

SPECIALIST TOWN PLANNING SERVICES



Clause 4.6 Variation Request – Building Height (Clause 4.3)

Shop Top Housing Development

1 – 3 Crown Street, Harris Park NSW 2150

(Lot A & B, DP 326493)

January 2022

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1. Introduction

The proposed development exceeds the maximum permitted height of building (HOB) standard of Parramatta Local Environmental Plan 2011 (PLEP 2011). The statement of environmental effects (SEE) submitted with the development application provides detailed discussion on the proposed development and its suitability for the subject site.

This Clause 4.6 Exceptions to Development Standards request has been prepared by Specialist Town Planning Services Group (STPS) on behalf of IDA Design Group. It is submitted in support of a development Application (DA) for a two storey shop top housing development at 1 – 3 Crown Street, Harris Park. The proposal includes:

- Demolition of existing structures.
- Basement Level
 - 9 x residential parking spaces (including 1 x accessible space and 2 visitor spaces)
 - 13 x commercial parking spaces (including 1 x accessible space)
 - 5 x bicycle spaces
 - 1 x loading bay
 - Services and storage
 - Lift and stairs access to the upper floors
- Ground Floor
 - 4 x commercial suits fronting on Crown and Harris streets
 - Commercial and residential waste rooms
 - Central lobby, lift and stairs access to the first floor
 - Communal open space
 - Amenities and services
 - Vehicular access ramp off Harris Street
- First Floor
 - 2 x 1 bedroom unit (including an adaptable unit)
 - 3 x 2 bedroom unit
 - 1 x 3 bedroom unit
 - Communal open space

Specifically, the request seeks approval to vary the height of buildings development standard in Clause 4.3 of the PLEP 2011. For the avoidance of doubt, the development standard is not specifically excluded from the operation of Clause 4.6 of PLEP 2011. Clause 4.3 prescribes a numerical building height limit of 6m over the subject site. The proposed building height departs from this standard. Clause 4.6 of PLEP 2011 enables consent for development to be granted even though it contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

2. The Development Standard & Variation Sought

2.1 *The applicable planning instrument which specifies the development standard*

Paramatta Local Environmental Plan 2011 (PLEP 2011).

2.2 *The relevant clause*

Clause 4.3 – Height of buildings.

2.3 *The provisions of the relevant clause*

Clause 4.3 – Height of buildings.

The development standard to which this request for contravention relates is Clause 4.3(2) of PLEP 2011 – Height of buildings, which specifies that:

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 nominated height on the map is 6m.

2.4 *The contravention sought*

The proposed development contravenes the 6.0m height development standard as follows:

Proposed height of the main building = 6.410m to 8.410m

Variation = 0.410m to 2.410m

Proposed height of the tower associated with the colonnade wall = 10.434m

Variation = 4.434m

2.5 *Illustration of the proposed contravention*



Image 1 – Height of Building Map – Source PLEP 2011 + Edits - E = 6.0m - J2 = 9.2m – N1 = 13m



Image 2 – Proposed North Elevation (As seen from Crown Street)



Image 3 – Proposed West Elevation (As seen from Harris Street)

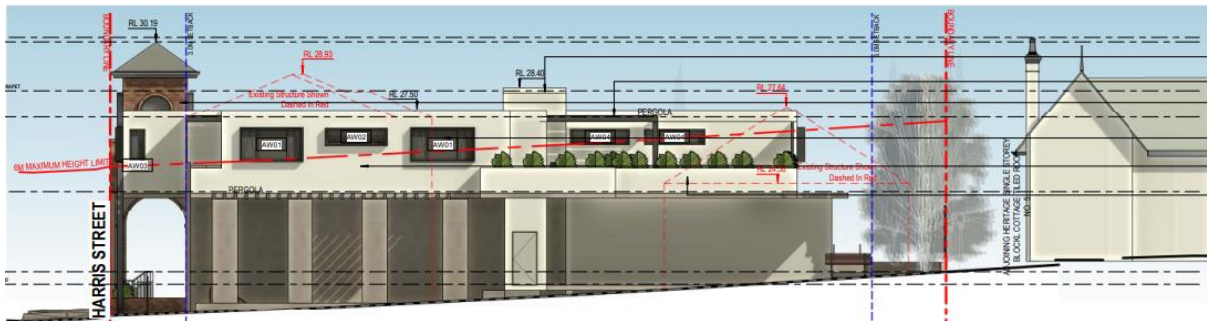


Image 4 – Proposed South Elevation (As seen from the common boundary with No. 49 Harris Street)

