



APPENDIX 31

CLAUSE 4.6 VARIATION – BUILDING HEIGHT

Residential Flat Building with In-fill Affordable Housing

No. 11-19 Middle Harbour Road,

LINDFIELD

Prepared for: Castle Hill No. 7 Pty Ltd

REF: M250136

DATE: 2 June 2025





Contents

1.	Introduction and Background	1
2.	Clause 16 and 176 of the Housing SEPP	2
3.	Proposed Variation	4
4.	Clause 4.6 to KLEP 2015.....	5
5.	Compliance is Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))	7
6.	Sufficient Environmental Planning Grounds (Clause 4.6(3)(b)).....	11
7.	Conclusion	15

FIGURES

Figure 1	Transport Oriented Development Map with site outlined red (Source: NSW Planning Portal).	2
-----------------	--	---

Figure 2	Proposed Height Banket Diagram.....	5
-----------------	-------------------------------------	---

©This document and the research reported in it remains the property of Planning Ingenuity Pty Ltd and are protected by copyright. Apart from fair dealings for the purposes of private study, research or review, as permitted under the Copyright Act 1968, no part of the document may be reproduced, by any process, without the written permission of the author. All inquiries in this regard are to be directed to the Managing Director, Planning Ingenuity Pty Ltd.





Clause 4.6 Variation Statement – Maximum Height of Buildings Clause 16(3) and Clause 155(2) of Housing SEPP

1. INTRODUCTION AND BACKGROUND

This 4.6 written request for exception to development standard has been prepared on behalf of the Applicant to accompany the Environmental Impact Statement (EIS) for the State Significant Development Application (SSD). The SSD is for the purpose of a Concept Development Application ('Concept SSDA') seeking concept approval for the demolition of existing buildings and associated structures, tree removal and site clearing and construction of a 9 storey residential flat building with infill affordable housing above basement car parking and associated landscaping at No. 11-19 Middle Harbour Road, Lindfield ('the site').

This Clause 4.6 Written Request for Exception to a Development Standard has been prepared in accordance with the NSW Department of Planning and Environment's "Guide to Varying Development Standards" (November 2023) and relevant decisions in the New South Wales Land and Environment Court (the Court). In particular, it is noted that the requirements of Clause 4.6(4) have been deleted which remove the need for the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone.

The following two Court judgments provide a clear outline of the matters required to be addressed under Clause 4.6, including the structure of such requests:

- *Brigham v Canterbury-Bankstown Council* [2018] NSWLEC 1406; and
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The Court has established principles that are to be addressed in relation to whether a variation to a development standard should be approved by a consent authority. The relevant tests to be considered are set out in the judgement of Justice Lloyd in *Winton Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79. The relevant tests were revisited by Chief Justice Preston in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*). Although the Winton Property Group and Wehbe judgment refer to variations to development standards submitted under State Environmental Planning Policy 1 – Development Standards (SEPP 1) the principles and tests contained therein remain applicable to a variation request under Clause 4.6 in the NSW Standard Instrument as confirmed by the Court in the following judgments:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five);
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245;
- *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61;
- *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
- *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112;
- *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

It is important to note at the outset that clause 4.6 of the LEP "is as much a part of [the LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome." (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

In our opinion, the variation achieves the objectives of the zone and the development standard and has demonstrated there are sufficient environmental planning grounds to justify contravening the development standard.

2. CLAUSE 16 AND 155 OF THE HOUSING SEPP

Clause 4.3(2) of Ku-ring-gai Local Environmental Plan 2015 (KLEP) is a development standard that sets out the maximum building height and refers to the Height of Buildings Map. The Site is identified on Height of Buildings Map as having a maximum height of 9.5m.

Despite the LEP provisions, this application has been made under the provisions of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) which allows for a greater maximum building height for the site under Clause 155 of Chapter 5 – Transport Oriented Development.

