

CLAUSE 4.6 REQUEST TO VARY DEVELOPMENT STANDARD

PROPOSED RESIDENTIAL FLAT
BUILDING

44-48 RODLEY AVE, PENRITH



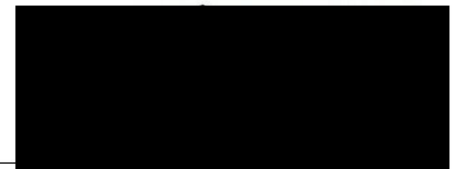
CLAUSE 4.6 REQUEST TO VARY DEVELOPMENT

Prepared by:

Name: Warwick Stimson
Qualification: Bachelor of Arts (Geography and Planning) (UNE)
Address: Stimson Urban & Regional Planning
Suite 5
488 High Street
Penrith NSW 2750

Client and Land Details

Client: Inglow Investments
Subject Site: Lots 62, 63 and 64 DP 33490, 44-48 Rodley Ave, Penrith
Proposal: Proposed Residential Flat Building



Warwick Stimson RPIA
Director



Version 2.1 - 5/10/21

TABLE OF CONTENTS

1	INTRODUCTION	1
2	VARIATION CONSIDERATION	2
2.1	NSW Land and Environment Court: Case Law (tests)	
2.2	The Proposed Development	
2.3	What is the name of the environmental planning instrument that applies to the land?	
2.4	What is the zoning of that land?	
2.5	What are the objectives of the zone?	
2.6	What is the development standard being varied?	
2.7	Under what clause is the development standard listed in the environmental planning instrument?	
2.8	What are the objectives of the development standard?	
2.9	What is the numeric value of the development standard in the environmental planning instrument?	
2.10	What is the proposed numeric value of the development standard in your development application?	
2.11	What is the percentage variation?	
2.12	How is strict compliance with the development standard unreasonable or unnecessary in this particular case?	
2.13	How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?	
2.14	Is the development standard a performance-based control?	
2.15	Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary?	
2.16	Are there sufficient environmental planning grounds to justify contravening the development standard?	
3	SPECIFIC CONSIDERATION OF CL 4.6 OF PENRITH LEP 2010	12
4	CONCLUSION	15

1 INTRODUCTION

The NSW planning system provides flexibility in planning controls by providing the ability for a consent authority to vary development standards in certain circumstances.

Stimson Urban & Regional Planning has been engaged by Inglow Investments Pty Ltd to prepare a request to vary a development standard in respect of its proposed residential flat building at 44-48 Rodley Ave, Penrith. The proposal is to be assessed by Penrith City Council and this request accompanies plans and other documentation, including a Statement of Environmental Effects, submitted to Council. This variation is to be read in conjunction with that material.

The amended plans propose a breach in the *height of building* development standard and this submission aims to address that aspect of the application. The request is considered to be reasonable in the circumstances and argues why compliance with the standard is unnecessary on the grounds that:

- a) there are sufficient environmental planning grounds to justify the contravention of the development standards, namely the provision of additional housing in an accessible location;
- b) the proposed development is in the public interest because the proposed development achieves relevant objects of the *Environmental Planning & Assessment Act 1979* and is consistent with the relevant control objectives and development standards, despite the non-compliance;
- c) the proposed breach in height is considered to be minor, with that breach arising as a result of the extension of the lift overrun only;
- d) the proposed lift tower is located centrally on the rooftop and unable to be readily viewed from the public domain; and
- e) this variation request satisfies the tests established by the Land and Environment Court for the justification and assessment of variations to development standards.

It is considered there are sufficient environmental planning grounds to support the variation. These include needing to accommodate Council's on-site waste collection requirements as detailed in the DCP, the proposal complying with the relevant development standards within Council's LEP, satisfying the objectives of the zone and the height of building control, and the enormous public benefit arising out of this development through the provision of additional housing. The relatively minor variation in building height will not negatively impact nearby or adjoining sites, however it maximises the building envelope, representing the most efficient way to deliver the public benefit of housing stock in this area.

2 VARIATION CONSIDERATION

The NSW Land and Environment Court has resolved a number of matters that have guided the way in which requests to vary development standards are to be considered by the consent authority.

2.1 NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

The key elements are outlined below.

Winten v North Sydney Council

The decision in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated.

The questions that needed to be considered included:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)? and
- Is the objection well founded?

Wehbe v Pittwater [2007] NSW LEC 827

The decision in *Wehbe v Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established a five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or

- Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
- Whether there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs; and
- All three elements of clause 4.6 have to be met and it is best to have different reasons for each, but it is not essential.

