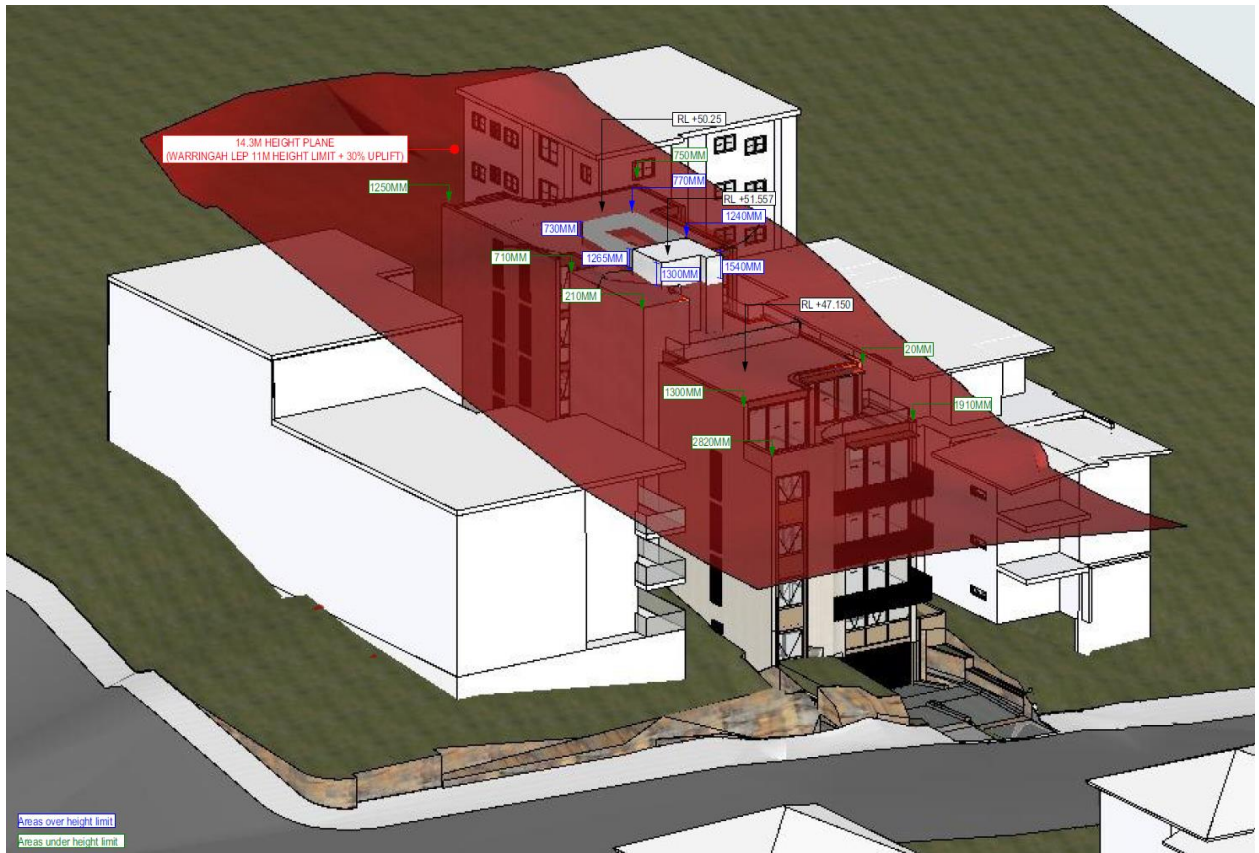


Figure 16 Height Blanket Diagram.

### 3. Clause 4.6 to WLEP 2011

The objectives and provisions of clause 4.6 are as follows:

(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 contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(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,

(ba) clause 4.4, to the extent that it applies to land identified on the Key Sites Map as Site F, Site G, Site H or Site I,

(c) clause 5.4,

(caa) clause 5.5.

(d) (Repealed)

(8A) Also, this clause does not allow development consent to be granted for development that would contravene a development standard for the maximum height of a building shown on the Height of Buildings Map on land shown on the Centres Map as the Dee Why Town Centre.

(8B) Despite subclause (8A), development on Site C or Site E may exceed the maximum height of building shown on the Height of Buildings Map if the maximum height is allowable under clause 7.14.

The development standards in Clause 4.3 are not “expressly excluded” from the operation of Clause 4.6.

**4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))**

Of relevance to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

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

The judgement goes on to state that:

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

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore 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 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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

*"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because the development is consistent with the standard objectives, even with the proposed variation, as discussed in further detail below.

The objectives and relevant provisions of Clause 4.3 of WLEP 2011 are as follows:

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,



*(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

*(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

In order to address the requirements of subclause 4.6(3)(a), each of the relevant objectives of Clause 4.3 are addressed in turn below.