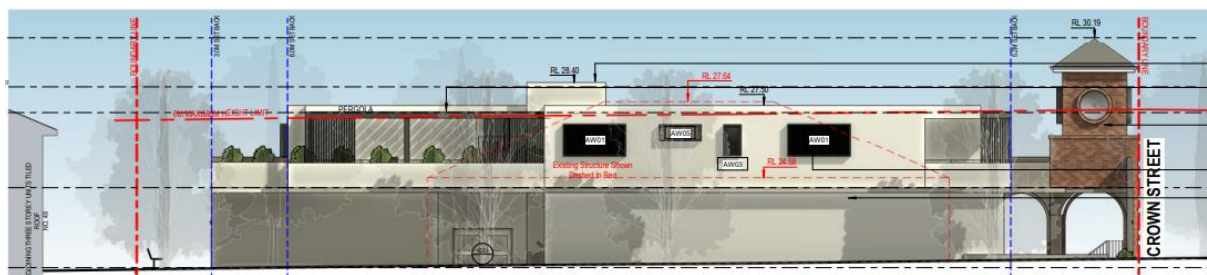


Image 5 – Proposed East Elevation (As seen from the common boundary with No. 5 Crown Street)



Image 6 – 6m Height blanket over the proposed building



Image 7 – 6m Height blanket over the proposed building

2.6 Causes of the contravention

Primary reasons for the height contravention are as under:

- The site has a cross fall of 2.24m from north eastern corner to the south western corner.
- Minimum floor to ceiling height of 3.5m from ground floor level and 2.7m for first floor level of a mixed use development (Section 3.3.5, Control C12, Part 3 Development Principles of Parramatta Development Control Plan 2011). This would necessitate a minimum height of 7.0m for a two storey development with a flat roof. Additionally, any lift overrun will be in a range of 1 to 2m.
- The maximum exceedance of height variation relates to a decorative tower associated with the colonnade wall. The tower is located at the corner of Crown Street and Harris Street and it is

primarily an architectural feature that does not offer any habitable floor nor it is capable of being converted into any habitable floor.

The primary focus of this report and arguments presented, relate to the contravention of height by the proposed main building, however all arguments should also be considered as inclusive of the architectural tower.

3. Provisions of Clause 4.6

3.1 General

Clause 4.6 seeks 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. As the following request demonstrates, flexibility may be afforded by Clause 4.6 because compliance with the height of buildings development standard is unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the standard. This request also demonstrates that the proposal will be in the public interest, as the proposed development will be consistent with the objectives of the development standard and the zoning of the site.

In preparing this variation request, consideration has been given to the following matters:

- *Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.*
- *Relevant planning principles and judgments issued by the Land and Environment Court. The Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 court judgment is the most relevant of recent case law.*
- *Wehbe v Pittwater Council [2007] NSWLEC 827*
- *Ex Gratia P/L v Dungog Council (NSWLEC 148).*

The consent authority must, primarily, be satisfied that the applicant's written request adequately addresses the 'unreasonable or unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

On the 'Five Part Test' established under *Wehbe v Pittwater Council [2007] NSWLEC 827*:

"The five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way..." [22]

That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

“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” [26]

That 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:

“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 will have a better environmental planning outcome than a development that complies with the development standard.” [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

3.2 Objectives of Clause 4.6

Clause	Objectives	Justification
4.6(1)(a)	<i>to provide an appropriate degree of flexibility in applying certain development standards to particular development,</i>	The proposal seeks to utilise this clause to provide appropriate flexibility in application of the maximum building height standard to permit approval.
4.6(1)(b)	<i>to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</i>	<p>The proposal would achieve better (planning) outcomes, for the development:</p> <ul style="list-style-type: none"> • The proposal is aligned with the natural topography involving minimal cut and fill resulting in minor height encroachment at the interface with heritage listed building at No. 5 Crown Street; and • Adequate floor to ceiling height for ground level commercial use and first floor level residential use that will ensure excellent internal amenity for future uses. <p>The proposal would achieve better (planning) outcomes, from the development:</p> <ul style="list-style-type: none"> • An attractive design at the corner location that would positively contribute to the existing streetscape; • Two storey shop top housing development will offer a compatible building envelope with both residential and commercial land uses in the vicinity; • Open style commercial floor at the ground floor and private open space at the first floor residential use will offer enhanced street surveillance and improved sense of security for this corner location; and • Improved choices for residential and commercial floors as envisaged by the zoning of subject land.