Moskovich v Waverley Council [2016] NSWLEC 1015

The court further reflected on the recent Four2Five decisions and noted:

- Clause 4.6(3)(a) is similar to clause 6 of SEPP 1 and the *Wehbe* ways of establishing compliance are equally appropriate. One of the most common ways is because the objectives of the development standard are achieved.
- Whereas clause 4.6(4)(a)(ii) is worded differently and is focused on consistency with objectives of a standard. Consequently, a consideration of consistency with the objectives of the standard required under clause 4.6(4)(a)(ii) to determine whether non-compliance with the standard would be in the public interest is different to consideration of achievement of the objectives of the standard under clause 4.6(3).
- The written request should address the considerations in the granting of concurrence under clause 4.6(5).

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

This case, along with subsequent cases concerning the application of clause 4.6, has been considered in detail in Section 3 of this report.

2.2 THE PROPOSED DEVELOPMENT

The subject application seeks Council's approval to demolish the existing dwellings and for the construction of a residential flat building development comprising a total of 29 dwellings, made up of the following:

- 26 two-bedroom dwellings (including one adaptable); and
- 3 three-bedroom dwellings (including two adaptable).

The dwellings are proposed to be contained within a five-storey building located centrally on the site.

The site is zoned *R4 High Density Residential* under *Penrith Local Environmental Plan 2010* with the proposal being permissible with consent.

The maximum height of building control on the site is 18.0m. A minor variation of 400mm occurs as a result of the height of the lift overrun as well as a small amount of roof plant. We note the remainder of the building is under the 18m height limit.

2.3 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

Penrith Local Environmental Plan 2010.

2.4 WHAT IS THE ZONING OF THAT LAND?

The subject site is zoned R4 High Density Residential.

2.5 WHAT ARE THE OBJECTIVES OF THE ZONE?

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that a high level of residential amenity is achieved and maintained.
- To encourage the provision of affordable housing.
- To ensure that development reflects the desired future character and dwelling densities of the area.

The proposed development is consistent with the objectives in that:

- The proposed residential apartment building provides for the community's housing needs in an emerging high density residential environment. The site location maximises public transport usage and encourages walking and cycling, particularly to the Penrith City Centre and wider recreational areas including the Nepean River.
- The proposal provides for a mix of bedroom and apartment styles and arrangements. This mix of housing would suit a range of household types in close proximity to the City Centre.

- A high level of residential amenity is provided for in the design of the proposal through the provision of high architectural design, private courtyards, terraces and balconies and common open space area in a landscaped setting.
- The proposed apartment mix provides housing options that are in walking distance to service and facilities and employment.
- The proposal provides for a residential apartment building which is the type of development emerging in the area as a result of recent zone changes on the area to permit this type of development.

2.6 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

Height of Building.

2.7 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

Clause 4.3 Height of Building.

2.8 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

Clause 4.3 Height of Building objectives include:

- to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
- to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,
- to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,
- to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

Character of the area

The proposed development is consistent with the built form anticipated in the locality and is similar to other residential flat development approved by Council nearby. This development is representative of the built form envisaged in the location and the accepted interpretation of the applicable controls.

Overshadowing

The proposed variation will not create any unacceptable shadowing impacts as demonstrated in the accompanying shadow diagrams. The vast majority of the building is situated below the 18m height limit.

In summary, the minor height breach, coupled with the generous setbacks, does not create any unacceptable shadowing impacts through mid-winter.

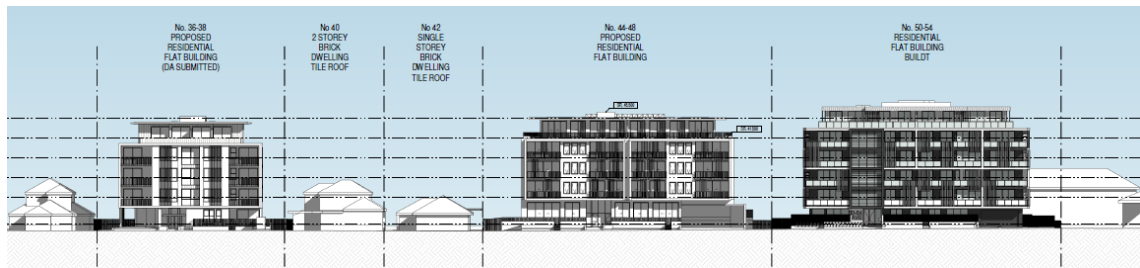


Figure 1 Streetscape including proposed development

Character and Streetscape Amenity

Summary

Specifically, the resultant development is not inconsistent with the objectives of the height of building standard on the basis that:

- The building form will be consistent with the height, form and scale of other approved development in the locality.
- There will be no impacts to views, solar access, including on any public spaces.
- No nearby heritage items will be impacted on as a result of the proposal.
- Compliance with the Council's DCP will be achieved, noting the need to provide on-site waste collection and the resultant floor to ceiling heights at ground level needed to provide that access.
- Having been the subject of UDRP meetings, the proposed development represents a high-quality urban design outcome for the locality.