In addition, whilst it is noted that there are no objectives for the height bonus afforded by the Housing SEPP, the objective of Division 1 In-fill affordable housing of the Housing SEPP is also addressed.

**(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,**

It is noted that objective (a) refers to being “compatible” with height and scale of surrounding and nearby development. It is considered that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of *Roseth SC in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*:

*“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”*

In accordance with the above and when considering the height and scale of surrounding developments, it is imperative to note that the subject site and surrounding locality is permitted an increase in density, per the Housing SEPP, to encourage affordable, transit orientated development.

The proposal has undertaken detailed site and contextual analysis to ensure that the proposed height variation is an appropriate response to the conditions of the site and surrounding context.

The proposal is best described as a residential flat building which is permissible in the zone and is consistent with the desired future character of the locality. The building height limit, inclusive of the Housing SEPP bonus, anticipates a four to five storey form, in which the proposal complies with. The proposed height encroachments, which are a direct result of the sites topography, are limited to the lift overrun and air conditioning units and surrounding palisades, and does not create a built form which is incompatible with the desired character and typology of developments throughout the locality, particularly on the backdrop of the Housing SEPP bonus.

These non-compliant elements are provided within a high-quality built form which is well articulated and is consistent with the objectives and principles of the LEP and DCP. The design has integrated various elements to reduce bulk and scale at the point of greatest variation, including appropriate setbacks, curved elements, balcony articulation and glazing, within a recessed floorplate. The built form, which is consistent with the intent of the Housing SEPP, is considered to respond to the existing and desired future character of the locality. As discussed, the non-compliant elements as they address Pacific Parade will not be visible from the streetscape due to the recessive design of the built form. Centrally, the non-compliances as they pertain to the building core and air conditioning units and surrounding palisades are setback from the compliant envelope below therefore mitigating impact and ensuring appropriateness of bulk and scale in the locality.

As detailed, the proposal provides a built form which is reflective of the objectives of the WDCP and character of the locality, in that the development will provide an articulated built form appropriately addressing the streetscape. This ensures that despite the non-compliance, the proposal is consistent with the desired building pattern in the locality. The burden on insisting on strict compliance would result in the removal of high quality, residential apartments which would





be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with the character of the locality. Additionally, the proposal does not result in any adverse impacts to the amenity of the neighbouring properties as is discussed in objective (b).

As detailed, the proposal is designed with a maximum building height which ensures a consistency in streetscape and built form character of the locality. That is, as the built form addresses Pacific Parade, the proposal will comply with the development standard, and the uppermost level, whilst compliant with the height limit set by the Housing SEPP bonus, has been recessed into the site so that the street frontage height is compatible with the surrounding development, which was limited to the LEP height limit, and the well-designed form minimises visual bulk and impact. As a result, the perceived height, bulk and scale of the development is consistent with that which is existing and is appropriate to the locality. It is prudent to note that although the proposed development is subject to a greater building height than the adjoining developments, the proposal has been designed to mask the bonus height through the recessive design to ensure compatibility with the existing and desired character of the locality.

Overall, the proposal provides a strategic response to the conditions of the site and neighbouring properties and is compliant with the development standard where it has the most bearing on character. Importantly, the proposed variation is minor and has been suitably designed so that it will not have any adverse visual or physical impact to the locality.

Therefore Objective (a) is achieved.

**(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,**

In terms of visual impact, the bulk and scale of the proposed development has largely been addressed in responses to objectives (a), (c) and (d). For the reasons discussed in relation to those objectives, including setbacks, design and materiality, the proposed development represents a bulk and scale which is compatible with the existing and desired future character of the locality. Furthermore, when viewed from the public domain and neighbouring properties, the design and siting of the non-compliance provides considerable visual and physical separation thus mitigating any potential sense of enclosure or visual impact. That is, the proposal presents to the public domain as a predominantly compliant built form with the non-compliances located centrally and out of view. The contemporary design, including framing, balcony articulation, fenestration and setbacks, in conjunction with the modern materials and neutral colour scheme, ensures that the proposal is not visually jarring from the streetscape.

In the case of view loss, the proposed variation will not result in any significant loss of views or outlook compared to a building with a compliant height. Importantly, there are no significant views currently enjoyed across the subject site from the public domain or neighbouring properties and the applicable planning controls effectively anticipate a continuous 11m high built form along Pacific Parade, notwithstanding the bonus height afforded to the site and surrounding sites under the Housing SEPP. As the existing site is under-developed relative to the height control and the proposal is predominantly compliant as it presents to the public domain, the expectation to retain any views through the permissible building envelope is considered unreasonable. It follows that there is a reasonable expectation that the views would be lost with any redevelopment of the site and therefore loss of views must be considered against the back drop of the permissible planning controls. Accordingly, any potential loss of views created by the non-compliance is considered to be reasonable.

