

# GYDE

## Clause 4.6 Variation Request

North Sydney Local Environmental Plan – Clause 4.3  
Five Ways, Crows Nest – SSD-66826207

Submitted to Department of Planning, Housing and Infrastructure  
on behalf of Deicorp Projects Pty Ltd

12 September 2024

[gyde.com.au](http://gyde.com.au)

## Acknowledgment of Country



**Towards Harmony by Aboriginal Artist Adam Laws**

Gyde Consulting acknowledges and pays respect to Aboriginal and Torres Strait Islander peoples past, present, Traditional Custodians and Elders of this nation and the cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander people. We recognise the deep and ongoing connections to Country – the land, water and sky – and the memories, knowledge and diverse values of past and contemporary Aboriginal and Torres Strait communities.

Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

### **This report was prepared by:**

Approver: Stephen Kerr  
Author: Rachael Petherbridge  
Project: North Sydney Local Environmental Plan – Clause 4.3  
Report Version: Final

### **Disclaimer**

This report has been prepared by Gyde Consulting with input from a number of other expert consultants (if relevant). To the best of our knowledge, the information contained herein is neither false nor misleading and the contents are based on information and facts that were correct at the time of writing. Gyde Consulting accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damage arising from reliance in information in this publication.

Copyright © Gyde Consulting  
ABN 58 133 501 774

All Rights Reserved. No material may be reproduced without prior permission.

## Contents

|           |   |           |
|-----------|---|-----------|
| <b>1.</b> | <b>Introduction.....</b>  | <b>1</b>  |
| <b>2.</b> | <b>Standard to be Varied .....</b>  | <b>2</b>  |
| <b>3.</b> | <b>Extent of Variation.....</b>   | <b>3</b>  |
| <b>4.</b> | <b>Unreasonable or Unnecessary.....</b>   | <b>5</b>  |
| 4.1       | The objectives of the development standard are achieved notwithstanding non-compliance with the standard.....   | 5         |
| 4.2       | The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary. ....   | 7         |
| 4.3       | The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable. ....  | 7         |
| 4.4       | The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary. .... | 7         |
| 4.5       | The zoning of the land is unreasonable or inappropriate.....  | 7         |
| <b>5.</b> | <b>Sufficient Environmental Planning Grounds.....</b>   | <b>8</b>  |
| <b>6.</b> | <b>Conclusion .....</b>   | <b>11</b> |

## Appendices

No table of contents entries found.

## Figures

|   |    |
|---|----|
| Towards Harmony by Aboriginal Artist Adam Laws .....                                | ii |
| Figure 1: Northern Elevation (Source: Turner) .....                                 | 3  |
| Figure 2: Height of Roof Plant Equipment (Source: Turner & Marked-up by Gyde) ..... | 3  |
| Figure 3: 78.06m Height Plane Diagram (Source: Turner).....                         | 4  |
| Figure 4: Height Plane Diagram Showing 76.08m and 58.50m (Source: Turner).....      | 4  |

## Tables

|  |   |
|--|---|
| Table 1: Consistency with Objectives of clause 4.3 ..... | 5 |
|--|---|

## Glossary and Abbreviations

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

## 1. Introduction

This request that has been prepared in accordance with Clause 4.6 of the *North Sydney Local Environmental Plan 2013* (LEP) to justify a variation to the height of building standard. The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decisions in the New South Wales (NSW) Land and Environment Court (LEC) and the NSW Court of Appeal.

The purpose of this request is to justify a variation of the building height standard under clause 4.3 of the North Sydney LEP. The variation is needed to provide residential floor-to-floor heights that are adequate to achieve contemporary building quality standards and to allow provide sufficient height to accommodate the required plant.

It is therefore considered appropriate in this circumstance to vary the development standard.

## 2. Standard to be Varied

The standard that is proposed to be varied is the maximum height of building (HOB) under Clause 4.3 of the North Sydney Local Environmental Plan (LEP) 2013.