Chapter 5 of the Housing SEPP came into effect on 13 May 2024 and applies to *Transport Orientated Development* (TOD) within various local government areas within Greater Sydney, including Ku-ring-gai. The TOD incentives permit residential flat buildings and shop top housing in elected well located residential, town centres and mixed-use land use zones. Where the TOD provisions apply, increased heights and densities are also afforded. Lindfield Train Station is a nominated station in accordance with Chapter 5 of the SEPP, deeming sites within a 400m radius eligible. The site is identified within the 400m radius established around Lindfield Train Station (**Figure 1**).



Figure 1 Transport Oriented Development Map with site outlined red (Source: NSW Planning Portal).

As such, Chapter 5 applies to the development which permits residential flat buildings on the subject site.

Furthermore, Clause 155 applies to the proposal which is reproduced below, is applicable:

155 Maximum building height and maximum floor space ratio

(1) This section identifies development standards for development under this chapter that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Note—

See the Act, section 4.15(3), which does not prevent development consent being granted if a non-discretionary development standard is not complied with.

(2) The maximum building height for a residential flat building in a Transport Oriented Development Area is 22m.

.....

Since the development is for a residential flat building within a TOD area it is subject to a maximum building height of 22m under Chapter 5 of the Housing SEPP.

It is also noted that in accordance with Clause 156 of the Housing SEPP, a residential flat building within a TOD area with a GFA of 2,000m² or more is required to deliver 2% of the total GFA of the proposal to affordable housing to be managed by a registered community housing provider in perpetuity. The proposed concept will deliver the 2% of GFA in perpetuity as required by Chapter 5 of the Housing SEPP.

Furthermore, Chapter 2 of the Housing SEPP sets additional provisions to promote diverse and affordable typologies of housing across New South Wales and permits an increased building height which prevails to the extent of an inconsistency between the relevant Environmental Planning Instruments.

Of relevance to this application, Clause 16 helps incentivise the construction of in-fill affordable housing by offering “bonus” floor space ratio and building height when used for the purposes of affordable rental housing as indicated below:

(1) The maximum floor space ratio for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).

(2) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

(3) If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

Example—

Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.

In accordance with Clause 15C, which is reproduced below, Division 1 Chapter 2 of the Housing SEPP applies to development which is permitted under Chapter 5 of the SEPP and therefore applies to this application.

15C Development to which division applies

(1) This division applies to development that includes residential development if—

(a) the development is permitted with consent under Chapter 3, Part 4, Chapter 5, Chapter 6 or another environmental planning instrument, and

(b) the affordable housing component is at least 10%, and

(c) all or part of the development is carried out—

(i) for development on land in the Six Cities Region, other than in the City of Shoalhaven or Port Stephens local government area—in an accessible area, or

(ii) for development on other land—within 800m walking distance of land in a relevant zone or an equivalent land use zone.

As permitted by Clause 15C of the Housing SEPP, the proposal seeks to apply the infill affordable housing “bonus” under Chapter 2 to the new base controls afforded by Chapter 5 in order to allow for a development which responds to the current planning controls and climate to provide the accepted affordable housing provision on the site.

As such, the proposal will provide an affordable housing component that equates to 15% of the gross floor area (GFA) in order to achieve a 30% “bonus” to the building height permitted at the site (22m).

When applying the 30% “bonus” to the 22m base under Chapter 5 of the Housing SEPP, the development is permitted a maximum building height of 28.6m by Chapter 2 of the Housing SEPP.

It is important to note that the proposal is required to provide the 15% of GFA for affordable housing under Chapter 2 of the Housing in addition to the 2% stipulated under Chapter 5, thereby resulting in a total affordable housing requirement of 17%. The concept proposal accounts for 17% of the total GFA proposed to be delivered as affordable housing thereby satisfying with the relevant provisions.

3. PROPOSED VARIATION

This Clause 4.6 Variation Statement seeks to vary the height of buildings development standard prescribed for the Site under Clause 16(3) and Clause 155(2) of the SEPP (Housing) 2021. The request is made under Clause 4.6 of the KLEP in seeking a variation to a development standard.

It is noted that the KLEP defines building height as follows:

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.

In accordance with the above definition, the proposal has a maximum height of 33.6m towards the south eastern corner of the site where the site is at its lowest.