The proposed development can be supported on this basis.

2.9 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The maximum building height is 18.0m.

2.10 WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN YOUR DEVELOPMENT APPLICATION?

The proposal exceeds the building height by 400mm, caused by the lift overrun and some roof plant.

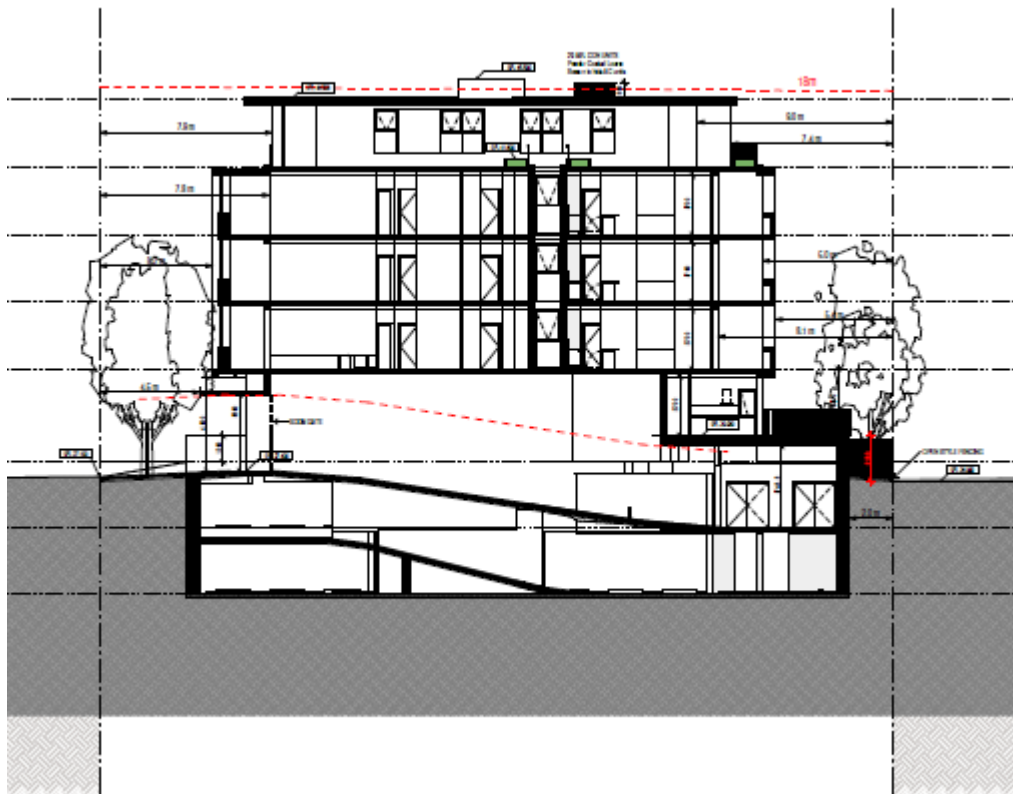


Figure 2 Extent of height breach, showing the ground floor/basement clearance requirements for on-site garbage collection (shown in red)

2.11 WHAT IS THE PERCENTAGE VARIATION?

We estimate the variation sought is approximately 2.5%.

2.12 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposal meets the general intent of clause 4.3 *Height of Buildings* and complies with the objectives of this development standard and more generally the zone as follows:

- The proposal is compatible with the height, bulk and scale of the emerging and desired future character of the locality and with the surrounding development.
- The proposal does not impact on the visual amenity, or minimise loss of privacy or solar access.

- There is no heritage item on the site.
- The proposal provides a high-quality urban form and results in a building that will contribute to a varying skyline given the uniform height limit in this locality.
- It is unreasonable to apply the height limit across the site in this case as the proposal does not impact on the visual amenity nor does it significantly reduce views, privacy or solar access.
- The proposed development meets the objectives of the zone and the height of building clause, it contributes to the provision of necessary land uses within the Penrith LGA in locations that are in close proximity to services and facilities.

Given the spatial context of the building, the proposed encroachment will not present as a perceptible element. It is considered that the proposal is in the public interest and strict compliance with the standard in this instance is both unreasonable and unnecessary.

2.13 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE ACT?