3.3 *that compliance with the development standard is unreasonable or unnecessary in the circumstance of this case (Clause 4.6(3)(a))*

In *Wehbe v Pittwater* [2007] NSW LEC 827, Preston CJ identified five ways in which it could be shown that application of a development standard was unreasonable or unnecessary. However, His Honour said that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

The five methods outlined in *Wehbe* are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).
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 (Fourth Method).
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 (Fifth Method).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method.

The objectives of the development standard are achieved notwithstanding the noncompliance (First Method).

The objectives of height of building standard are as follows:

- (a) *to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,*

The first objective is primarily to guide the plan making process where appropriate heights are to be nominated for different areas and varying land uses. It is our observation that the nominated height and zoning of the subject site is not entirely consistent with the above objective.



As shown in the image 8, the subject site and two other properties directly opposite (facing Harris Street) are zoned B1 as an extension of the commercial strip that continues along Marion Street and Station Street towards west of the subject site. The height of all B1 zoned land in the vicinity, with the exception of subject site and the two properties directly opposite (facing Harris Street) is 9.2m. The B1 zoning allows shop top housing development and as discussed earlier in this report, for any two storey development with compliant floor to ceiling height, a minimum height of 7 - 9m is required.

Expanding on the 'fifth test' under *Wehbe v Pittwater* [2007] NSW LEC 827, as noted above; it is our understanding that zoning of subject land and height standards contradict each other. If the intention of the zoning was to allow single storey development only, the zoning should have been kept to R2 Low Density residential or shop top housing development should have been nominated as a prohibited land use. A logical end of B1 Neighbourhood zone is the south western corner of Marion and Harris Street.

Contrary to the above, the B1 zoning of the subject site is not considered entirely inappropriate as it offers an end to the low density residential zone and beginning of commercial zone. This is similar to the zoning interface at the opposite corner of Harris Street and Marion Street. The opposite corner however offers a height standard of 9.2m that can accommodate a two storey shop top housing development.

Nominated height for land to the south and west of the subject site is 13.0m and it is zoned R4 High Density Residential. A four storey residential flat building can be accommodated within 13.0m height blanket whereas 6.0m height in a B1 zone can only accommodate a single storey commercial building. This zoning and height controls will result in an appropriate height transition where 4 storey buildings will be sitting next to single storey buildings.

- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*

Visual Impact

The proposal offers a two storey shop top housing development and the proposed building envelop is consistent with other single and two storey developments in the vicinity. The proposal will not

have any adverse visual impact for a causal observer from surrounding public areas or from adjoining commercial/residential buildings.

The proposed development will positively contribute to the existing and desired character of local area when viewed in connection with the existing and emerging development context. The built form of this development is considered compatible with the context and not of a form that may be interpreted as visually “jarring” from Crown Street, Harris Street or neighbouring properties. It is evident that the siting and scale of the height breach is such that it will not preclude the ongoing integration between visual built forms serving as an affirmation of the objective, and not that of a building that abandons height controls.

As outlined in Image 9 below, the scale of the development is not inconsistent with several other two and three storey development or single storey development with high pitched roof.

