

Clause 4.6 Variation Request – Height of Buildings

Harrington Water Estate Residential Flat Building

39 Josephine Boulevard, Harrington
(Lot 4122 in DP1065326 and part Lot 49 in
DP1239209)

Prepared by Willowtree Planning Pty Ltd on
behalf of Roche Group Pty Limited

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation request has been prepared in accordance with Clause 4.6 of the *Greater Taree Local Environmental Plan 2010* (GTLEP2010) to accompany Development Application (DA) which seeks consent for the proposed Residential Flat Building (coupled with two (2) and four (4) storey elements) at 39 Josephine Boulevard, Harrington (Lot 4122 DP 1065326) and part Lot 49 DP 1239209 – Josephine Boulevard, Harrington (herein referred to as the 'Site').

Specifically, the proposal seeks variation to the maximum building height prescribed in Clause 4.3 of the GTLEP2010 across relevant portions of the Site from 8.5 m to **9.7m** (Lot 4122 DP 1065326) and 14.5 m to 15.7m (part Lot 49 DP 1239209).

This Clause 4.6 Variation has been prepared in accordance with the requirements of Clause 4.6 of GTLEP2010 which includes the following objectives:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In accordance with Clause 4.6(3) of the GTLEP2010, NSW Land and Environment Court (LEC) (as the Consent Authority – including concurrence with MidCoast Council) are required to consider the following:

- "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 Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant Development Standard (Clause 4.3) of GTLEP2010.

1.2 PROPOSED VARIATION

1.2.1 Clause 4.3 Height of Buildings and the Variation Sought

Under the provisions of Clause 4.3 of GTLEP2010, the Site is subject to two maximum building heights: 14.5 m on the western side of the site with a transition to 8.5 m at the Site's eastern edge (property identified as 39 Josephine Boulevard) adjoining the neighbouring single storey residential dwelling at 37 Josephine Boulevard.

The maximum building heights as noted above, are prescribed by the Height of Buildings Map of the GTLEP2010 as illustrated in **Figure 1** below.

Clause 4.6 Variation – Height of Buildings

Proposed Residential Flat Building

Josephine Boulevard, Harrington (Harrington Waters Estate)



Figure 1 Height of Buildings Map under the *Greater Taree Local Environmental Plan 2010* Applicable to the Subject Site and Surrounding Area (Source: NSW Legislation, 2021)

Clause 4.6 Variation – Height of Buildings
Proposed Residential Flat Building
Josephine Boulevard, Harrington (Harrington Waters Estate)

By virtue of interpretation, the proposed building heights have been measured from the vertical distance of the ground level (existing) to the highest point of the building (lift overrun and skylights), in accordance with the definitions bestowed in both the GTLEP2010 and the Standard Instrument. Additional detail on this is addressed below in section 1.2.2.

The proposed development will result in an exceedance of the relevant building heights as follows under the GTLEP2010:

- 39 Josephine Boulevard, Harrington to the top of the lift overrun: **9.7m** (or by 14.12%)
- Part Lot 49 DP 1239209 to the top of the lift overrun: **15.7m**(or by 8.28%)

This proposed variation is shown in the Height Plane Plan, A710, Revision B included in the Amended Architectural Plans prepared by BKA Architecture. A snapshot of each of the height planes is copied below for ease of reference.

The South East View of the height plane indicates that the height is exceeded by the following elements on the eastern portion of the site to which the lower height control of 8.5m applies:

- Top of the built form including parapet which exceeds the height by a max of 349mm
- 2 skylights which exceed the height by 600mm - the form of the skylights have been amended to a flat type design as opposed to the previous triangle shaped skylights to reduce visual perception.
- A lift overrun

