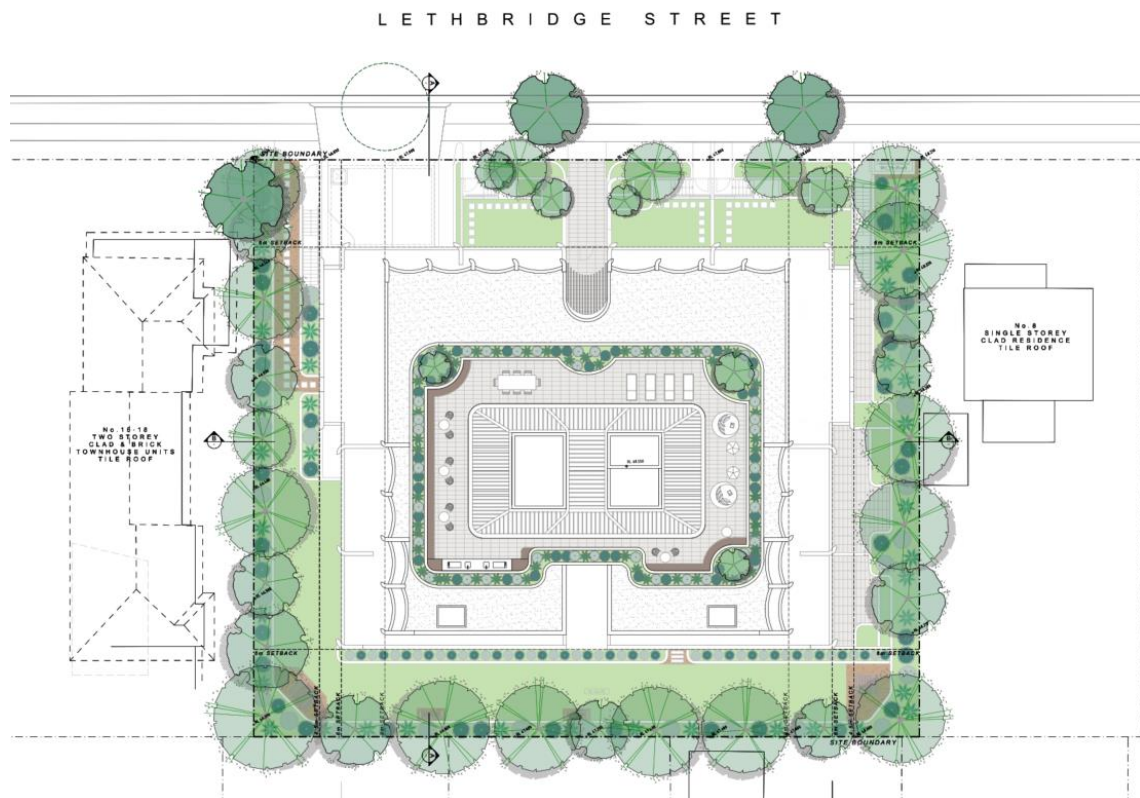




CLAUSE 4.6 VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

Residential Flat Building
10-14 Lethbridge Street, Penrith

Summary Description	
Property:	Lot 456 DP 1114361; 10-14 Lethbridge Street, Penrith NSW 2750
Development:	Construction of a six storey residential flat building (RFB) with two levels of basement car parking and rooftop communal open space, including 36 apartments.
Development Standard:	Clause 4.3 (Height of buildings) of <i>Penrith Local Environmental Plan 2010</i>
Development Plans:	Architectural Plans prepared by PDB Architects, dated 13/12/2021, Issue B



Source: PDB Architects,

Figure 1. Site Plan

1. Background and Summary

Introduction

The proposed development involves the removal of one existing tree, construction of a six storey residential flat building (**RFB**), 2 levels of basement car parking comprising 53 spaces, rooftop communal open space including 36 residential apartments comprising of:

- 9 x 1 bedroom apartments,
- 19 x 2 bedroom apartments, and
- 8 x 3 bedroom apartments.

Location

The site is situated within the Penrith LGA, is approximately 90m west of the Nepean Hospital, 1.6km east of Penrith Railway Station and Penrith Town Centre, and 1.6km west of Western Sydney University (Kingswood Campus).