In terms of privacy, the height breach does not result in any adverse additional privacy impacts. The areas of non-compliance relate to the lift overrun and air conditioning enclosure, and therefore will not introduce any privacy impacts for neighbouring properties.

With regards to overshadowing, the proposed height breach will not result in any adverse overshadowing as opposed to an entirely compliant built form. The shadow diagrams submitted confirm that the proposal will not result in any significant additional overshadowing to the surrounding properties beyond what is permitted by the increase of density



envisaged by the WLEP and WDCP, and the bonus height afforded by the Housing SEPP. That is, despite the anticipated increase density, the proposal will retain appropriate solar access to the neighbouring properties during mid-winter as the majority of a shadows cast will be onto the public domain. As such, the additional overshadowing impact as a result of the height breach when compared to a compliant development are insignificant.

Therefore objective (b) is achieved.

**(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,**

Objective (c) seeks to minimise adverse impacts of development on the scenic quality of Warringah's characteristic environments.

The subject site is not within close proximity to any coastal area or bush environment. Nevertheless, the proposal has been designed to maximise the provision of vegetation throughout the site by providing ample deep soil and landscaped areas. Importantly, the non-compliant building height will not compromise the provision of vegetation.

Further to the above, the variations are limited to lift overrun and air conditioning units and surrounding palisade. That is, the proposal is appropriately designed to respond to the topography of the site to provide a compliant built form as it presents to the public domain. Additionally, the proposal also incorporates relevant architectural features (such as setbacks, framing, balcony articulation and fenestration), materiality and colour scheme to reduce the impact created by the non-compliances.

The proposal is therefore consistent with objective (c), despite the height breach.

**(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.**

This objective seeks to manage the visual impact of the development as viewed from public places.

As detailed, the development is predominantly compliant with the building height development standard and it is only the lift overrun and air conditioning enclosure which encroaches the maximum height. As a result, and when viewed from the public domain, the non-compliance will not be visible and to the casual observer the proposal will appear as a height compliant development, as shown in **Figure 17**.



**Figure 17** Perspective of development as viewed from Pacific Parade.



Importantly, the height of buildings control, inclusive of the Housing SEPP bonus, essentially anticipates that a four to five storey building can be constructed on the site, and surrounding sites, should they wish to provide affordable housing in accordance with the Housing SEPP. In this regard, the proposal has been designed to present to Pacific Parade as five storeys, and only four storeys when viewed from the rear adjoining reserve. The proposed development has been designed to provide a built form which appropriately transitions to the rear adjoining reserve, managing any potential visual impact of the development as viewed from the public domain.

Whilst the proposal is non-compliant, the proposal is designed to minimise the extent of non-compliances as far as practicable (in addition to their visual impact) and respond to the desired future character of the locality, as discussed in this Variation. That is, the non-compliant elements have been centrally located within the site and will not be visible when viewed from Pacific Parade or the adjoining reserve.

Overall, it is considered that the proposed height encroachments do not result in a development which will be incompatible with the desired medium density character of the R3 zone. The proposal will appropriately manage visual impact through a high quality built form and a coherent streetscape appearance with building elements that complement the topography of the site and are appropriately setback from the public domain.

The burden of insisting on strict compliance would result in the removal of the uppermost level which would be an unreasonable and unnecessary planning outcome given the nature of the non-compliance.

Therefore, the visual impact of the non-compliance as viewed from the public domain is appropriately managed and the proposal satisfies Objective (d).

**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.**

The proposed development, including the non-compliant building height, will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To request strict compliance and require deletion of floor area, or associated private open space, will reduce the provision of affordable residential accommodation (and associated facilities), without any benefit to streetscape character or amenity of neighbouring properties. The proposed distribution of floor space is strategic and has considered the site constraints and relationship to neighbouring properties. The proposed non-compliance is a result of the site constraints and relationship to the neighbouring properties. As such, the proposal will satisfy the objective of *Division 1 In-fill affordable housing* despite non-compliance.

## **5. Sufficient environmental planning grounds (Clause 4.6(3)(b))**

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*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].

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

**1. The proposal will deliver affordable housing in accordance with the Housing SEPP.**

- a. The proposal will seek to benefit from the 30% bonus height and floor space afforded by the Housing SEPP, in lieu of delivering affordable housing. The proposed development, including the non-compliant building height, will seek to distribute floor space centrally within the site, to deliver the most appropriate streetscape outcome and balance the amenity of future residents and neighbouring properties. Whilst the development will result in non-compliance with the 14.3m standard, the non-compliance is centrally located and relate to the lift overrun and air conditioning enclosure which allow for necessary services to be provided on the site.
- b. Object 1.3(d) of the EP&A Act is to “*promote the delivery and maintenance of affordable housing*”. The proposal will deliver a distinctive public benefit through the provision of 5 affordable housing apartments, which will be allocated for a period of 15 years to a registered community housing provider, in accordance with the Housing SEPP. The considerable public benefit afforded by delivering a high quality contemporary development, with an appropriate quantum of affordable housing, must be considered in this variation request. To require strict compliance with the bonus height would significantly impact the provision of affordable housing, communal open space and high quality apartments.