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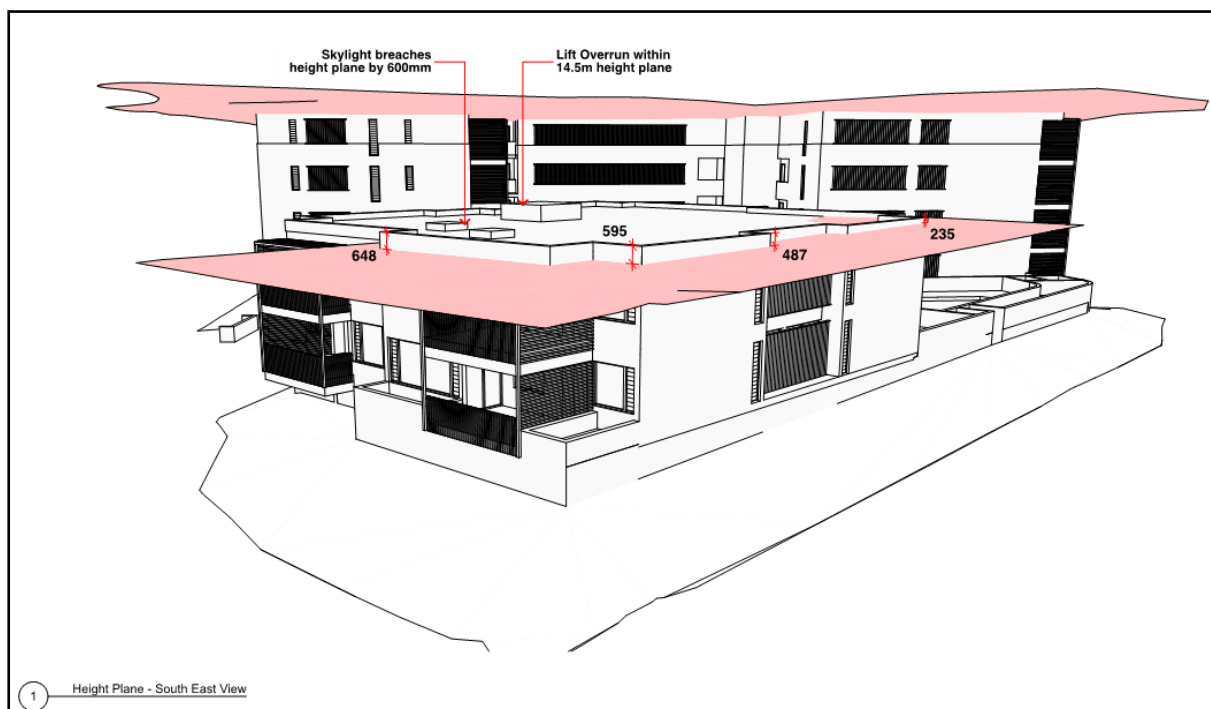


Figure 2 Proposed Height Limit Exceedances at the Site when Viewed from the South East (Source: BKA Architecture, Height Plane Plan, A710, Revision B, 2021)