The Site

The site is 10-14 Lethbridge Street, Penrith which is legally described as Lot 456 in DP1114361. The site is rectangular in shape, with an area of 1,811m², a 45.72m frontage to Lethbridge St and a depth of 39.63m. The site is currently vacant and contains only one existing tree located in the south west corner of the property. Three street trees exist in front of the site in the Lethbridge Street road reserve.

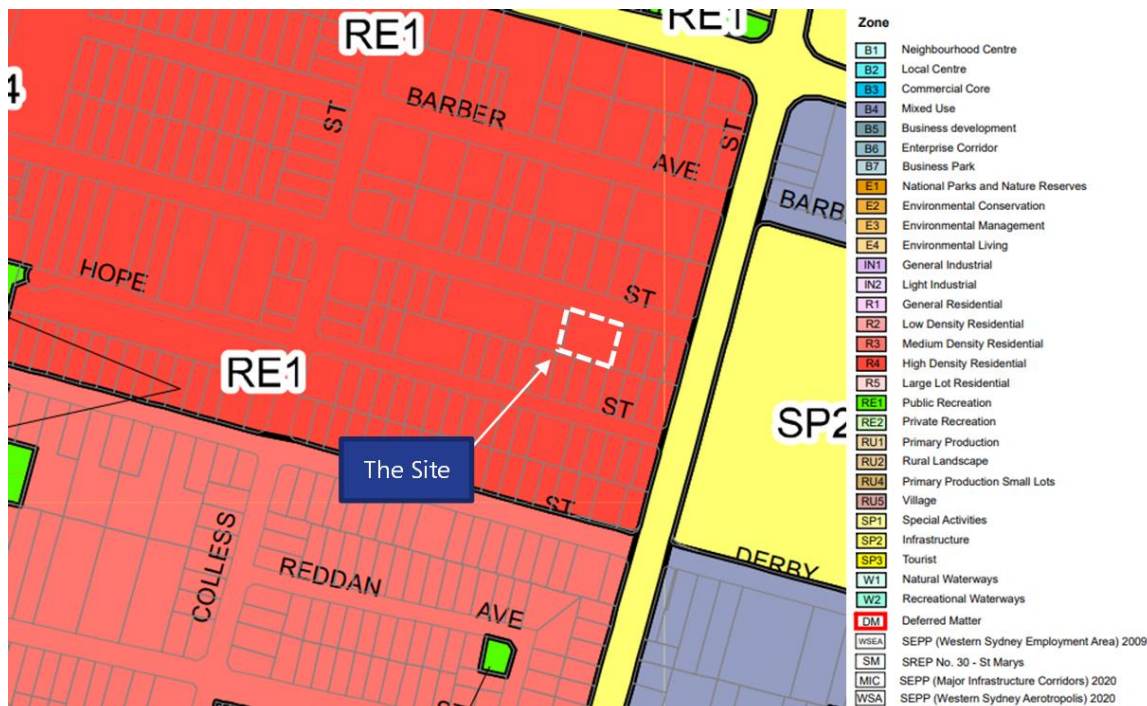


Source: Nearmaps (20 May 2021)

Figure 2. Surrounding locality

Zoning

The site is zoned R4 High Density Residential under *Penrith Local Environmental Plan 2010* (the **LEP**) as shown in **Figure 3**. RFBs are permissible with consent in this zone.



Source: NSW Planning Portal, 2021

Figure 3. Land zoning map

Summary of Clause 4.6 Request

This DA proposes the construction of a RFB that, in part exceeds the 18m maximum building height development standard under the LEP. A variation to the development standard is sought having regard to the site context, compliance with the objectives of the standard and a site responsive design that provides a high level of internal amenity and social interaction without adversely impacting the amenity of the surrounding properties and public domain.

2. Authority to vary a development standard

The objectives of clause 4.6 of the Penrith LEP seek to recognise that in particular circumstances strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the standard can be achieved as outlined below:

(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 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.

