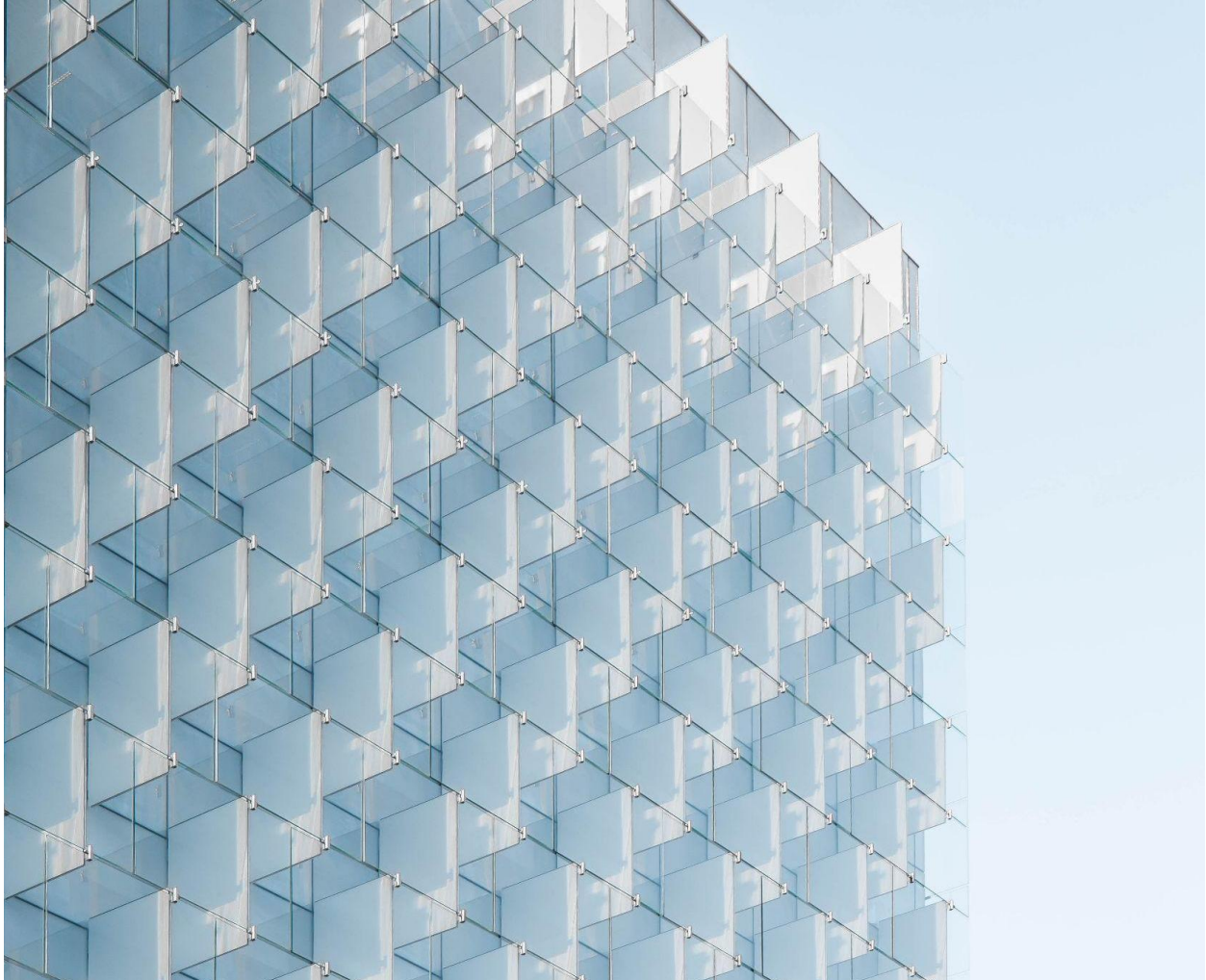


WILLOWTREE PLANNING



4 April 2025

Ref: WTJ24-278
Contact: Louise Meilak



CLAUSE 4.6 VARIATION REQUEST HEIGHT OF BUILDINGS



PROPOSED RESIDENTIAL FLAT BUILDING INCLUDING IN-FILL AFFORDABLE HOUSING

12-16 Bent Street, Lindfield
Lot 3 DP1226294, Lot 1 DP935936, Lot 1 DP960015, Lot 1 DP318518 & Lot 1
DP960014

—




Prepared by Willowtree Planning Pty Ltd
on behalf of Sundale Northland Development Pty Ltd

Clause 4.6 Variation - Height of Buildings

Proposed Residential Flat Building including In-fill Affordable Housing
12-16 Bent Street, Lindfield NSW 2070



In the spirit of reconciliation and recognition, Willowtree Planning acknowledges the Traditional Owners of this Country throughout Australia and their continuing and ongoing connections to land, waters and community. We show our respect to Elders - past and present. We acknowledge that we stand on this Country which was and always will be recognised as Aboriginal Land. We acknowledge the Traditional Owners of the Lands in this Local Government Area, belonging to the local Aboriginal People, where this proposal is located upon.