Importantly, as shown in the height blanket diagram, the proposed height variation ranges is up to a maximum of 5m, with an extent of the concept envelope complying with the height of buildings requirements. The maximum variance in the height of buildings is directly attributable to the topography of the site which has a significant fall of approximately 10m from the north western corner of the site to south east.

The extent of the height breach is shown in **Figure 2** overpage.

Overall, the proposed concept envelope seeks to provide a maximum variation of 5m (17.48%) from the provisions of the Housing SEPP.

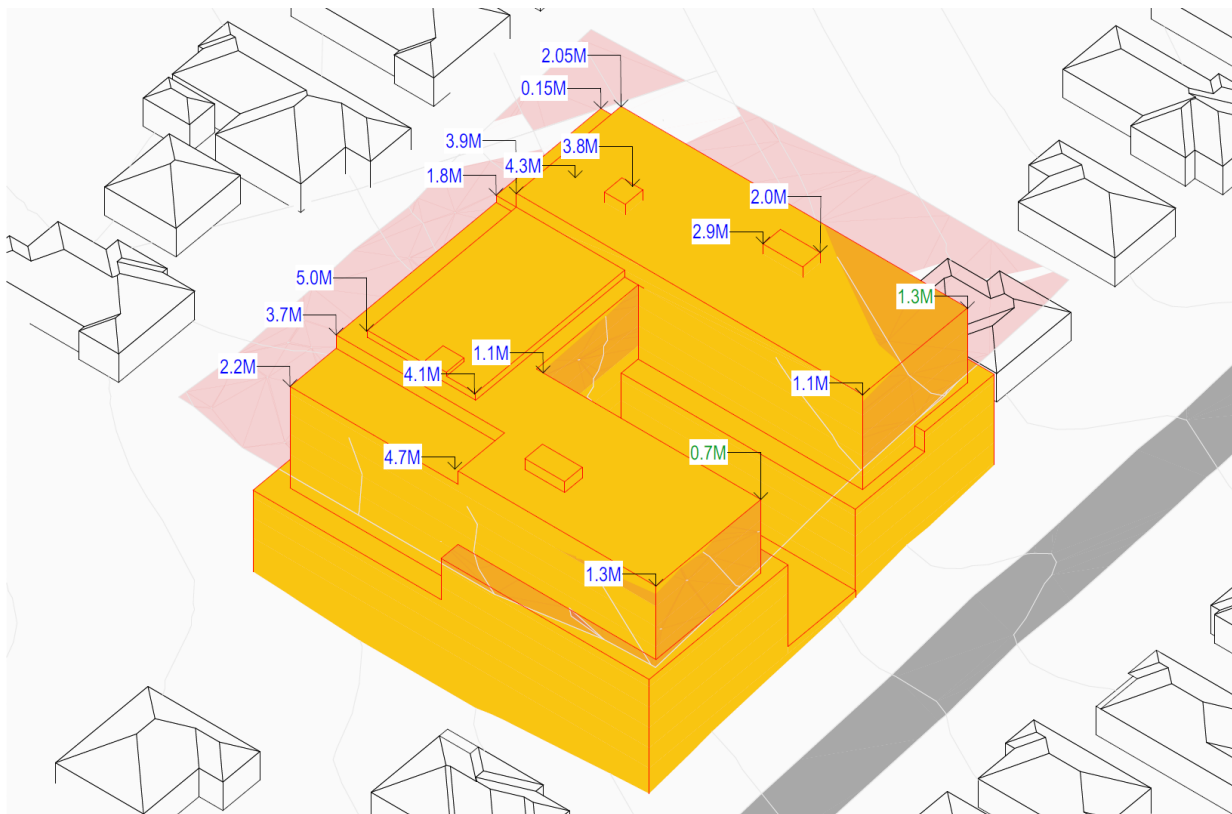


Figure 2 Proposed Height Banket Diagram.

4. CLAUSE 4.6 TO KLEP 2015

The objectives and provisions of Clause 4.6 of Ku-ring-gai LEP 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 include all of these zones.

- (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,
 - (c) clause 5.4,
 - (caa) clause 5.5.