(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

(ii) 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

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU6 Transition or Zone R5 Large Lot Residential.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(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,

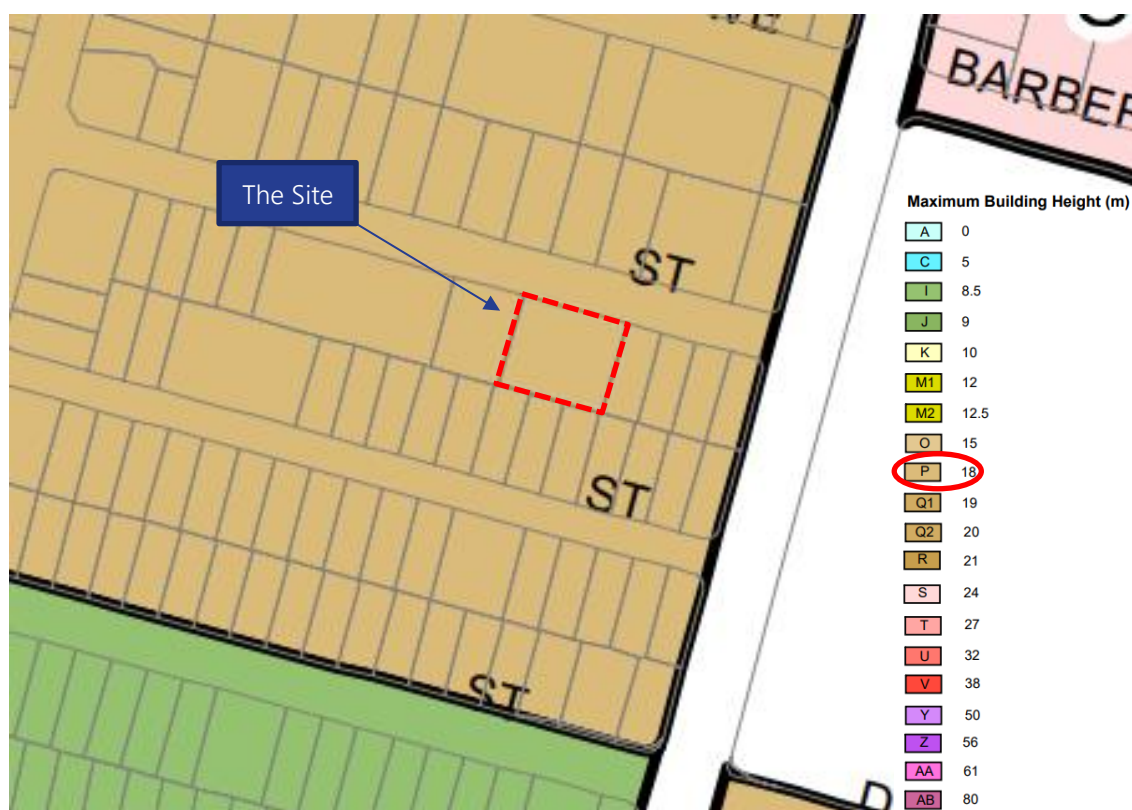
(ca) clause 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 7.24, 8.4(5) or Part 9.

3. Development standard to be varied

A variation is requested to Clause 4.3 *Height of buildings* in Penrith LEP which requires:

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The site is subject to a maximum building height of 18 metres as illustrated at **Figure 4**.



Source: NSW Legislation, 2021

Figure 4. Height of buildings

The WLEP dictionary provides the following relevant definitions:

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.

4. Extent of variation

The roof of the building is located below the 18m height control, however portions of the communal open space, lift overrun and a small portion of the parapet and architectural articulation on the western elevation will exceed this control by varying degrees (see **Figures 5 and 6**):