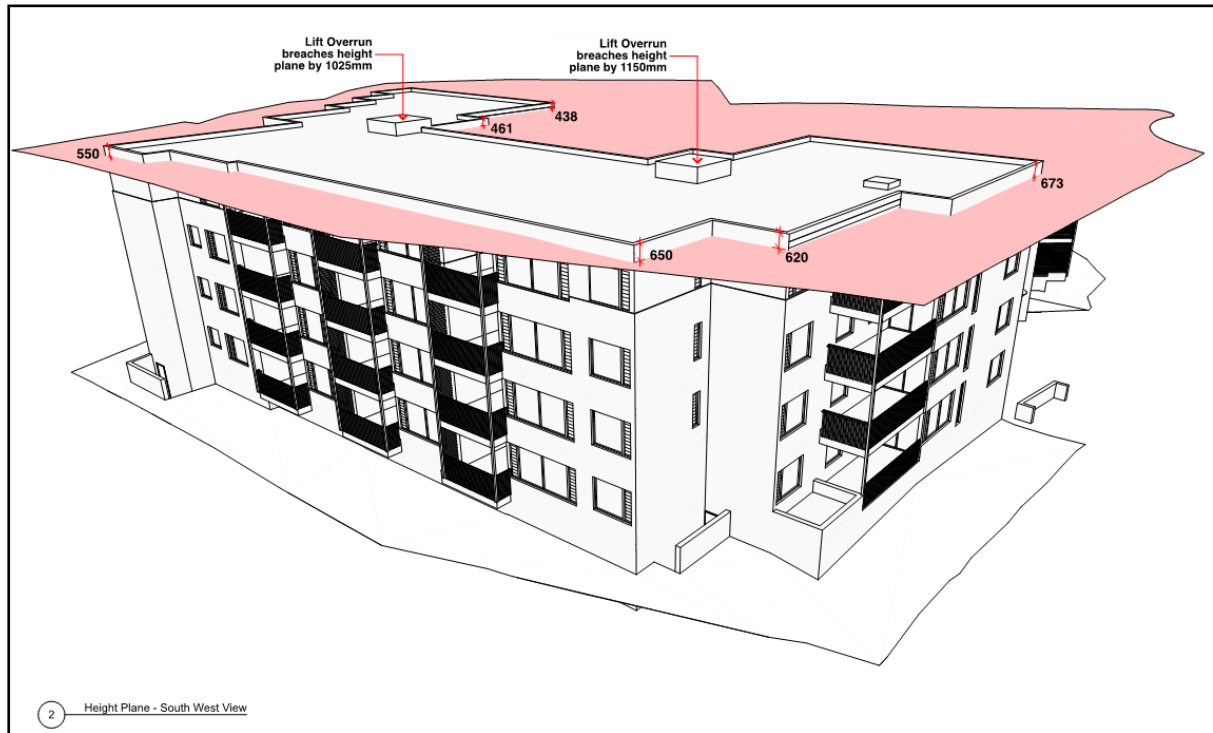


Figure 3 Proposed Height Limit Exceedances at the Site when Viewed from the Southwest (Source: BKA Architecture, Height Plane Plan, A710, Revision B, 2021)

The South West View of the height plane indicates that the height is exceeded by the following elements on the western portion of the site to which the higher height control of 14.5m applies:

- Top of the built form including parapet which exceeds the height by a max of 673mm
- 2 lift overruns which exceeds the height by a max of 1150mm
- A skylight which exceeds the height by less than the height of the lift overruns

1.2.2 CALCULATION OF GROUND LEVEL (EXISTING) AND HEIGHT EXCEEDANCE

The height limit has been calculated using the vertical distance between the 'lowest' point on the site through to the highest point on the proposed built form for both buildings– ie the lift overrun.

The existing topography of the site has a recessed central portion due to previous excavation works. As this is not indicative of the ground level (existing) relative to the surrounding topography, the ground level (existing) has been measured in accordance with the principles in *Bettar v City of Sydney* [2014] NSWLEC 1070. That is using the RLs of the ground along the site's perimeters to extrapolate across the site to the RL on the opposite perimeter, excluding the recessed central portion of the site, to obtain the average of the two surveyed points. This approach was similarly endorsed in *Stamford Property Services Pty Ltd v City of Sydney* [2015] NSWLEC 1189.

The RLs of the ground level on the site's perimeters were obtained from the survey.

The North – South Section on drawing A301, Revision C prepared by BKA Architecture The North – South Section provides a dotted blue line denoting the 14.5m height line relative to the ground level.



PART B CLAUSE 4.6 AND RELEVANT CASE LAW

2.1 CLAUSE 4.6 OF GTLEP2010

In accordance with Clause 4.6 of GTLEP2010, MidCoast Council is required to consider the following Subclauses of Clause 4.6.

Subclause 4.6(3) 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."*

In addition, Subclause 4.6(4) states that (our emphasis added):

- (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.*

Further to the above, Subclause 4.6(5) states the following:

- (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.*

The development standards in Clause 4.3 are not "expressly excluded" from the operation of Clause 4.6.

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 Subclauses 4.6(3) & (4) 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).

The matters are responded to in **Part D** of this Clause 4.6 Variation.

Accordingly, a successful Clause 4.6 Variation must satisfy three limbs explained in detail below:

First Limb – cl 4.6(4)(a)(i)

Clause 4.6(4)(a)(i) provides that the consent authority must be satisfied that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

These matters are twofold:

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

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

“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in Al Maha, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. Properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3). Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced.”

Accordingly, a consent authority must be satisfied:

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

The matters identified in the First Limb are addressed in **Sections 4.3** and **4.4** of this Clause 4.6 Variation Request.