DOCUMENT CONTROL TABLE			
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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 variation request (Variation Request) has been prepared in support of a State Significant Development Application (SSDA) SSD-78156462 on behalf Sundale Northland Development Pty Ltd (the Applicant) for the proposed construction of a 10 storey residential flat building with infill affordable housing and basement car parking at 12-16 Bent Street, Lindfield (the Site), which captures the following land parcels:

- Lot 3 DP 1226294
- Lot 1 DP 935936
- Lot 1 DP 960015
- Lot 1 DP 318518
- Lot 1 DP 960014

The Site is zoned R4 High Density Residential zone, pursuant to the *Ku-Ring-Gai Local Environmental Plan 2015* (KLEP 2015) and is located within the Ku-Ring-Gai Local Government Area (LGA). The proposed development is permissible with consent via the provisions of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) and having regard for the recent changes in planning controls surrounding the Site, is considered contextually appropriate. The proposed development is generally consistent with the objectives and provisions of the KLEP 2015 and Housing SEPP, with the exception of the maximum building height provision prescribed by Section 155(2) of the Housing SEPP, for which this Variation Request is sought.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 of the KLEP 2015 and the relevant development standards prescribed under the Housing SEPP. It considers various planning controls, strategic planning objectives and existing characteristics of the Site and concludes that the proposed non-compliance is the best means of achieving the objectives of encouraging orderly and economic use and development under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.2 RATIONALE OF VARIATION FROM DEVELOPMENT STANDARDS

This Variation Request has been submitted to assess the proposed non-compliance with Section 155(2) of the Housing SEPP and has been prepared in accordance with the requirements of Clause 4.6 of KLEP 2015 which includes the following objectives:

- (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.



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Section 155(2) of the Housing SEPP prescribes provisions for Transport Oriented Development (TOD) which is applicable to the proposed development. Under the provisions of Section 155(2) of the Housing SEPP, the Site is subject to a maximum building height development standard of **22m**. Section 16 of the Housing SEPP provides non-discretionary development standards for In-fill affordable housing which allows for an additional building height of up to 30%, based on a minimum affordable housing component. The proposed development has a minimum affordable housing component of 24.35% allowing for a maximum building height of **28.6m**.

The maximum height of the proposed residential flat building is **32.05m** which would exceed the maximum height by **3.45m** or **12.06%**.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards prescribed by the Housing SEPP.

1.3 DEVELOPMENT STANDARD VARIATION

Under the provisions of Section 155(2) of the Housing SEPP, the Site is subject to a maximum height development standard of **22m**. This is increased to **28.6m** pursuant to Section 16 of the Housing SEPP. The proposed development will result in a height of **32.05m**. **Table 1** below provides a summary of the variation.

TABLE 1: SECTION 155(2) HOUSING SEPP VARIATION SUMMARY				
Housing SEPP	Housing SEPP Development Standard	Maximum Proposed	Proposed Development Non-Compliance	
Section 155(2) of the Housing SEPP	28.6m	32.05m	3.45m or 12.06% variation from the development standard.	

The proposed height exceedance is largely due to the topography of the Site and redistribution of bulk from east to west to reflect the transitional nature of the Lindfield Railway Station TOD area, resulting in the western upper elements of the building protruding through the height plane. The remainder of the built form remains below the 28.6m height limit.

Compliance with the building height development standard would be detrimental to the proposed development and not represent the most efficient use of the Site. The proposed development responds to the existing and future desired characteristics of the area, relocating bulk and scale to the west to be consistent with the adjoining height limits of the E1 Local Centre zone, resulting in no additional impact to the locality.



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PART B THRESHOLDS THAT MUST BE MET

2.1 INTERPRETING CLAUSE 4.6

Clause 4.6 of KLEP 2015 facilitates exceptions to strict compliance with development standards in certain circumstances. Clause 4.6(3) states (our emphasis added):

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).*

Accordingly, a successful Clause 4.6 variation must satisfy the below:

First Limb – cl 4.6(3)

Clause 4.6(3) states that the consent authority must be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the following:

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)); and
- b. that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 (**Rebel**) Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in *Al Maha*, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request*



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must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”

Accordingly, a consent authority must be satisfied:

- a) that the Clause 4.6 variation application addresses the matters in Clause 4.6(3); and
- b) of those matters itself which means that there is greater scope for a consent authority to refuse a Clause 4.6 variation.