Section 1.3 of the *Environmental Planning and Assessment Act 1979* details its objectives:

The objects of this Act are as follows:

- 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,
- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- to promote the orderly and economic use and development of land,
- to promote the delivery and maintenance of affordable housing,
- to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- to promote good design and amenity of the built environment,
- to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- to provide increased opportunity for community participation in environmental planning and assessment.

It is submitted that the height encroachment still maintains an appropriate bulk and scale, and also maintains the objectives of the clauses within the LEP that relate to the zone and the height of building. The objects of the Act are not hindered through the proposed variation being supported.

Complying with the height will not alter the outcome in relation to visual bulk, scale, amenity and solar access and it is considered the proposal provides a good planning outcome. To require compliance with the height limit, an entire level of apartments would need to be deleted.

It is against the objects of the Act and not in the public interest to comply with the 18.0m height limit as the resultant development would not represent the orderly and economic use of the land and it would limit the provision of housing in close proximity to services and facilities. The height encroachment is considered to be imperceptible in the context of the overall development and surrounding locality.

2.14 IS THE DEVELOPMENT STANDARD A PERFORMANCE-BASED CONTROL?

No, it is prescriptive.

2.15 WOULD STRICT COMPLIANCE WITH THE STANDARD, IN YOUR PARTICULAR CASE, WOULD BE UNREASONABLE OR UNNECESSARY?

Strict compliance with the standard in this particular case is unreasonable and unnecessary as the variation sought as part of this development application is considered appropriate in the context and setting of the site. The proposed development meets the objectives of the zone, it meets the objectives of the height of buildings clause, and it is considered that the objectives of the Act would not be undermined by supporting the variation. It is also noted that, except for the lift overrun and plant elements, the building is actually below the height limit by 0.25m.

It is submitted that the development standard is unnecessary given the negligible resultant environmental impacts arising from the proposal and is unreasonable given the benefits that the development as proposed would bring to Penrith CBD, over a strictly compliant development. We also note that the breach is largely created as a result of the policy position of Penrith Council to provide on-site waste collection. Ceiling heights at the lower levels are designed to satisfy Councils DCP.

Strict compliance would also potentially result in a complete level of the proposed building needing to be removed, which would not represent the most efficient use of the land.

In supporting the variation, it is noted that the public interest is retained in that some key objectives of the planning controls have been achieved as a result of the development. Those include:

- Ability for waste collection vehicles to enter and leave the site in a forward direction.
- Building Alignment to existing context.
- Extensive landscaping throughout.

- Negligible shadow impacts.
- Positioning of that part of the building above the height limit centrally within the floor plate.

The parts of the building which exceed the Height of Building control are of a utility nature and will not detract from the appearance of the building, or how it relates to adjoining or nearby sites.

2.16 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

There are a number of positive environmental planning grounds that arise as a result of this development, and specifically the breach in the height limit, including:

- Compliance with Councils DCP can be achieved in respect to on-site waste collection. In justifying the requirements of the DCP, the floor to ceiling heights of the ground level do need to be increased to allow for vehicle access. This creates an increase in the resultant overall building height and is unavoidable if on-site waste collection is to be provided.
- There will be no material impacts on nearby or adjoining sites in relation to overshadowing, loss of views, overlooking or privacy.
- The proposed variation of the height standard allows for the provision of additional housing stock (in perpetuity) over and above that of a strictly compliant development.
- The height variation allows for optimisation of the site's development potential as a transport-accessible site and provision of much needed housing in the Penrith Local Government Area which in turn would assist in Council achieving the goals of its housing strategy and the NSW Government's *A Plan for Growing Sydney*, and the *Metropolitan Strategy*.
- The proposal represents the orderly and economic development of the land, and provides for housing, both two objectives of the Environmental Planning and Assessment Act 1979.
- The proposed height variation makes for efficient, economic and optimal use of the subject site, taking advantage of the local topography, and surrounding context, and by facilitating the on-site collection of waste as required by Councils DCP.
- The non-compliant height will not give rise to any material streetscape or amenity impacts compared to a compliant development, by virtue of the proposed siting, massing, setbacks, design of the building, and site characteristics. The proposed development reflects a built form that is consistent with the controls and development that has been already constructed in the locality.

- The proposed development satisfies the objectives of the height control and zone objectives, despite the non-compliance.
- Compliance is achieved with all other development standards that apply to the development.
- Design excellence has been demonstrated through the general satisfaction of the ADG controls and SEPP 65 design principles.

The environmental planning grounds cited above are considered to be sufficient.