Second Limb – clause 4.6(4)(a)(ii)

Clause 4.6(4)(a)(ii) provides that the consent authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

- a. the objectives of the particular development standard; and
- b. the objectives for development within the zone in which the development is proposed to be carried out.

The opinion of satisfaction under Clause 4.6(4)(a)(ii) differs from the opinion of satisfaction under Clause 4.6(4)(a)(i) (i.e. the first limb) in that the consent authority must be directly satisfied that the Proposed Development will be in the public interest because it is consistent with the objectives of the development standard and the zone, not indirectly satisfied that the applicant's written request has adequately addressed those matters.

The matters identified in the Second Limb addressed in **Sections 4.1, 4.2 and 4.5** of this Variation Request.

Third Limb – clause 4.6(4)(b)

Clause 4.6(4)(b) requires that concurrence of the Planning Secretary of the NSW Department of Planning, Industry and Environment has been obtained.

Clause 4.6(5) outlines the matters to be considered by the Planning Secretary in deciding whether to grant concurrence.

The matters identified in the Third Limb are addressed in **Sections 4.6 and 4.7** of this Variation Request.

Other relevant legal matters

This request has been prepared having regard to the principles established by the Court when considering the assessment of Clause 4.6 requests (including applicable principles adopted from consideration of SEPP 1 requests), contained in the following guideline judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118
- *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130

In summary, the principles adopted and applied in this clause 4.6 request include:

- In *Wehbe V Pittwater Council (2007) NSWLEC 827* Preston CJ held that, it can be demonstrated that the objectives of the development standard are achieved notwithstanding non-compliance with the standard, as below (emphasis added):

“43 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).” Wehbe V Pittwater Council (2007) NSWLEC 827 Preston CJ

This variation adopts Method 1 in *Wehbe* which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard. The factual circumstances surrounding the existing ground level across the site and its presentation to the Street frontages demonstrate that compliance with a height control is unreasonable in the circumstances.

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 held (at paragraph 15) that for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which is the measure by which the development is said to be in the public interest (cl 4.6(4)(a)(ii)).
- At paragraphs 23 and 24 in *Initial Action*, Preston CJ held that with respect to “environmental planning” grounds, although not defined, the grounds should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s. 1.3 of the Act. Further, in order that the environmental planning grounds proffered in the written request are “sufficient”, firstly the focus should be on the aspect or element of the development that contravenes the development standard, rather than the development as a whole and why the contravention is justified and secondly, the environmental planning grounds must justify the contravention of the development standard, not just promote the benefits of carrying out the development as a whole.
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 the Court, in exercising the functions of the consent authority, must “in fact” be satisfied of the above matters. The state of satisfaction that compliance is “unreasonable or unnecessary” and that there are “sufficient environmental planning grounds” to justify the contravention must be reached only by reference to the cl 4.6 request. The evidence in the proceedings cannot supplement what is in the request, although the evidence may assist in understanding the request and in considering its adequacy. On the other hand, the state of satisfaction that the proposed development is consistent with the relevant objectives, and therefore in the public interest, can be reached by considering the evidence before the Court and is not limited to what is contained in the cl 4.6 request.

The underlying purpose of clause 4.6, as stated at 4.6(1)(a) is “to provide an appropriate degree of flexibility in applying certain development standards to particular development”.

PART C DEVELOPMENT STANDARD

2.1 **CLAUSE 4.3 (HEIGHT OF BUILDINGS) UNDER THE GREATER TAREE LOCAL ENVIRONMENTAL PLAN 2010**

The Development Standard being requested to be varied is Clause 4.3 Height of Buildings pursuant to GTLEP2010, which provides the following:

"4.3 Height of Buildings

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure that the height of a building is appropriate for the site,*
 - (b) *to ensure that the height of a building complements the streetscape or rural character of the area in which the building is constructed.*
- (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 GTLEP2010 map referred to in Subclause 4.3(2) identifies the Site as being subject to a maximum building height of 8.5 m (39 Josephine Boulevard) and 14.5 m, which applies to the remainder of the Site. Pursuant to the provisions of Clause 4.6, the proposed development seeks exception to the 8.5 m and 14.5 m building height limits articulated under the Development Standard prescribed by Clause 4.3.