The applicable HOB standard under Clause 4.3 of the North Sydney LEP 2013 is 58.5m. With the 30% incentive provided under Section 16(3) of the Housing SEPP, the applicable building height is 76.05m. Under Clause 4.3A of the LEP, the development may exceed the maximum building height by a further 2m if the protruding structures are for the purposes of lift overruns, plant rooms, and other associated structures. Therefore, the maximum permissible building height contemplated by the planning controls collectively is 78.05m.

While the maximum permissible building height is 78.05m, out of an abundance of caution this Clause 4.6 variation request has assessed the proposed height variation against the maximum HOB provided under Clause 4.3 of the LEP (58.5m), hereafter referred to the base HOB standard.

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

### 3. Extent of Variation

The maximum HOB proposed is 80.305m measured to the top of the rooftop plant room.

This Clause 4.6 request is framed against the base HOB standard of 78.05m. The extent of the variation, therefore, is 21.805m, equalling a 37.3% variation to the development standard.

When measured against the maximum permissible building height on the site, the variation is 2.255m, equalling a more realistic variation of 2.9%.



Figure 1: Northern Elevation (Source: Turner)

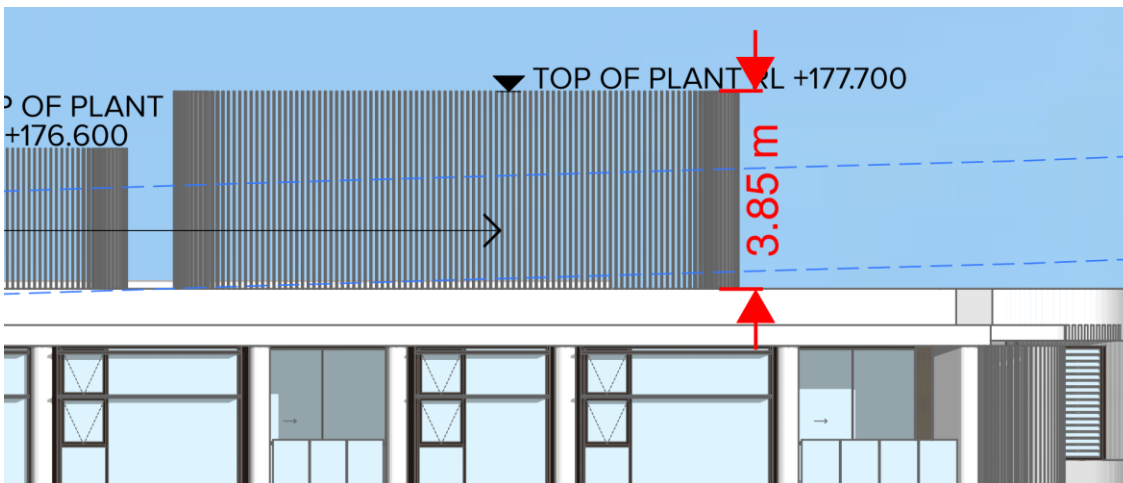


Figure 2: Height of Roof Plant Equipment (Source: Turner & Marked-up by Gyde)