In accordance with Clause 4.6(2), the height of building that applies under Clause 16(3) and Clause 155(2) of the Housing SEPP can be varied under Clause 4.6 of the KLEP. Neither Clause 16(3) or Clause 155(2) are expressly excluded from the operation of clause 4.6.

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (Initial Action), Preston CJ notes at [87] and [90]:

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...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements

of Subclause 4.6(3) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states:

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

(a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in the circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5. COMPLIANCE IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (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. This list is not exhaustive. 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 Judgment 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 Judgment 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 or 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.

The proposal seeks to vary Clause 16(3) under Division 1 of Part 2, Chapter 2 of the Housing SEPP and Clause 155(2) under Chapter 5 of the Housing SEPP.

With regard to Clause 16(3), the objective of Division 1 of Part 2, Chapter 2 of the Housing SEPP is as follows:

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 concept envelope, 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 the additional levels will adversely reduce the provision of affordable residential accommodation in the Lindfield locality which is contrary to the above objective and certainly does not “*facilitate the delivery of new in-fill affordable housing*”. The proposed distribution of floor space above the height limit is the most appropriate response to the site constraints (primarily topography), relationship to neighbouring properties and the public domain.

The proposal will allocate 28 apartments as affordable housing in accordance with the Housing SEPP. Importantly, the site is ideally located to accommodate affordable housing, and the subsequent uplift in height and density, given its prime location within the Lindfield TOD precinct, with excellent access to public transport, commercial and retail premises and services. Given the context and size of the site, it is considered suitable to accommodate the additional development density to support affordable housing without adversely impacting surrounding properties.

Ultimately, the provision of affordable housing on the site is delivering a significant social benefit to the locality.

To request strict compliance would be antipathetic to the objective of *Division 1 In-fill affordable housing* and as such, is insisting on compliance with the numerical development standard is unreasonable and unnecessary in this instance.

With regards to Clause 155(2), the Housing SEPP does not contain any objectives for the development standard, however, does contain the following aims for the chapter itself.

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.



The concept proposal satisfies Aims (a) and (c) through the provision of increased residential density on the site, inclusive of approximately 28 dwellings to be delivered as affordable housing. The site is located within 400m walking distance of the Lindfield Railway Station and will contribute approximately 173 new dwellings within a desirable and accessible locations for essential workers.

As for Aim (b), the proposal seeks to provide the concept envelope for a 9 storey residential flat building that responds to the context and constraints of the site to achieve the permissible density. Whilst detailed design of the development will be undertaken during the Detailed SSDA stage, the proposed concept building envelope is considered to provide a built form outcome that achieves an appropriate balance of minimising impacts on surrounding properties and the public domain while delivering an envelope that is anticipated by the Housing SEPP, including much needed affordable housing.

Importantly, the bulk and scale of the concept proposal, whilst notably greater than the existing scale of development with the locality, is in transition to higher density development envisaged by the Housing SEPP. Therefore, the concept envelope will be compatible with the desired future character of the locality while still having regard to the existing character of development.

In this regard, the concept proposal responds to the topography and takes its cues from surrounding development by providing a podium design with the higher elements increasing the setback from the boundaries as the height increases. The stepped and recessive form ensures that the concept proposal will appear like a height compliant building and the variation will not be visually jarring or out of character with the anticipated planning controls under the Housing SEPP.

The greatest extent of the variation occurs at the south eastern corner of the site where the topography is at its steepest and away from the public domain. The maximum extent of the variation will not have any adverse impacts on the amenity of adjoining properties as the most affected properties to the south are largely impacted by compliant elements of the building.

Notably, the podium form will sit at a maximum of 4 storeys in height, with the upper levels set back a further 3m in order to provide a suitable transition to the adjoining residential properties, which are indeed capable of this same residential density. Ultimately, the concept proposal will allow for a suitable relationship at a pedestrianised scale and neighbourhood scale, with the integration of this podium form, as well as landscaped setbacks and a central open space which all go to alleviate the visual bulk of the built form when viewed from Middle Harbour Road and create an appropriate bulk and scale.