Table 1 outlined below considers the proposed variation to Clause 4.3 of GTLEP2010.

Table 1: Proposed Development Standard Variation in Relation to GTLEP2010			
GTLEP2010 Clause	GTLEP2010 Development Standard	Proposed Development Non-Compliance	Percentage of Variation
Clause 4.3(2) Height of Buildings	Maximum 8.5 m	On Lot 4122 DP 1065326 the proposal seeks Development Consent for a 9.7 m maximum building height	14.12%
	Maximum 14.5 m	On part Lot 49 DP 1239209 the proposal seeks Development Consent for a 15.7 m maximum building height	8.28%

The Site is primarily zoned R1 General Residential with a small portion along the northern boundary of the Site adjacent to the existing Harrington Waters Estate Golf Course zoned RE2 Private Recreation under the GTLEP2010.

The proposed development entirely takes place in the R1 General Residential zone, where development for the purposes of Residential Flat Buildings are permitted with consent.

PART D PROPOSED VARIATION TO CLAUSE 4.3 HEIGHT OF BUILDINGS

3.1 CLAUSE 4.6(3)(a) – IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The principle set out in *Wehbe* provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This request relies on method 1 in *Wehbe* which requires an applicant to demonstrate that the objectives of the relevant development standard will be achieved, despite the non-compliance with the numerical standard.

Compliance with the development standard is unreasonable or unnecessary because the proposed development achieves the objectives of the standard, notwithstanding the non compliance as detailed in section 1.2.1.

The proposed development meets the objectives of clause 4.3 of the GTLEP2010 as detailed below:

(a) To ensure that the height of a building is appropriate for the site,

The Site currently supports a modified ground level which is not indicative of the Site's or surrounding site's natural ground level. This is due to previous earthworks which were undertaken at the Site to support a built form outcome which was ultimately not pursued.

The Proposed Development includes provisions for a 4-storey residential element over part Lot 49 and a 2-storey residential element over Lot 4122. Lot 49 has a height of 15.7 m from the ground floor Finished Floor Level (FFL) to the top of the lift overrun. Lot 4122 has a height of 9.7 m from the ground floor Finished Floor Level (FFL) to the top of the parapet. If the ground floor FFL was able to be set at natural ground level, the Proposed Development would comply with the 14.5m height limit applicable to Lot 49 & 4122.

The proposed development and form reflects the desired future character for the site, being a four storey building and one which addresses the entertainment precinct and provides for an integrated transition to the low density area to the east by stepping the building down to two storeys adjacent to 37 Josephine Boulevard.

The proposed development is of a design and scale that is appropriate for the site. The variation to both the 8.5m and 14.5m height control are marginal and the building presents as clearly compatible with its surroundings.

The site has a number of environmental constraints that present the development from being able to comply with the height control. These constraints include:

- The groundwater level for the site prevents the level of the basement from being put below RL2.0;
- The permitted flood planning level for the site requires non habitable floor levels to be equal to or greater than FPL2 (a level of 2.4m AHD) , or otherwise no lower than FPL1. Habitable floor areas are to be no lower than FPL3 (a min level of 5.4m AHD which is 1.9m higher than FPL3).
- The site is mapped under the GTLEP 2010 as having Class 3 Acid Sulfate Soils. This has been confirmed by testing undertaken on the site which has indicated the presence of Acid Sulfate Soils, which will impact the soil integrity and groundwater if the site is excavated below the permitted level. Clause 7.1 of the GTLEP specifically requires that consent be obtained for any works more than 1m below the natural ground surface, and for works by which the water table is likely to be lowered by more than 1m below the natural ground surface.

Due to site constraints, inclusive of the groundwater level, acid sulfate soils and the flood planning level, the FFL to the basement carpark is required to be built above RL2.4 so as to avoid encountering groundwater or acid sulfate soil, thus resulting in the ground FFL to be RL5.5.