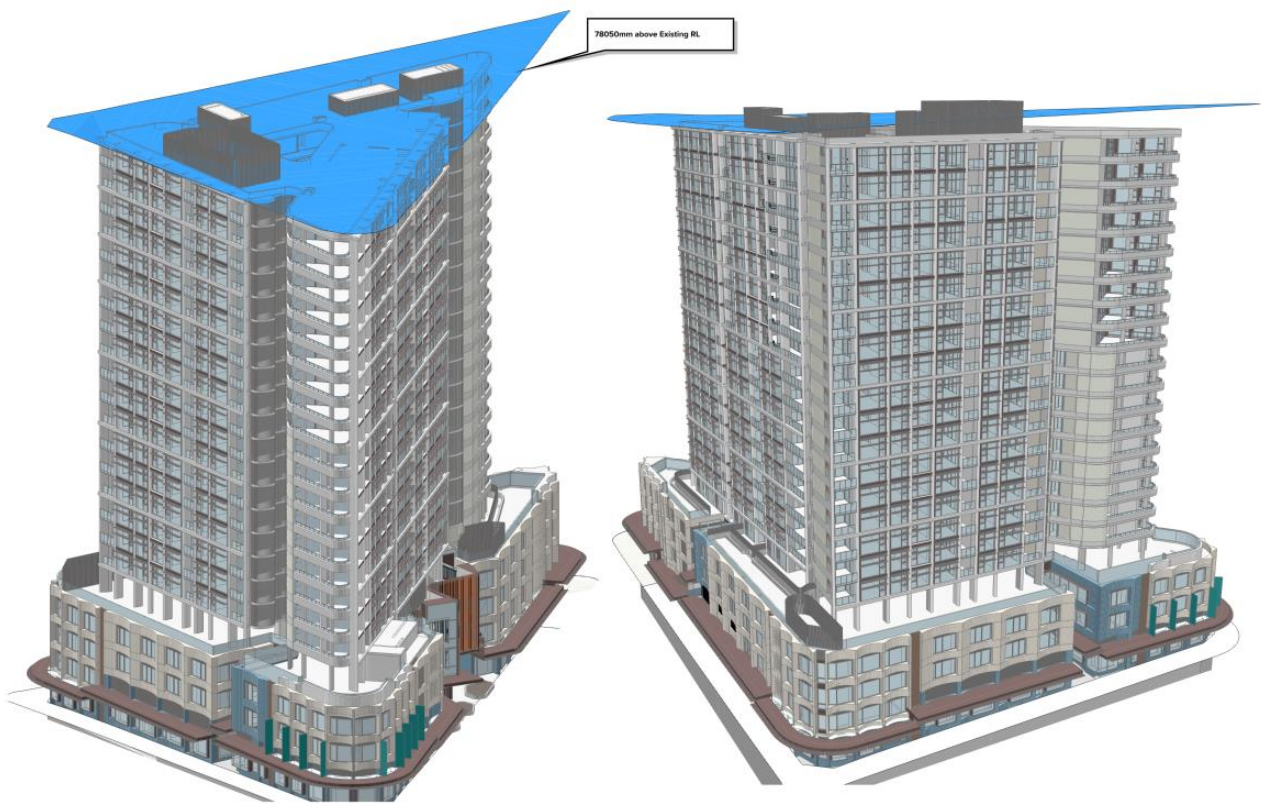


Figure 3: 78.05m Height Plane Diagram (Source: Turner)