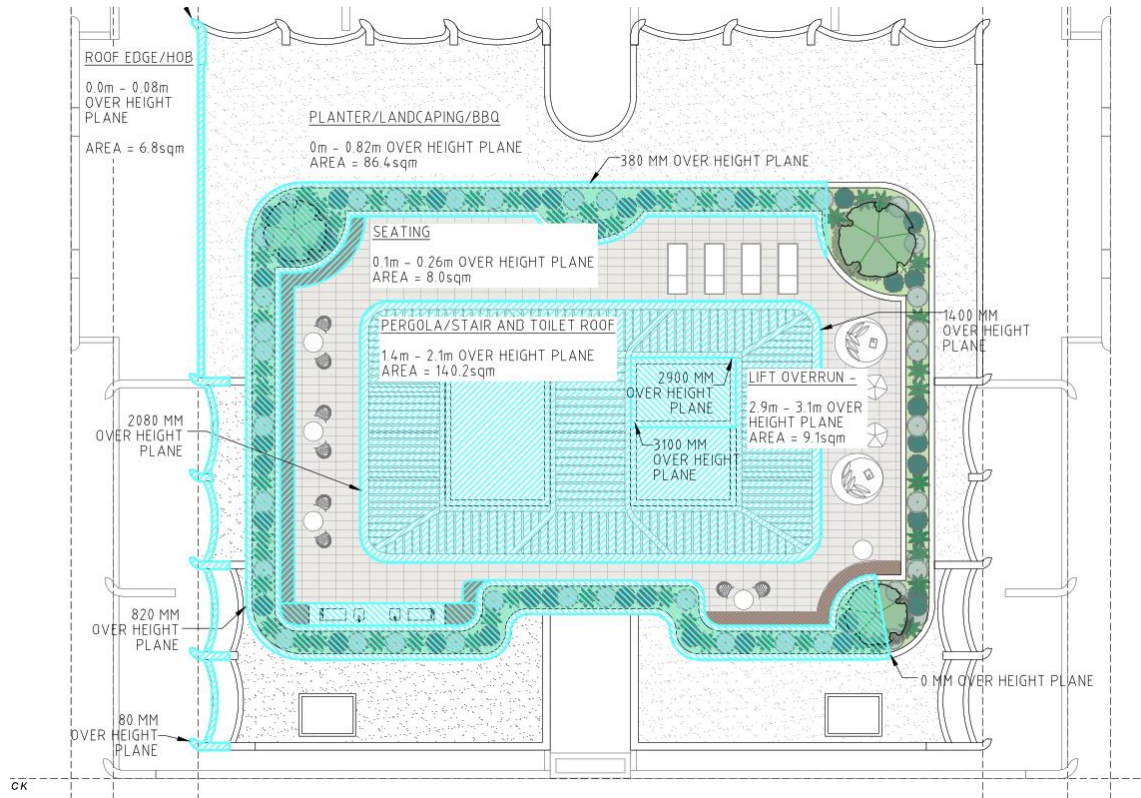
- 6.8m² of parapet and architectural articulation on western portion of the building is between 0.015m - 0.08m over.
- 86.4m² of the landscape planter and seating is over the height limit a maximum of 0.8m at the western elevation, but under the height limit at the eastern elevation.
- 86.4m² of the pergola and stair/toilet roof are between 1.4m - 2.1m over.
- 9.1m² of the lift overrun is between 2.9m - 3.1m over.

The maximum height of the building is located at the eastern portion of the lift over-run. The maximum height of the building at this location is 21.1m, representing a variation of 3.1 metres (17.2%) above the 18 metre height standard.



Source: PDB Architects

Figure 5. Height plane diagram



Source: PBD Architects

Figure 6. Portions of building over the 18m HOB Development Standard

Source: PBD Architects

5. Objectives of Clause 4.3 Height of building

The objectives of Clause 4.3 of WLEP are outlined below:

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

- (a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*
- (c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*
- (d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

All objectives are of specific relevance to the site and proposed development.

6. Assessment

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.3 (3)(a))

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the maximum building height requirement is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council (2007) NSWLEC 827*, Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

We note that whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6. Regard is also had to the Court's decision in *Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90* and *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, which elaborated on how these five ways ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone.

In addition to the above, Preston CJ further clarified the appropriate tests for a consideration of a request to vary a development standard in accordance with clause 4.6 in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. This decision clarifies a number of matters including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined in *Wehbe* are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be "sufficient" to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal satisfies at least one of the five ways established in *Wehbe* that demonstrate that the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.

1st Way – The objectives of the standard are achieved notwithstanding non-compliance with the standard

The proposal satisfies the objectives of the standard to the extent relevant to the current proposal, and compliance with the maximum building height standard in the circumstances is considered both unreasonable and unnecessary for the following reasons.