3 SPECIFIC CONSIDERATION OF CL 4.6 OF PENRITH LEP 2010

In NSW Land and Environment Court, *Initial Action Pty Ltd v Woollahra Municipal Council* further clarified the correct approach to the consideration of Clause 4.6 requests. This included clarifying that the Clause does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not.

Clause 4.6 of a standard instrument LEP permits a consent authority to grant development consent for development that would contravene a development standard where the consent authority is satisfied that:

- cl4.6(4)(a)(i): a written request from the applicant adequately demonstrates that compliance with the development standard is unreasonable or unnecessary (cl4.6(3)(a)), and that there are sufficient environmental planning grounds to justify the contravention (cl4.6(3)(b)), and
- cl4.6(4)(a)(ii): the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development within the relevant zone.

To clearly consider this case and its applicability to the proposed development, the clauses have been tabulated below, and considered against the above Court case, the proposal, and this very submission.

Penrith LEP 2010

4.6(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

Subclause (3) requires the following to be demonstrated for the purposes of this consideration:

- (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.*

In respect of the height of building variation, the reasons why compliance is unreasonable or unnecessary are provided in Section 2.

We also note that the objectives of the standards have been achieved notwithstanding the non-compliance with those standards (*Wehbe v Pittwater Council*) as follows:

Height of Building

- The breach in the height limit arises from the need to satisfy the on-site waste collection requirements of Councils DCP.

	<p>Other matters to note, although less direct in the specifics of this proposal, include:</p> <ul style="list-style-type: none"> • The height, bulk and scale of the proposal is consistent with that of the desired future character of the locality, as demonstrated in the accompanying architectural plans. • There will be no loss of views to or from public areas, nor any loss of solar access. • The height proposed is considered to result in a building that will present as a high-quality architectural element in this locality, represents a scale and bulk generally consistent with the desired future character. <p>The objective of each of the development standards can be satisfied through this development as proposed.</p> <p>It follows that this aspect of Clause 4.6 has been satisfied.</p> <p>As to there being 'sufficient environmental planning' grounds to justify the variation, 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. In this context we note that the increased height has been created by satisfying the on-site waste collection requirements of Councils DCP. The public benefit of complying with this aspect of the DCP far outweighs the imperceptible impacts created by the height breach, and the related impacts which are virtually non-existent.</p>
<p>(ii) <i>the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and</i></p>	<p>The proposed development is consistent with both the development standards that are proposed to be varied, as well as the objectives of development in the zone. The development is therefore in the public interest (see para 27 of the judgement).</p>

A more recent case, *RebelMH Neutral Bay Limited v North Sydney Council (2019) NSWCA 130*, further considered requests under clause 4.6. The Court reaffirmed (at [51]):

In order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3)(which is the process required by cl4.6(3)), the request must in fact demonstrate the matters in subcl (3)(which is the outcome required by cl4.6(3) and 4(a_(i)).

Our reading is that a request under cl4.6 will only adequately address cl4.6(3) if the consent authority is satisfied that the matters have in fact been demonstrated. In this regard, we note the minor non-compliance results in no discernible impact and therefore in the circumstances of this case, compliance is unnecessary and would be considered unreasonable if pressed. Additionally, compliance has been achieved with Council's DCP in relation to on-site waste collection vehicles being able to enter and leave the site in a forward direction – the result necessitating an increased floor to ceiling height on the ground level to accommodate waste vehicles. This has been demonstrated earlier in this report and, in particular, in Figure 2 where

the required clearances are indicated in red, and shows the contribution that clearance makes to the overall height of the building. We submit that this element successfully demonstrates sufficient environmental planning grounds to justify the minor variation proposed.

4 CONCLUSION

Compliance with the building height development standard is considered to be unreasonable and unnecessary in the circumstances of the case, and it is considered that there are sufficient environmental planning grounds to vary the standards in this case.

The request to vary the development standards is considered to be well-founded on the grounds that the non-compliance with the building height development standard, *inter alia*:

- Enables compliance with Council's DCP in respect of on-site waste collection vehicles being able to enter and egress the site in a forward direction.
- Enables provision for additional housing stock in a transport-accessible location.
- Allows for the efficient and economic development of a site that is capable of accommodating, and suitable for, the additional height proposed.
- Enables a development that reflects the changing character of the locality without significant impact on the use and enjoyment of adjoining land.
- Does not fetter consistency of the development with the objectives of the building height development standard, or the objectives of the zone.
- Achieves relevant objects of the *Environmental Planning & Assessment Act 1979*, in particular, the provision of housing, in the public interest; and
- Does not raise any issues of State or regional planning significance.

This variation request addresses the matters required to be considered in Clause 4.6 of Penrith LEP 2010. Council is requested to exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the building height standard.