These matters are addressed in **Sections 4.3** and **4.4** of this Variation Request.

This written request has been prepared under Clause 4.6 to request a variation to the "maximum building height" development standard at Section 155(2) of the Housing SEPP.



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PART C STANDARDS BEING OBJECTED TO

3.1 OVERVIEW

The Site is subject to the underlying objectives of the varied standard as well as the R4 High Density Residential zone under KLEP 2015.

3.2 CHAPTER 5 TRANSPORT ORIENTED DEVELOPMENT UNDER THE HOUSING SEPP

Chapter 5 of the Housing SEPP identifies the following aims:

The aims of this chapter are as follows—

- (a) To increase housing density within 400m of existing and planned public transport,*
- (b) To deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that—*
 - (i) are well designed, and*
 - (ii) are of appropriate bulk and scale, and*
 - (iii) provide amenity and liveability,*
- (c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.*

Pursuant to Clause 4.6, the proposed development seeks exception to the maximum building height of 28.6m.

3.3 PROPOSED VARIATION TO DEVELOPMENT STANDARDS

The SSDA seeks approval for the purpose of a residential flat building with infill affordable housing. The Site is subject to a maximum building height of 28.6m. The development proposes a maximum height of **32.05m**. The proposed development would **exceed the building height applicable to the Site by a maximum of 3.45m, which represents a 12.06% variation.**

The proposed height exceedance is largely due to the topography and redistribution of bulk from the east to the west of the site to reduce visual amenity impacts on the adjoining R3 Medium Density Residential zoned land. It is noted that the majority of the built form remains below the 28.6m height limit. Refer to **Figure 1** below for details.



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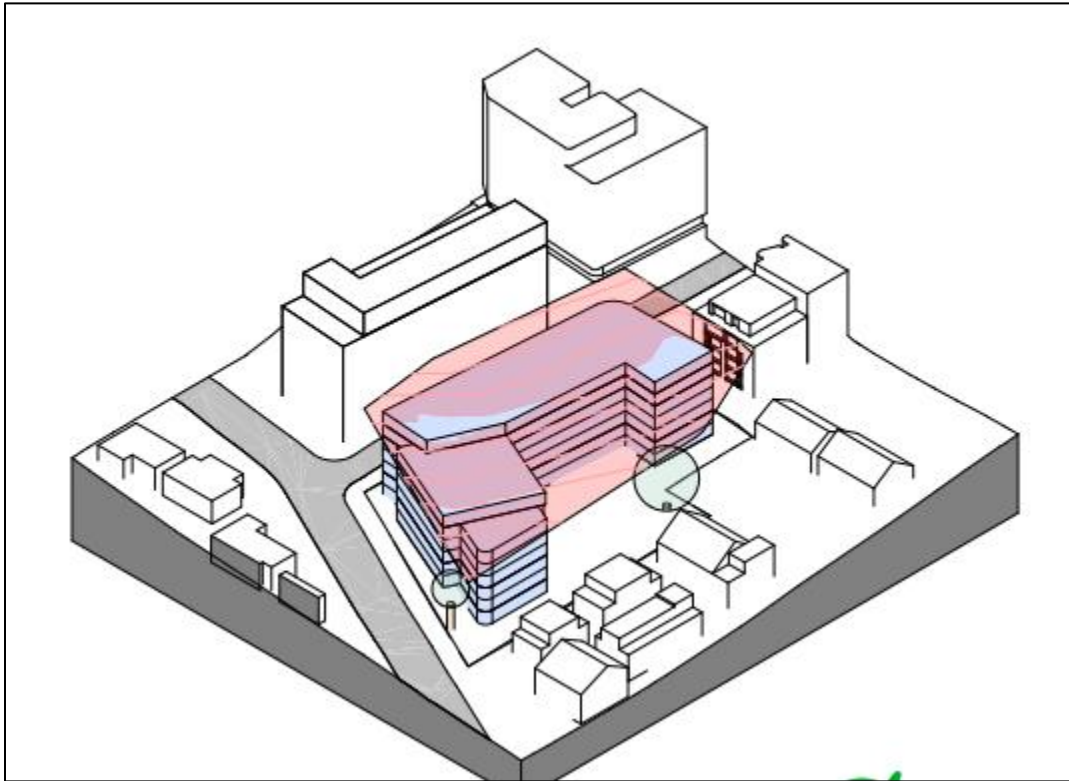


Figure 1. Built Form and Scale (Source: PTW, 2025)

In its current form, the proposed development represents an orderly and efficient use of the Site which responds to the existing environmental constraints and the form and scale of the existing desired future development on the surrounding properties.