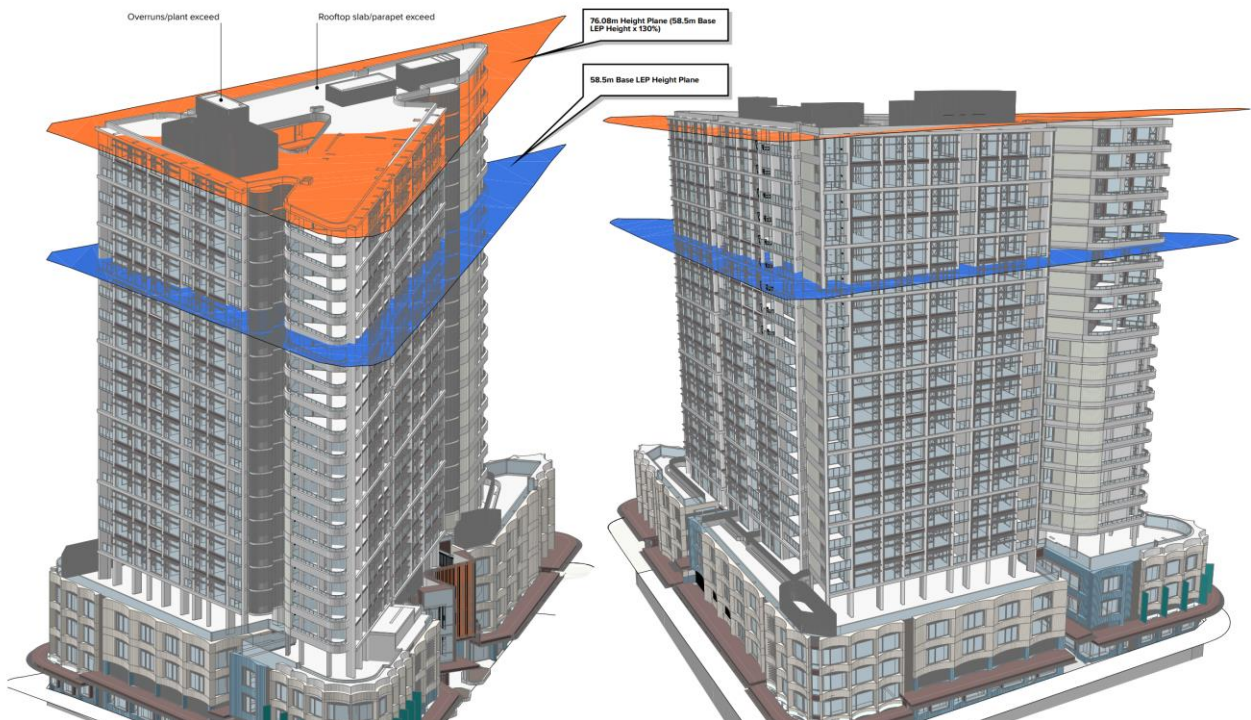


Figure 4: Height Plane Diagram Showing 76.05m and 58.50m (Source: Turner)

## 4. Unreasonable or Unnecessary

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

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

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

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

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

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

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

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

**Table 1: Consistency with Objectives of clause 4.3**

| Objective   | Demonstration   |
|---|---|
| <b>Clause 4.3 Height of Buildings</b>   |   |
| 1. <i>The objectives of this clause are as follows –</i>  |   |
| <i>(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient</i> | The site falls from north the south and west to east, however, to is relatively flat in topography, however, to provide substantial commercial floorplates as required by the zone and minimum non-residential floor space ratio standard, it is necessary to avoid stepping the building. Instead, the cross fall is absorbed within the ground floor retail tenancies with very generous floor to floor heights that on the low parts of the site that ensures the retail entrances follow the natural gradient consistent with this objective. |
| <i>(b) to promote the retention and, if appropriate, sharing of existing views</i>  | The proposed development does not obstruct any significant views or vistas.   |
| <i>(c) to maintain solar access to existing dwellings, public reserves and streets,</i>   | Thorough solar and shadow analysis has been undertaken by the project architect, Turner. The analysis has assessed  |

| Objective  | Demonstration  |
|--|--|
| <i>and to promote solar access for future development</i>  | the impact of the proposal with a compliant height of 78.05m as well as the proposed height of 80.305m. The analysis included in the EIS demonstrates that development surrounding the site maintains at least 2 hours of uninterrupted solar access between 9am and 3pm on the 21 June, compliant with the controls of the NSW Apartment Design Guide (ADG)   |
| <i>(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings</i>   | The proposal achieves more than adequate privacy for both existing and future residents by virtue of its isolated nature and exceptional separation distances to existing and likely future development. The development site, which encompasses an entire street block, features large setbacks from adjacent built forms due to the size of the three (3) roads that front the site. The nearest residential dwellings, part of the 290 Pacific Highway development, are located approximately 50m away across the Pacific Highway. The additional 2.255m height variation will not result in privacy impacts as the variation is predominantly limited to roof structure and services.  |
| <i>(e) to ensure compatibility between development, particularly at zone boundaries</i>  | The site is zoned MU1 Mixed Use. Compatible with the zone, the development seeks consent for a mixed-use development that integrates retail and commercial opportunities within the podium and residential levels above. The planning proposal for the site underwent rigorous strategic assessment, confirming the site and proposed development's suitability and compatibility with the surrounding development. The site does not immediately adjoin the zone boundary, and any impacts on the nearest residential zone boundary is mitigated by the existing mixed use development that separates the site from this boundary.  |
| <i>(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area</i>                           | <p>The proposed scale is generally in accordance with that envisaged by the planning controls while the density is strictly in accordance with the planning controls. The planning controls envisage a change in the character of the area, notwithstanding that the change will not be apparent from all vantage points in the locality. For example, the site is offset from the alignment of Willoughy Road and in this regard the proposal will not be apparent from the Willoughy Road High Street.</p> <p>As outlined in the Architectural Design Report, The building features a podium base that engages with the streetscape and public domain, while the tower is set back from the podium, creating visual interest and variation in massing, consistent with the site-specific DCP. Drawing inspiration from the surrounding context, particularly the fine-grain shopfronts of Pacific Highway and Crows Nest village, the façade design incorporates articulation and detailing to echo the local architectural character.</p> |
| <i>(g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living</i> | Not Applicable. The site is zoned MU1 Mixed Use.   |