The following documents have been submitted in support of the proposed development as part of the Development Application:

- Groundwater and Acid Sulfate Soil Assessment prepared by Douglas Partners dated 12 February 2019
- Acid Sulfate Soil Management Plan prepared by Douglas Partners dated February 2019
- Letter addressing flood planning matters prepared by GCA Engineering Solutions dated 28 July 2021

however, the visible points of the built form on Lot 4122 from the adjoining property would vary marginally between 235 mm and 595 mm, which is considered to be a minor variation in nature.

The Report on Groundwater and Acid Sulfate Soil Assessment prepared in support of the Proposed Development by Douglas Partners (refer to Appendix 15 of the SEE submitted with **DA 460/2019**) states that caution should be exercised in founding the proposed basement below RL2.0. This avoids the need to not only intercept groundwater levels within this coastal environment, but also the possibility of encountering Acid Sulfate Soils which could jeopardise the structural integrity of the Proposed Development and cause impacts to the surrounding environment.

The results of the Douglas Partners report have influenced the basement floor FFL of RL2.4 (which is 400mm above the minimum level recommended by Douglas Partners to allow for the basement slab thickness). This basement floor FFL then places the ground floor FFL at RL5.4 which allows for a reasonable 3 m floor to floor distance.

Accordingly, by virtue of the environmental constraints impacting the depths for which the building can be positioned, this demonstrates a direct correlation and requirement to attain the heights proposed.

In addition, the proposed building heights are cognisant of adjoining built form, which includes the single storey dwelling at 37 Josephine Boulevard. The Proposal includes provisions for a complementary 6 m setback along the eastern boundary coupled with both deep-soil landscaping and recessive and neutral colours and materials that ameliorate any unwanted views from the adjoining residence. Any onlookers with respect to the adjoining property would be greeted by an aesthetically-pleasing architecturally landscaped design that provides a vibrant and welcoming aesthetic.

Notwithstanding, it is considered that the building heights proposed are suitable for the Subject Site.

(b) To ensure that the height of a building complements the streetscape or rural character of the area in which the building is constructed.

The proposed development complements the streetscape and character of the locality.

The site is located within Harrington Waters Estate, a large residential subdivision. The Estate comprises multiple residential allotments with varying sizes and orientations. The locality is characterised by a dominant mix of detached dwellings and dual occupancy of one and two storeys with generous street frontages.

The current planning controls provide for a significant increase in the allowable development within the locality. The planning principles determined by the Land and Environment Court indicate that the compatibility of a development with the desired future character of an area becomes increasingly more important where the adopted planning controls allow for a significant change in development.

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A possible future development scenario of the locality was submitted with the original form of DA, as considered by the Council in its agenda on page 36. It is noted by Council on page 36 that "[the proposal] *is considered [to be] acceptable in terms of character, on balance, when having regard to the comparison of the existing character with the future desired character.*"

The proposed development provides two built forms, one that is 9.7m in height that then transitions to the other that is 15.7m. Both built forms are softened by significant landscaping and complimentary finishes and materials sympathetic to those within the existing locality.

Given the location of the site is proximate to the existing golf clubhouse and Harrigans Pub, it is considered that the height, bulk and scale of the proposed development is not out of character with the current and intended future character of the area, having regard to the land use zoning and permitted development scale.

The Proposed Development has been designed with an eastern façade that is sympathetic and respectful of the existing residential amenity at 37 Josephine Boulevard, particularly in regard to privacy, acoustics and sunlight access whilst creating functional residential apartments facing east. The Proposed Development has the appearance of a two storey building when viewed from 37 Josephine Boulevard, with a tapering to a full four storeys in the west.

The proposed development also seeks to maximise landscaping and deep soil zones on the site, as well as using sympathetic materials and finishes.

Having regard to the amended overshadowing plans, the Proposed Development does not create significant visual or overshadowing impacts for neighbouring developments.

Furthermore, whilst keeping in line with the existing and future streetscape character intended for the Site and surrounding area, the proposed development seeks to implement a complementary landscape strategy and design, that is consistent with Council's preferred plant and species list, as well as a combination of native and endemic species that are found locally, that supports an improved and enhanced aesthetic across the Site, reinforcing the proposal's consistency with the overall streetscape. An illustration depicting the Proposal and associated landscaping is provided in **Figure 4** below, which further demonstrates the biophilic nature & design and complementary aesthetic the Proposed Development will emit in relation to its relationship with the adjoining streetscape, as well as the positive direct and indirect relationship it will have on residents and passersby.