Furthermore, the concept proposal reflects good design which alleviates the visual bulk of the development when viewed from surrounding properties and the public domain. It is likely that detailed design development during the Detailed SSDA stage will facilitate further mitigation measures to surrounding properties and the public domain as a result of the height variation.

In terms of liveability, the proposal will be capable of providing a high level of amenity to future residents as the concept scheme indicates compliance with the ADG in terms of apartment size, private open space, communal open space, solar access and cross ventilation. Furthermore, the concept scheme provides compliant building setbacks with regard to the ADG to ensure an adequate level of separation is provided to neighbouring properties in order to maximise privacy, whilst also minimising overshadowing impacts. Overall, the concept envelope will allow for residential development with high levels of amenity for future residents, subject to detailed DA design.

Furthermore, for completeness, since there are no objectives specific to Clause 155 of the Housing SEPP, the objectives of the height of buildings standard under KLEP have also been considered as assumed objectives for the purpose of this variation request.

Clause 4.3(1) of the KLEP provides the following objectives:

(1) The objectives of this clause are as follows—

(a) to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

(c) to enable development with a built form that is compatible with the size of the land to be developed.

These objectives are addressed in turn below.

Objective (a) to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

The site sits outside the Lindfield town centre, however, this objective is not considered relevant in this instance. Notwithstanding this, the height of the concept scheme is considered appropriate when set against the backdrop of the permissible height of development on land immediately surrounding the site afforded by the Housing SEPP provisions. This sets a different context to that envisaged by KLEP 2015, whilst ensuring the proposed 9 storey built form envisaged in the concept envelope will align with the desired future character of the area where land to the west and south is also capable of achieving 9 storeys and land to the north and east is capable of achieving 4 storey residential flat buildings under the Low to Medium Rise (LMR) housing provisions.

The proposal is considered to satisfy objective (a).

Objective (b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

The height variation of the concept scheme, at the macro level will provide a transition of sorts between the centre and low density development to the east. In this regard, it is anticipated that the proposed development will provide a transition from the high density town centre to the 9 storey developments permitted within this 400m radius, and then again down to development located further from the centre subject to the Low to Medium Rise (LMR) housing provisions where 3 and 4 storey residential flat buildings are permitted.

With the more immediate context, the concept design provides for a stepped built form with a lower scale podium to take its cues and transition to lower scale development to alleviate the visual bulk and provide a suitable transition in terms of proportion and scale to those adjoining lower density developments. Upper levels of the building will be setback from the podium as the height increases to give visual relief to the streetscape, allowing for solar access and providing for ADG compliant building separation distances, to maximise amenity of the adjoining properties. Therefore, the proposal is considered to satisfy objective (a).

Objective (c) to enable development with a built form that is compatible with the size of the land to be developed.

The proposed concept building envelope is appropriate for and compatible with the size of the land. The subject site is rectangular in shape with an area of 5,187m² and a frontage to Middle Harbour Road of 73.15m which can easily accommodate the proposed density envisaged by the concept envelope. Whilst there is a variation to the height of buildings, the maximum variation is located at the south-eastern end of the site, away from the public domain, and where the slope of the site is at its steepest.

The size of the site reasonably allows for a development of the scale proposed without having adverse impacts on the surrounding locality in terms of the natural and built environment. This is demonstrated by the fact that the concept envelope achieves compliance with key numerical requirements including GFA, building separation, deep soil area, landscaped area, communal open space and parking, all of which are affected by site area. Furthermore, the concept envelope will sit comfortably within the site in a way that will not have any adverse or unreasonable impacts on the surrounding properties or the streetscape. This is evidenced by the submitted shadow diagrams, compliance with the side and rear setback controls and the technical studies and investigations which accompany the EIS.

As such the proposal is considered to satisfy objective (c).

Summary

The above adequately demonstrates that compliance with the development standards which determine the height of building for the site is unreasonable or unnecessary in the circumstances in this case where the Proposal achieves the objectives and/or aims of the relevant standards, notwithstanding the Variation, with the building height.