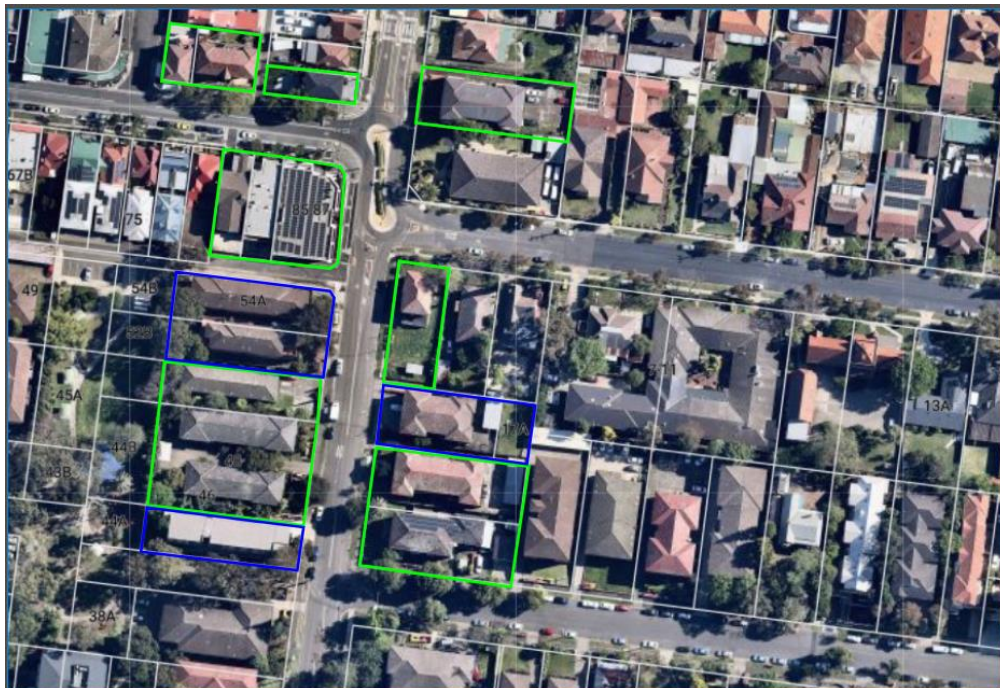


Image 9 – Two and three storey buildings within visual catchment – Green Box - 2 Storey and Blu Box - 3 Storey

The significance of proposed height variation is more prominent along Harris Street. The interface along Harris Street will be the colonnade wall and corner tower followed by main building. As such any visual impacts along this elevation will not be visually intrusive. The corner tower offers the highest point of the development and this will become a landmark offering positive visual experience.

Disruption of Views

There are no significant views that the proposed development will block or obscure.

Loss of Privacy

The proposal is designed in such a way that there will be no adverse privacy impacts on the adjoining commercial development to the east and residential flat building to the south.

Loss of Solar Access

Hourly shadow diagrams are included in the architectural package submitted with the development application, refer DWG 600 and 601. The shadow diagrams demonstrate that the proposal will not unreasonably overshadow the adjoining 3 storey residential flat building at No. 49 Harris Street. It is important to note that a minimum 12m separation is maintained between the subject development and existing residential flat building at No. 49 Harris Street that accommodates a three storey development with ground level parking and two residential floors above.

The proposal is entirely consistent with the second objective of height development standard.

- (c) *to require the height of future buildings to have regard to heritage sites and their settings,*

The subject site is located within Experiment Farm HCA and in vicinity of several heritage items including an item of local significance at the adjoining property to the east at No. 5 Crown Street. The height of the proposed development does not exceed the adjoining heritage item to the east or other items in the vicinity. Refer to the following two sketches that demonstrate the height of the proposed development, height of the existing building on the subject site and height of adjoining heritage building to the east. A better version of these sketches is included within the architectural drawing package submitted with the development application. Refer DWG DA 200, DA 201 and DA 300.



Image 10 – Comparison of proposed height with existing building on the site and adjoining heritage building at No. 5 Crown Street



Image 11 – Comparison of proposed height with existing building on the site and adjoining building to the south and heritage building in the background.

The other heritage listed buildings in the vicinity are generally single and two storeys with comparable heights. The proposed development with a flat roof and compliant floor to ceiling height will not compete for attention and by no means dwarf their older neighbours. The proposal is considered consistent with the third objective of height development standard.

- (d) *to ensure the preservation of historic views,*

As discussed under objective b above, the proposed development will not block any significant views from any vintage points surrounding the site. Views to the chimneys and roof profile of the adjoining heritage listed building at No. 5 Crown Street will improve as a result of proposed building with flat roof. The proposal is considered consistent with fourth objective of height development standard.

- (e) *to reinforce and respect the existing character and scale of low density residential areas,*

The general built character of the area is single to three storey residential and commercial buildings. The purpose of this report is not to carry out any detailed character analysis and it is merely a brief mention here that there have been several planning principles established by Land & Environment Court to assess local character. A common theme of those principles is that to be compatible with the local character does not mean to be similar; rather be in harmony with other buildings. As demonstrated through this report and SEE, submitted with the development application, the proposed two storey shop top housing is not considered out of character for the area. The proposal offers a unique mix of contemporary architecture with traditional features within a landscape setting which will marry well with its older neighbours. The proposal is considered entirely consistent with the fifth objective of height development standard.

- (f) *to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.*

The above objective primarily relates to high rise commercial/residential building within commercial centres. The proposal is a two storey shop top housing with compliant setbacks along common boundaries with other residential properties. It will generally maintain exiting exposure to the sky and availability of natural day light for the neighbouring buildings. It will not unduly overshadow the public domain around it nor will result in any wind tunnel effects for any public areas. The proposal is considered entirely consistent with the last objective of height development standard.

3.4 *that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))*

The environmental planning grounds relied upon in a written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus of the request needs to be on that aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds presented in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as summarised in (Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118).