This Variation Request has been prepared in accordance with the aims of Chapter 5 of the Housing SEPP and the R4 High Density Residential zone objectives of KLEP 2015.



Clause 4.6 Variation – Height of Buildings

Proposed Residential Flat Building including In-fill Affordable Housing
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PART D PROPOSED VARIATION TO STANDARDS IN CLAUSE 4.3 OF KLEP 2015

Pursuant to Clause 4.6 of KLEP 2015 exception is sought from the height of buildings standard applicable to the Site pursuant to Section 155(2) of the Housing SEPP.

4.1 OBJECTIVES OF THE STANDARD

There are no objectives of the standard. Notwithstanding, consideration of the proposal's consistency with the aims of Chapter 5 of the Housing SEPP is provided in **Table 2** below:

TABLE 2: CONSISTENCY WITH THE AIMS OF CHAPTER 5 OF THE HOUSING SEPP	
Aim	Response
<i>(a) To increase housing density within 400m of existing and planned public transport,</i>	The proposed development will provide 115 units within 400m of Lindfield train station and is therefore consistent with this aim.
<i>(b) To deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that– (i) are well designed, and (ii) are of appropriate bulk and scale, and (iii) provide amenity and liveability,</i>	<p>The proposed development will provide a residential flat building that provide an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site. The proposed height and scale of the development is generally consistent with the future character of the area as established by the new built form controls within Chapter 5 Transport Oriented Development in the Housing SEPP.</p> <p>The proposed height will not be responsible for any discernible impacts beyond that of a building with a compliant height in terms of visual bulk, privacy, solar access and views. The non-compliant components of the development will not result in any unreasonable overshadowing.</p> <p>As such, the proposed development is considered consistent with this aim.</p>
<i>(c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.</i>	The proposed development provides 24.35% of the gross floor area of the building for the purpose of affordable housing which will meet the needs of essential workers and vulnerable members of the community.



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4.2 OBJECTIVES OF THE ZONE

The Site is zoned R4 High Density Residential pursuant to KLEP 2015. Therefore, consideration has been given to the R4 zone objectives in **Table 3** below:

TABLE 3: CONSISTENCY WITH THE R4 ZONE OBJECTIVES	
Objective	Response
<i>To provide for the housing needs of the community within a high density residential environment.</i>	The proposed development provides 115 units within the R4 High Density Residential zone.
<i>To provide a variety of housing types within a high density residential environment.</i>	The proposed development provides a suitable density housing type within the R4 High Density Residential zone which varies from the lower density residential zones to the west of the Site.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	The proposed development is for a residential flat building for the residents of the building.
<i>To provide for high density residential housing close to public transport, services and employment opportunities.</i>	The proposed development will provide 115 units within 400m of Lindfield train station and town centre.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) (refer to **Section 2.1**) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6.

The five methods outlined in *Wehbe* include:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*



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- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).*
- *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 Method**).*
- *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 Method**).*

It is sufficient to demonstrate only one of these methods to satisfy clause 4.6(3)(a) of LCLEP 2009 (*Wehbe, Initial Action* at [22], *Rebel* at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated below that the First Method has been satisfied, and the aims of Chapter 5 of the Housing SEPP are achieved notwithstanding the non-compliance with the numerical standard (see also **Section 4.1** above).

When considering whether a development standard is appropriate and/or necessary, one must take into account:

- the nature of the proposed variation;
- the Site context; and
- the design of the proposed development.

Following the decision in *Initial Action*, it was established that Clause 4.6 does not require an applicant to demonstrate that a development which contravenes a development standard have a better (or neutral) environment planning outcome than a development that complies with the development standard.

The standard is unreasonable and unnecessary in the circumstances of the case on the following basis:

- The proposed development will provide a residential flat building that provides an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site. The proposed height and scale of the development is generally consistent with the future character of the area as established by the new built form controls within Chapter 5 Transport Oriented Development in the Housing SEPP.
- The purpose of the variation is to reduce bulk and scale impacts to the adjoining R3 Medium Density Residential zone. The proposed height variation is consistent with the future intended



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height of the adjoining E1 Local Centre zone and no additional impacts to bulk and scale will result from the proposed variation.