As demonstrated in Table 1 above, the objectives of Clause 4.3 Height of buildings development standard are achieved notwithstanding the proposed variation.

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

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

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

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

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

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

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

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

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

## 5. Sufficient Environmental Planning Grounds

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

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

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

- The requirement to vary the HOB standard comes about because of:
  - Increased floor to floor heights needed to achieve the requirements of the *Design and Building Practitioners Act 2020* (DBP Act) and associated regulations and guidelines. Whereas the ADG (2015) recommends an allowance of 3.1m for floor to floor heights when crafting development standards, to achieve the amenity standards prescribed in the DBP Act and regulations, in particular the waterproofing standards, 3.2m is now the commonly accepted standard. This new standard added 1.9m to the height of the residential tower. The consequences of not increasing the floor to floor height would be reduced apartment amenity, if indeed the apartments were buildable.
  - A higher plant room than contemplated by Clause 4.3A of the LEP. Clause 4.3A makes a 2m allowance for rooftop plant whereas which corresponds with the 16m building height that applied to site before the recent planning proposal. Sites with equivalent maximum permitted building heights are provided with a 5m rooftop plant allowance that acknowledges the nature of the plant required for tall buildings. The rooftop plant on the proposal is approximately 3.85m in height. The rooftop plant occupies only a portion of the rooftop as illustrated in Figure 3 and has no adverse environmental impacts.

If it were not for these two factors, the proposal would comply with the maximum permissible building height.

- The variation sought satisfies the objectives of the Clause 4.3 Height of buildings development standard and the objectives of the MU1 Mixed Use zone.
- While this variation is based on the LEP height of 58.5m which reflects a 37.3% variation. However, the actual permissible height (without the need for a variation request) is 78.05m, which when considered against the proposal, results in only a minor 2.9% variation. Given this, it is argued that the proposed variation is minor and presents a small additional impact as a result of the buildings shadow. The solar and shadow analysis undertaken by the project architect demonstrates that the resultant shadow of the development complies with the controls of the NSW ADG, as development affected by the shadow maintain at least 2hrs of uninterrupted solar access on the 21 June between the hours of 9am and 3pm.
- Due to the isolated nature of the site, allowing the proposed built form to be contained within its own street block, the nearest development is across established two-way streets including the Pacific Highway, Alexander Street, and Falcon Street. The separation of the site from other development ensures privacy is maintained to adjoining development as well as for the proposed future residents.
- The NSW Government has committed to building 377,000 new homes across the State in the next 5 years to align with the National Housing Accord. North Sydney Council's housing target is 5,900 new completed homes by 2029. The proposed development, seeks to provide a total of 188 new homes, including 48 affordable housing units. The targets help address the housing shortage and prioritise more diverse and well-located homes in areas with existing infrastructure capacity, such as

transport, open spaces, schools, hospitals and community facilities. Failure to apply flexibility to the HOB standard will prejudice the provision of additional housing.