**2. The non-compliance is minor and will not have adverse impact to the character of the locality**

- a. The height non-compliance is limited to the lift overrun and the air conditioning enclosure which are located centrally within the site to ensure they will not be visually jarring or obtrusive from the public domain. Both non-compliant elements relate to infrastructure serving the proposed development and does not relate to residential or habitable floor area. The non-compliant elements are well setback from the site boundaries to ensure that the extent of non-compliance will limit the visual and physical bulk and scale of the development as viewed from the public domain and neighbouring properties.
- b. When viewed from the streetscape and adjoining properties, the non-compliant elements will not be visible and the proposal will appear as a height-compliant development to the casual observer.

**3. The non-compliance does not contribute to gross floor area**

- a. The proposed height non-compliance does not constitute gross floor area and the proposal has been designed and sited to ensure that all floor space proposed on the site will sit below the maximum permissible building height of the site. As a result, the proposed height non-compliance does not add any significant bulk to the development, when compared to a compliant built form, and ensures that there will not be any amenity impacts on the surrounding locality as a result of the non-compliance.

**4. The topography contributes to the extent of non-compliance**

- a. The topography is a site-specific reason that contributes to the extent of this variation. Specifically, the topography falls from the rear boundary to Pacific Parade by approximately 8m. This topographical decline directly results in, and exacerbates, the extent of non-compliance centrally within the site. This is a specific condition that the LEP height limit does not contemplate, in that the height limit applies equally to a vast area of the LGA with distinctly different topography and contributes to the extent of non-compliance.
- b. Whilst the topographical variation increases the extent of non-compliance for a portion of the site, it is considered acceptable as the built form is designed to maintain the street frontage height of built form addressing Pacific Parade. Further to this, the non-compliances are recessed, pertain to minor elements and are integrated into the contemporary design to mitigate any adverse impact to bulk and scale of the site. The provision of appropriate setbacks and a stepped built form which responds to the topography of the site similarly mitigates impacts to the surrounding developments.

#### **5. Deletion of a floor would not be orderly and economic use of land**

- a. Object 1.3(c) of the EP&A Act 1979 is “*to promote the orderly and economic use and development of land*”. The social benefits of providing additional housing stock within a highly sought-after location should be given weight in the consideration of the variation request. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of apartments as a result of the height non-compliance which is limited to the lift overrun and air conditioning enclosure.
- b. A shorter building would unnecessarily result in a suboptimal provision of housing on the site. This would reduce the contribution of the development to meeting the R3 zone objective to ‘*provide for the housing needs of the community within a medium residential environment*’. Under-provision of housing within an R3 zone simply diverts people to be resident in areas with reduced opportunity for access to transport links or an urban environment well-suited for walking and cycling.

#### **6. The impacts of the height breach will be imperceptible**

- a. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality.
- b. The proposed shadow impacts are acceptable given they are compliant with the DCP despite the numeric variation. The shadow impact is therefore what would be reasonably expected of a fully height compliant development on the subject site and entirely consistent in scale with the development within the locality.
- c. The height non-compliance relates to the lift overrun and air conditioning enclosure only, and as such the non-compliant section of the building does not introduce any privacy impacts to the surrounding residential developments. Any privacy impacts resulting from the proposed development can be attributed to the height compliant portions of the built form.
- d. The height of building breach does not result in view loss which is not reasonably anticipated within the planning controls and site context. Given the minor extent of the non-compliant elements it is anticipated the extent of view loss caused by these elements would be insignificant or nil.

#### **7. The impacts of the height breach will satisfy relevant environmental planning instruments**

- a. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone.

- b. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
  - i. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
  - ii. The proposal promotes the delivery and maintenance of affordable housing (1.3(d));
  - iii. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
- c. The variation to the height of buildings development standard will give better effect to the aim of Division 1 of *Chapter 2 Affordable Housing of State Environmental Planning (Housing) 2021* in that it will facilitate the delivery of new in-fill affordable housing.

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the provision of affordable housing and the minor extent of the non-compliance. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is not visible from the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

- 86. *The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
- 87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

## 6. Conclusion

This application seeks to benefit from the building height bonus afforded by *Part 2, Division 1 In-fill affordable housing, Section 18(2)* of the Housing SEPP. This written request has been prepared in relation to the proposed variation to the



14.3m maximum building height, inclusive of a 30% bonus afforded by Section 18(2) of the Housing SEPP, to the base 11m development standard contained within Clause 4.3 of WLEP.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard, as increased by the Housing SEPP in-fill affordable housing bonus, is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