Objective (a) - to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality

The proposal is for a six storey residential flat building with basement car parking. The site is located within an area currently undergoing transformation to a high density residential environment. The desired character of the surrounding locality can be determined from surrounding recently constructed and/or approved RFBs – including the approved development directly adjoining the site's eastern boundary.

The approved development over 2-8 Lethbridge Street is of a similar scale to that on the site. The approved development is of a similar six storey scale that includes a rooftop terrace and two lift over runs that exceed the maximum height of building development standard. The roof level of the adjoining development is approved at RL69m with the lift overrun at RL70m for the easternmost portion of the development. The western portion of the approved development (directly adjoining the site subject of this DA) has the roof is at RL66m.

The lift over runs and communal open space of the adjoining approved development has been setback from the façade to ensure it is not immediately visible from the public domain and therefore does not contribute to the building's bulk and scale.

The proposed height and scale continue the scale established by the adjoining approved development. The roof of the development is set at RL64.8m, which continues the stepping down of form from west to east. The proposal also includes a communal open space and lift overrun that exceed the maximum height of building control, but are setback to ensure that the exceedance is not immediately evident.

The zoning and 18m height standard would implicitly contemplate 6 storey RFB development. The proposal will provide a height bulk and scale commensurate with that expectation. The areas of the building that exceed the height standard are either screened from view from the public domain or are inconsequential to the way the size of the building is perceived. This would be consistent with recent approvals in the locality. Consequently, the proposal would be consistent with this objective despite the variation to the height development standard.

Objective (b) - to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public area, including parks, streets and lanes.

The proposal maintains separation distances commensurate with the design criteria in the Apartment Design Guide (ADG), which the accepted standard to ensure visual privacy. The proposal has also demonstrated in the Sun Eye Diagrams in **Appendix D** that despite the development, surrounding properties will maintain a suitable level of solar access – including those existing dwellings to the

south which all maintain over 2 hours direct solar access to at least 50% of the backyard during mid-winter.

Objective (c) - to minimise any adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,

The site is not listed as a heritage item nor is it located within a heritage conservation area of area with scenic or visual importance.

Objective (d) – to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.

Further to the response to Objective (a) above, the proposed development continues the stepping of building scale from the west to the east. The approved building located on the corner of Parker and Lethbridge Street has a roof level of RL69m. The approved roof level of the RFB directly adjoining the site has a height of RL66m. The proposal has a roof level of RL64.8m.

2nd Way - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

This consideration is not relevant in this case.

3rd Way - The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.

This consideration is not relevant in this case.

4th Way - The development standard has been virtually abandoned or destroyed by the Council's own decisions

Although the maximum height of building standard may not have been completely abandoned or destroyed, the proposal provides an exceedance to the standard that is reflected in previous decisions. Considering Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* detailed that the five ways of determining whether a standard is unreasonable or unnecessary are not exhaustive, the fact that the nature of the exceedance in the proposal reflects the exceedance of the adjoining approved development can still be considered in determining whether the application of the standard is reasonable or necessary.

The adjoining development has similarly provided all floor area below the maximum height of building control and only located the communal roof top area and lift over-runs above. The Council Report for the adjoining development , DA16/0182.02 dated 30 November 2017 outlines that:

"The development exceedance is due to the provision of a roof top communal open space and an architectural roof feature. These non-compliances are centrally located on the building and will be imperceivable from street level".

Ultimately the proposal is consistent with the adjoining development and provides the same justification for the variation to the height standard that was supported under DA16/0182.02 including:

- The proposal is consistent with the height, bulk and scale of the emerging and desired future character of the locality.
- A compliant development will not improve or alter the outcome in relation to visual bulk, scale, amenity and solar access.
- The building is below the height limit on all elevations (other than a small edge of the façade material at the western edge – which results from the natural slope of the land) which provides a suitable scale in the site context
- The proposal provides a high quality urban form and provides a building that can contribute to a varying skyline given the recent increase in height limit in this area.
- There are no adverse environmental impacts arising from the proposed height variation.

5th Way – The zoning of the site is unreasonable or inappropriate and consequently so is the development standard.

This consideration is not relevant in this case.