Figure 4 Photomontage of the Proposed Development (Source: BKA Architecture, A950, Revision B, 2021)

As noted in the Council's agenda that considered the original form of the Development Application, the proposed development (in its original form which is taller than the amended proposal) makes *"a positive contribution to the desired form intended under the adopted planning controls and the hierarchy of the area. It is further noted that the effective reduction of a residential floor to achieve compliance with the height standard would not significantly improve the development and, conversely, may lessen the overall planning outcomes for the site."* (See page 31).

Accordingly, by providing a building at the height proposed, a site layout is able to be achieved that enables: the desired built form to be achieved; floor levels that will not impact the existing groundwater levels; landscaping throughout the Site that integrates with the built form and reduces the visual presence of the ground plane by providing conducive elements that are visually and aesthetically pleasing; and provides opportunity for enhanced architectural treatment at the four (4) storey component that will contribute to setting a desirable precedent pertaining to future development that will adjoin the Site to the west. Furthermore, the proposed building height mitigated encroachment on the RE2 Private Recreation land at the northern boundary of the Site.

In summary of the abovementioned items, the standard is considered to be unreasonable and unnecessary in the circumstances on the following basis:

- The Proposed Development is entirely consistent with the objectives of the building height standard as demonstrated in **Section 4.1**.
- The Proposed Development fully achieves the objectives of GTLEP2010 for the R1 General Residential zone, as described in **Section 4.2**.
- It is unreasonable to require strict compliance with the height standard having regard to the environmental constraints which apply to the site that have been mitigated and avoided through minor variations to the height control – namely, flooding and acid sulphate soils.

The abovementioned justifications are considered valid and, in this instance, the proposed Clause 4.6 Variation is considered to be acceptable. The proposed development represents a more orderly form of development on the Site when compared to a compliant scenario having regard to the zoning and contemplated built form and residential density for the precinct. The proposed development is consistent with the objectives of Clauses 4.3 as well as the R1 General Residential and RE2 Private Recreation zones.

3.2 OBJECTIVES OF THE ZONE

The majority of the Site is zoned R1 General Residential under GTLEP2010. A small portion of the Site is zoned RE2 Private Recreation. However, The Proposed Development would not extend into the portion of Lot 49 which is zoned RE2 Private Recreation. The Proposed Development is located wholly within the R1 General Residential portion of Harrington Waters Estate and is therefore permissible with consent.

3.2.1 R1 General Residential Zone

Accordingly, the Proposed Development is consistent with the R1 General Residential zone objectives as follows:

- *To provide for the housing needs of the community.*

The Proposed Development will provide housing near to the centre of Harrington, where people can access local services and facilities including a supermarket and Council library. It would also positively contribute towards dwelling density targets within the MidCoast LGA by providing a range of apartment housing typologies in an area experiencing enhanced urban growth potential.

- *To provide for a variety of housing types and densities.*

The Proposed Development will provide for residential dwellings in a higher density form than the dominant existing residential stock of detached dwellings. This presents an opportunity for greater housing diversity, potentially allowing a mix of demographics in the area to utilise. Furthermore, the higher density as a result of the proposed building height allows for immediate contribution to housing stock, supporting dwelling targets stipulated within the strategic planning framework applicable to the wider area.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The Site is located within the Harrington Waters Estate, where existing utility services such as water, sewer, electricity and telecommunications can be augmented to service the Proposed Development. Furthermore, whilst the R1 General Residential zone allows for a range of residential land uses, the proposed development has been designed for the purposes of being consistent with existing and future residential housing typologies permissible within the R1 General Residential zone, for which the proposed development would complement the existing built form surrounding the Site and provide a sequential and transitional development for future development.

Accordingly, the proposed development would not preclude other land uses from continuing to function (and future developments from being undertaken) that adjoin or are in close proximity to the Site given the generous separation distances proposed, and the relevant design measures and mitigation measures proposed to be implemented across the Site which will protect and preserve the amenity of the Site and adjoining sites – particularly 37 Josephine Boulevard.