Compliance with the maximum height of buildings development standards is considered to be unreasonable and unnecessary as the objectives of those standards are achieved for the reasons set out above. For the same reasons, the objection is considered to be well-founded as per the first method of *Wehbe* underlined above.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied. Notably, under Clause 4.6(3)(b) a consent authority must now be satisfied that there are sufficient planning grounds for the contravention of a development standard. Clause 4.6(3)(b) is addressed in Section 6 below.

6. 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 concept envelope seeks to utilise the 30% "bonus" height and floor space afforded by the Housing SEPP, in return for delivering affordable housing. The concept envelope, 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.
 - b. The proposal will provide for a quantum of gross floor area which is permitted on the site under Clause 16(1) of the Housing SEPP and therefore, whilst height non-compliant, the density of development proposed for the site is anticipated by the provisions. Furthermore, the local strategic planning documents for the site identifies a lack of housing supply within the Ku-ring-gai LGA and identifies Lindfield as a desirable location for high density residential development to address the housing demands. Indeed, the proposal achieves compliant building separation distances, deep soil, landscaped area, communal open space and parking and therefore is considered to provide an appropriate building arrangement on the site. As such, the height variation is not considered

to be a result of excess density and instead provides a better distribution of permissible floor space across the site, in a way that responds to the context of the site.

- c. Object 1.3(d) of the EP&A Act is to “*promote the delivery and maintenance of affordable housing*”. The proposal will deliver a public benefit through the provision of 15% of the gross floor area to be provided as affordable housing for a period of 15 years to a registered community housing provider, in accordance with the Housing SEPP. Furthermore, the proposal will provide an additional 2% of the total gross floor area as affordable housing in perpetuity. The provision of at least 17% affordable housing is a considerable public benefit that will not be realised without the height variation and distribution of GFA above the height limit as a result of site constraints. To require strict compliance with the bonus height would significantly reduce the provision of affordable housing, communal open space and high quality apartments which is a sub-optimal outcome.

2. 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 approximately 10m from the north western corner of the site at the Middle Harbour Road frontage towards the rear south eastern corner of the site. This topographical decline is double the maximum numerical height variation which occurs where the slope of the site is at its steepest. This is a specific condition that the height limit does not contemplate, in that the height limit applies equally to a vast area of the LGA with distinctly different topography and circumstances. In this instances, the following points are noted:
 - i. The extent of the height variation at the street frontage provides for a balances outcome which varies from a maximum of 1.3m above the height limit to a maximum of 1.3m below the building height limit. As such, when viewed from the streetscape the height non-compliance will not be overly perceptible, particularly when considering the stepped podium which will address the street.
 - ii. Centrally, the elements that exceed the height limit include the lift overrun, fire stairs and communal open space, which provides a high quality area with high levels of amenity, including solar access, privacy and views. The lift overrun and stairs also provide equitable and safe access and to remove these elements to improve compliance, would be an inferior outcome; and
 - iii. The greatest extent of variation (5m) or 17.48% occurs in the south-eastern corner of the site which will not be readily discernible from the public domain or noticeable to the casual observer. This also provides a balanced outcome as the north-western corner of the site will be up to 3m below the height of buildings development standard.
- b. Whilst the topographical variation increases the extent of non-compliance for a portion of the site, the concept envelope provides a built form that provides a podium to define the street frontage and alleviate the scale of the development whilst providing recessed upper levels which, subject to detailed façade design and articulation, will be 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 similarly mitigates impacts to the surrounding developments.

- c. To request strict compliance will require significant modification to the built form which will create an incoherent architectural form and be a disproportionate response to the benefit of providing diverse and affordable housing on the subject site. Strict compliance is therefore considered to be both unreasonable and unnecessary in the circumstances of the development.