- The proposed height will not result in any visual, privacy or overshadowing impacts to the adjoining properties.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The proposed development represents a more efficient use of the Site and reduces bulk and scale impacts through the implementation of the height variation. The aims of Chapter 5 of the Housing SEPP and the R4 zone are considered upheld as a result of the proposed development. As such, the application of the height of building development standard is considered unreasonable and unnecessary for the proposed development.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

In *Initial Action*, 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.

The environmental planning grounds to justify the departure of the development building height development standard are as follows:

- The proposed development is entirely consistent with the underlying aims or purpose of Chapter 5 of the Housing SEPP, as demonstrated in Section 4.1.
- The proposed development fully achieves the objectives of the R4 High Density Residential zone, as described in Section 4.2.
- Compliance with the standard would be unreasonable and unnecessary for the reasons outlined in Section 4.3.
- There would be no impacts on any sensitive receptors due to the proposed development in relation to solar access, privacy or visual bulk as the non-compliant elements are suitably setback from the boundaries of the Site.
- Compliance with the remaining development standards applicable to the Site is achieved. There would be no measurable environmental or amenity benefits in maintaining the standard.

For the reasons outlined above, it is considered that the proposed variation to the building height under Section 155(2) is appropriate and can be clearly justified having regard to the matters listed within clause 4.6(3)(b) under KLEP 2015.



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4.5 OBJECTIVES OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the objects of the Act in accordance with section 1.3 of the EP&A Act. **Table 4** below assesses the proposed development against the objects of the EP&A Act.

TABLE 4: EP&A ACT OBJECTIVES	
Objective	Response
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The proposed development is considered to be in the public interest as it would support the provision of much needed housing (including affordable housing) in a location close to public transport, services and facilities.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposed development allows for the provision of much needed housing in a location close to existing infrastructure, has minimal impact on the environment and includes the provision of affordable housing.
<i>(c) to promote the orderly and economic use and development of land,</i>	As outlined above, the proposed development allows for the provision of much needed housing in location close to public transport and an existing town centre and is therefore considered to promote the orderly and economic use and development of land.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposed development will provide at least 2% of the gross floor area of the building for the purpose of affordable housing in accordance with the provisions of Section 156 of the Housing SEPP.
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	<p>A detailed Biodiversity Development Assessment Report waiver is provided at Appendix 28 of the EIS that demonstrates that the proposed development will protect the environment.</p> <p>The proposed development would not impact on the conservation of biological diversity or the ecological integrity of the locality.</p>
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	<p>The Site is not listed on the State Heritage Register under the NSW Heritage Act 1977.</p> <p>The Site is not listed on Council's Local Heritage Register or identified as being located within a Heritage Conservation Area within Schedule 5 of the KLEP2015.</p>



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TABLE 4: EP&A ACT OBJECTIVES

Objective	Response
<i>(g) to promote good design and amenity of the built environment,</i>	An Urban Design report by PTW is provided at Appendix 10 of the EIS. The Urban Design report identifies that the proposed development as a well-designed, multi-unit residential development that constitutes an exemplar development that embodies the aims and principles of the TOD SEPP, but it also responds well to the aims and objectives of the KLEP 2015.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposed development will be constructed to a high quality and achieve full compliance with relevant standards and controls.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The proposed development is considered to be a state significant development, for which the consent authority is the Department of Planning, Housing and Infrastructure (DPHI)
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The SSDA is subject to the relevant public notification requirements.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliance with Section 155(2) of the Housing SEPP will not give rise to any matters of significance for State or regional environmental planning. They will also not conflict with any State Environmental Planning Policy or Ministerial Directives under section 9.1 of the EP&A Act.

Planning Circular PS 08-014, issued by the former NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by full Council rather than under delegation. It is noted that this variation does exceed 10% and will be determined by the Department of Planning, Housing and Infrastructure (DPHI) as a SSDA.

4.7 SUMMARY

For the reasons outlined above, it is considered that the variation to Section 155(2) of the Housing SEPP is well-founded in this instance and is appropriate in the circumstances. Furthermore, the Variation Request is considered to be well-founded for the following reasons as outlined in Clause 4.6 of KLEP2015, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2**);



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- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3**);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4**); and
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.5**);

Overall, it is considered that the proposed variation to the maximum building height control is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of KLEP 2015.



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PART E CONCLUSION

For the reasons outlined above, it is requested that Council support the Variation Request, which seeks approval for non-compliance with Section 155(2) of the Housing SEPP for the following reasons:

- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2**);
- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3** as part of the First Limb satisfied);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4** as part of the First Limb satisfied);
- The Proposed development is consistent with the objectives of the EP&A Act (refer to **Section 4.5**);
and
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.6**);

Given the justification provided above, the Variation Request is well founded and should be favourably considered by the Department of Planning, Housing and Infrastructure.