- The proposal is consistent with the St Leonards and Crows Nest 2036 Plan. The proposal is consistent with the overarching objectives of the 2036 Plan, particularly in the areas of infrastructure, liveability, productivity, and sustainability. It strategically positions itself to leverage existing and future transport infrastructure, including the Crows Nest Metro Station, on a site which was recognised as being capable of accommodating significant new development.
- The proposed development is consistent with the Objects in Section 1.3 of the EP&A Act, specifically:
  - The proposed development promotes the social and economic welfare of the community by providing 48 affordable housing units to be managed by a CHP, contributing to the social fabric and addressing housing needs. The design also considers sustainability using sustainable practices in construction and resource management. The variation to the height standard allows for better utilisation of the site's potential, without compromising the integrity of the State's natural resources, as the site has previously been developed.
  - The proposal integrates economic, environmental, and social considerations by ensuring that the development is both economically viable and socially beneficial, while also meeting environmental standards. The height variation supports the inclusion of enhanced floor-to-ceiling heights, which improve indoor environmental quality by allowing better natural light penetration, reducing the need for artificial lighting, and contributing to energy efficiency. The development aligns with ecologically sustainable development principles by maximising the use of the site for affordable housing while minimising environmental impacts.
  - The proposed variation to the building height allows for an efficient and economic use of the land, aligning with the strategic objectives of the Housing SEPP and the National Housing Accord. The development is consistent with the site's MU1 Mixed Use zoning and the surrounding area's character. The height variation is minor and does not disrupt the orderly development of the area, ensuring that the land is used to its full potential while adhering to planning principles.
  - The proposal directly contributes to the delivery of affordable housing by including 48 affordable units. The height variation enables the development to meet the necessary floor-to-floor height requirements as per the National Construction Code, facilitating the inclusion of these affordable units. This aligns with the State's objectives to increase affordable housing supply, particularly in well-located urban areas.
  - The proposed development is situated on a previously developed urban site with no significant ecological communities or habitats present. The height variation does not impact any environmental conservation efforts. The development adheres to environmental protection standards and includes measures to minimise its ecological footprint, ensuring that the natural environment is preserved.
  - The development does not adversely affect any known built or cultural heritage items, including Aboriginal cultural heritage. The site's history and heritage were considered during the planning process, and the development respects the cultural significance of the area. The proposed height variation does not detract from the site's or surrounding area's heritage values.
  - The development proposal, including the height variation, has been assessed in collaboration with various levels of government, ensuring that all planning and environmental considerations are addressed. The process involved consultations with local, state, and community stakeholders, reflecting a shared responsibility in environmental planning and assessment. The proposal aligns with state and local government objectives, ensuring coordinated and integrated decision-making.

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

Other examples that demonstrate the wide range of commonplace numerical variations to development standard under Clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the 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.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council [2019] NSWLEC 1555* the Court granted development consent for a three-storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Stellar Hurstville Pty Ltd v Georges River Council [2019] NSWLEC 1143* the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1369* the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

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

## 6. Conclusion

This Clause 4.6 variation request demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development. The proposed height variation is essential to achieving the required floor-to-ceiling heights that improve the overall quality and functionality of the dwellings. Given the site's unique characteristics and its contribution to the delivery of affordable housing, strict adherence to the height standard would hinder the development's potential to meet these critical needs.
- There are sufficient environmental planning grounds to justify the contravention. The proposed development does not result in any significant overshadowing of public spaces, such as public reserves or streets, nor does it impede existing views or compromise the privacy of neighbouring properties.
- The development achieves the objectives of the development standard and is consistent with the objectives of the MU1 Mixed Use zone. The design respects the surrounding context by maintaining solar access, ensuring privacy, and contributing to the area's character through appropriate scale and density. The minor height variation supports these objectives by enabling a development that is both sustainable and beneficial to the community, particularly in terms of affordable housing provision.
- The proposed development aligns with the NSW Government's strategic and statutory planning initiatives. By facilitating the delivery of 48 affordable housing units, the development supports the broader goals of increasing housing diversity and addressing housing affordability in well-located urban areas. The height variation is justified as it allows for the inclusion of these units while maintaining compliance with other planning controls.

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