Contravention of the development standard would result in a more satisfactory environmental planning outcome. Specifically, the proposed development is supportable on environmental planning grounds for the following reasons:

- The proposed development provides an intensity of development envisaged by PLEP 2011 for the site;

- The social benefits of providing housing stock within a highly sought after location should be given weight in the consideration of the variation request;
- A compliant building would lose all residential units rendering the site unsuitable for shop top housing development - a permitted land use within the zone;
- Strict compliance with the height will see a single storey commercial building which will be a misfit in the local context;
- The proposed development is for a two storey shop top housing in an area that displays numerous examples of two and three storey development. Therefore, there would be an expectation by the viewer that any new development form emerging within the context would also display this more visually identifiable form;
- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 of the Parramatta LEP 2011;
- The proposal is compatible with the existing and desired future character of the locality. That is, the non-complaint element will not bring with it a form greater than anticipated by the relevant development standards and controls. The height breach is also, in part, a result of the site topography which falls across the site.
- The slope of the site being a cross fall of approximately 2.24m from the north eastern corner of the site down towards the south western corner, has been a determinative factor with regards to the extent of height variation observed across the building;
- The perception of building height will be mitigated through introduction of colonnade wall with a tower along the street edges and fenestration together with choice of materiality for the first floor level. In addition, the proposed building successfully mitigates environmental impacts such as overshadowing, privacy and visual impact; and
- 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:
 - The extent of the additional height creates no significant adverse overshadowing impacts to adjoining properties when compared to a compliant building envelope. The proposal will retain reasonable solar access to the neighbouring properties, with only negligible differences to a compliant building height. As such, the proposal will continue to retain adequate solar access to neighbouring properties.
 - The height breach does not result in any adverse additional privacy impacts. As such, the non-compliance will have no greater impact on the privacy of adjoining properties when compared to a compliant built form; and
 - The height breach will not result in any significant view loss. The subject site does not contain any significant views across or from the public domain.

The above environmental planning grounds are not generic comments. These are unique circumstances for the proposed development, given the negligible impacts on the amenity of surrounding residential and commercial properties, site's topography and that the proposal seeks to achieve a high level of architectural design for the subject site. Insistence on compliance with the height control will result in poor architectural design. The additional height does not adversely impact the amenity of the neighbouring properties (when compared to a compliant built form) and has been designed to ensure the additional height is not visually dominating from the public domain or neighbouring properties.

3.5 *The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 3 - Clause 4.6(4)(a)(i)*

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed. In accordance with paragraphs 15 and 26 of the judgment the following commentary is offered:

The first point of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). In that

- a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and,
- b) that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) and Clause 4.6(3)(b) in preceding sections of this report.

The second point of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second point of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in clause 4.6(4)(a)(ii) are addressed in Section 3.6 below.

3.6 *The proposed development will be in the public interest – Clause 4.6(4)(a)(ii)*

Objectives of Clause 4.3 of PLEP 2011 are discussed in Section 3.3 of this report. The proposed development is generally consistent with the objectives of Clause 4.3.

Objective of B1 zone:

To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.

The SEE submitted with the development application advances the following points in support of proposed development's consistency with the zone objective:

- The proposal offers street level commercial floor that can be used for a range of small scale business and retail activities.
- The proposal will provide high quality residential accommodation with public transport, education, health, entertainment and employment opportunities available in proximity;
- The proposal will provide commercial and residential accommodation that is well-integrated with the existing low to high density residential and commercial built character of the area;
- Through the incorporation of high-quality urban design, the proposed development will positively contribute towards revitalization of the area;
- The proposal has provided adequate setbacks and building separation from the adjoining residential properties to the east and south; and
- The proposed development has been designed to facilitate passive surveillance of the public domain along Crown and Harris Streets.

3.7 Concurrence of the Planning Secretary - Clause 4.6(4)(b)

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained. Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

3.8 Weather contravention of the development standard raises any matter of significance for State or Regional environmental planning - Clause 4.6(5)(a)

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

3.9 Public benefit of maintaining the development standard - Clause 4.6(5)(b)

Pursuant to *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development".

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standard, whilst better planning outcomes are achieved.

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

3.10 Consent authority to keep a record of its assessment – Clause 4.6(7)

The Consent Authority must keep a record after determining this DA.

4. Conclusions

This Clause 4.6 variation request to Clause 4.3 of PLEP 2011 should be supported on the basis that the strict application of the development standard to the DA is both unreasonable and unnecessary given the variation is well founded and detailed in this report and will provide for quality residential apartment development for the needs of the community.

The overall development has been designed to cater for the slope of the site in an effort to reduce the amount of level changes throughout the ground floor level across the site and to ensure for accessible pathways throughout and via proposed landscaped areas.

For the reasons set out in this report, the shop top housing development should be approved with variation to numerical height of building standard in Clause 4.3. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the numerical non-compliance with the development standard.