Are there sufficient environmental planning grounds to justify contravening the development standard? (Clause 4.6(3)(b))

There are two primary environmental planning grounds which support the contravention to the height of building standard. These grounds are as follows.

The need to provide a suitable, high quality communal open space with no impacts to surrounding properties in terms of overshadowing or privacy impacts.

The exceedance of the height control is limited to structures associated with providing suitable amenity and access to the rooftop terrace. The floor level of the rooftop terrace is located below the maximum height of building control. Garden beds around the edge of the space and shade structures have been provided to ensure the space is usable and private.

Further, the rooftop terrace is serviced by a lift so that equitable access can be provided. The lift overrun contributes to the greatest exceedance of the height control. Notably all these exceedances have been located in the centre of the rooftop – this has ensured that the exceedance is not visible from the public domain along Lethbridge Street (see **Figure 7**) and that the shadow of these exceedances fall within the greater building shadow between 9am-3pm during mid-winter (see shadow diagrams in **Appendix D**).

Ultimately, strict compliance with the maximum height of building development standard would not result in better amenity to surrounding development or the public domain. Furthermore, requiring strict compliance with the development standard would result in a worse outcome for the future occupants of the development – as access would not be equitable, rooftop planting would be reduced and there would be no shade structures.



Source: PBD Architects

Figure 7 Perspectives of the development viewed from up and down Lethbridge Street - demonstrating that the communal open space is not visible

The development provides a comparable height outcome to recently approved RFB on the adjoining land and represents the desired outcome for the surrounding locality.

As outlined throughout this Clause 4.6 report the justification provided in this request is consistent with those provided for the approved building to the east. The proposal has a built form scale and design that reflects the accepted character for the area established under the approval of DA16/0182.2.

Consequently, the proposal is consistent with the following objects of the EP&A Act:

(c) to promote the orderly and economic use and development of land,

(g) to promote good design and amenity of the built environment,

There are negligible material negative impacts resulting from the proposed variation from the height of building standard.

Is the proposed development in the public interest? (Clause 4.6(4)(a)(ii))

The proposed development is in the public interest because it:

- Facilitates a development that is not inconsistent with any objectives of the standard and the intent of the R4 High Density Residential zoning of the site. Consistency, with the objectives of the standard has been addressed previously under Wehbe methods.
- Provides additional housing choice within the Sydney metropolitan region and Penrith LGFA, in the form of high amenity residential apartments.

In regard to the first point, the relevant objectives of the R4 High Density Residential zoning of the site area are:

- *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 ensure that development reflects the desired future character and dwelling densities of the area.*

The proposed RFB will further increase the employment and business opportunity in the Penrith LGA during construction. The proposal also provides a mix of apartment sizes for different market entry points. The proposed RFB is located within an area transitioning to high density residential character and reflects a form that is consistent with the desired future character associated with the R4 zone. Consequently, the proposal would be consistent with the objectives of the zone.

Consideration of concurrence by Director-General (Clause 4.6(4)(b) & (5))

Concurrence to the proposed variation is required by the Secretary pursuant to clause 4.6(4)(b), as we understand that on account the proposed variation to the development standard is greater than 10%, concurrence is not assumed as set out in the Assumed Concurrence Notice issued by the Secretary of the Department of Planning and Environment dated 21 February 2018 (attached to DPIE Planning Circular PS 18-003).

Despite this, the proposed variation to the maximum height of building standard is not considered to be detrimental to any matter of significance for state or regional environmental planning.

In the circumstances of the application, there is no public benefit, if not a significant loss to the local community, in maintaining the development standard. To the contrary and consistent with the objectives of clause 4.6, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree of flexibility in applying a development standard.

In relation to clause 4.6(5)(c), we note that no other matters have been nominated by the Secretary for considerations.

7. Conclusion

A variation to the strict application of Council's maximum building height standard is considered appropriate for the proposed development on 10-14 Lethbridge Street, Penrith.

The proposed height results in an optimum outcome for the site that provides roof top communal open space with equitable access design and is responsive to the site context. There are negligible impacts resulting compared to those cause by a compliant height.

The proposal meets the intent of the height of building standard and in accordance with clause 4.6 of the WLEP, demonstrates that the development standard is unreasonable and unnecessary in this case and that the variation is justified.