3. The variations will not result in any adverse or unreasonable impacts on the amenity of the surrounding locality

- a. The non-compliance will not result in any adverse impact to the overshadowing, views or privacy of the surrounding locality beyond that created by a compliant form. Indeed, 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. Specifically:
 - i. The extent of the non-compliant height creates no adverse additional overshadowing impacts to adjoining properties when compared to a compliant building envelope. That is, despite the height non-compliances, the proposal will not create any adverse overshadowing impacts to properties to the south, when considering the permissible scale of development on the site. Notably, whilst overshadowing is largely unavoidable, particularly to the directly adjoining site at No. 9 Middle Harbour Road, the adjoining properties maintain suitable levels of solar access during midwinter. Importantly, the extent of shadowing caused by the non-compliant elements of the built form do not add any significant or detrimental shadow impact to adjoining properties.
 - ii. The height breach does not result in any adverse additional privacy impacts. Where non-compliant, appropriate setbacks are provided to both side boundaries. Furthermore, subject to the Detailed SSDA design stage, landscaped elements, blank facades and privacy screens can be incorporated as a visual and physical buffer to the neighbouring properties if considered necessary. This would ensure that any additional loss of privacy caused by the non-compliant elements would be insignificant; and
 - iii. The height of building breach does not result in adverse view loss when compared to a compliant built form. Importantly, there are no significant views to be enjoyed across or over the site that would be impacted by the height non-compliant elements.

4. Orderly and economic use of the land

- a. Object 1.3(c) of the EP&A Act 1979 is “*to promote the orderly and economic use and development of land*”. A shorter building would unnecessarily result in a suboptimal provision of affordable housing and private and communal open space on the site. This would reduce the contribution of the development to meeting the objectives of the Housing SEPP and the objectives of the R2 zone to ‘provide for the housing needs of the community’. The removal of residential apartments, inclusive of affordable housing, and communal open space will reduce the quality and quantity of



housing within the locality. This will simply divert people to be residents in areas with reduced opportunity for access to transport links or an urban environment well-suited for walking and cycling.

- b. It would be a loss to the community to require strict compliance and ultimately stifle redevelopment. The current buildings on the site represent a significant underutilisation of the and in accordance with the applicable density controls. In contrast, submission of this application, requiring variation to maximum building height, will result in the delivery of approximately 173 high quality residential apartments, inclusive of affordable housing, that subject to detailed design, will provide for a significant social benefit to the locality in terms of built form, landscaped network, sustainability, architectural merit and visual impact, which is significantly improved when compared to the existing, at the same time as appropriately managing amenity impacts.
- c. In addition, the social benefits of providing high quality communal open space within a well-designed development in a highly accessible area 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 communal services due to the existing site conditions and topography.

5. The proposal meets aims and objectives of key planning documents

- a. The proposed development meets the objectives of the development standard, objectives of *Division 1 In-fill affordable housing* of the Housing SEPP and the aims of Chapter 5 of the Housing SEPP;
- 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 underutilise site for residential uses (1.3(c));
 - ii. The proposal promotes the delivery and maintenance of affordable housing (1.3(d)); and
 - 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 aims of *Chapter 4 Design of residential apartment development*, of the Housing SEPP. In particular:
 - i. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
 - ii. to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define (clause 2(3)(b));
 - iii. to contribute to the provision of a variety of dwelling types to meet population growth (clause 2(3)(f));
 - iv. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly given the public benefits provided by affordable housing, the steep topography and the lack of environmental impacts. Insistence on strict compliance with the height limit will result in an incoherent architectural



design and removal of private and roof top open spaces, including ancillary elements, which is a disproportionate outcome given the limited impacts of the proposal. Furthermore, to request strict compliance would also reduce the quantum of affordable housing provided on the subject site and would be detrimental to the benefit of the locality. The additional height does not significantly impact the amenity of the public domain or surrounding properties (when compared to the existing buildings) and has been designed in such a way to ensure the additional height is compatible with 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.

7. CONCLUSION

This application seeks to benefit from the building height and floor space bonuses afforded by *Part 2, Division 1 In-fill affordable housing, Section 16(3)* of the Housing SEPP. This written request has been prepared in relation to the proposed variation to the 28.6m maximum building height, inclusive of a 30% "bonus" afforded by Section 16(3) of the Housing SEPP, to the base 22m development standard contained within Chapter 5 of the Housing SEPP.

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.

In addition, the request demonstrates that there are sufficient site-specific environmental planning grounds to justify the variation, and therefore the proposal is considered to be in the public interest.