3.2.2 RE2 Private Recreation Zone

The Proposed Development does not restrict the future enjoyment of the adjoining land zoned RE2 Private Recreation. Notwithstanding, for consistency and completeness an assessment against the RE2 Private Recreation zone objectives is noted as follows:

- *To enable land to be used for private open space or recreational purposes.*

The Proposed Development does not extend into the portion of Lot 49 which is zoned RE2 Private Recreation. The Proposed Development would therefore not hinder the fulfilment of the RE2 Private Recreation zone objectives on this adjoining private recreation land.

- *To provide a range of recreational settings and activities and compatible land uses.*

The Proposed Development does not extend into the portion of Lot 49 which is zoned RE2 Private Recreation. The Proposed Development would therefore not hinder the fulfilment of the RE2 Private Recreation zone objectives on this adjoining private recreation land.

- *To protect and enhance the natural environment for recreational purposes.*

The Proposed Development can be progressed without significantly impacting on the surrounding natural environment. It is considered that the proposed heights are in fact the best means of allowing a Residential Flat Building to be developed at the Site whilst also avoiding the potential environmental impacts which could result from development interactions with groundwater and acid sulfate soils at the Site (which are understood to occur at relatively shallow depths).

Furthermore, the Proposed Development's configuration represents the best response to the Site's potential flooding impacts, by ensuring that the ground floor FFL is located at RL5.5, or 2 m above

the Council recommended RL3.5 AHD flooding planning level which is 500 mm above the 2100 1% flooding event.

3.3 CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

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.

The following environmental planning grounds are considered to justify contravening the maximum building height:

- The proposed breach to the height control facilitates a built form which accommodates basement parking and a design that does not interfere with or intrude upon the groundwater table, which sits just below the basement slab proposed.

The design of the proposed development has been finalized to ensure that the groundwater table is not impacted or interfered with, which has set a minimum level for the basement carpark, above which the development is located.

- The proposed breach to the height control facilitates the orderly and economic development of the land by permitting the provision of a well resolved and densely landscaped residential flat building over basement parking, which does not interfere with or intrude upon the environmental constraints which apply to the site – namely, ground water, flooding and acid sulphate soils. By marginally increasing the height of the basement to sit above the groundwater levels, and setting the ground floor level above the flood planning level the proposal provides for a superior planning outcome by avoiding the need for intrusion into the groundwater, provision of mechanical flood devices to prevent inundation and at grade parking.
- The proposed height variation facilitates the orderly development of the land by allowing generous landscaped setbacks around the basement car park which is located above the ground water table and providing the ground floor residential level above the flood planning level.
- The proposed development avoids the requirement to interfere with and treat the acid sulphate soils which are present on the site below existing ground level by utilizing the existing landform and limiting extent of excavation to ensure floor plates are above the flood planning level and ground water levels, as determined.
- The proposed development responds to the existing topography of the site and results in a superior planning outcome by minimizing excavation and maintaining site levels surrounding the site and current relationship to Josephine Boulevard. The overall height of the building could be reduced however, this would create groundwater, flooding and acid sulphate soil issues. It is considered that the minor breach to the height control generates a far superior outcome in a planning sense and the avoidance of the environmental constraints on the site constitute sufficient environmental planning grounds to justify the contravention.
- The proposed development has been specifically designed to integrate with both the local and regional context, specifically the R1 General Residential zone that surrounds the Subject Site. The relationship of the development as proposed, with respect to height, would remain consistent due to the transition offered between the surrounding sites, including the gradual

step up in height from east to west, particularly by virtue of the transition in the heights provided, along with the visual separation of the built form, softened through the use of materials and landscaping.

For the reasons outlined above, it is considered that the proposed variation to the building height control under Clause 4.3 is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of GTLEP2010.

3.4 PUBLIC INTEREST

As outlined in **Section 2.1**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

In *Lane Cove Council v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

It is noted, that Subclause 4.6(4)(a)(ii) requires the Proposal (**DA 460/2019**) to 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.

Sections 4.1 and **4.2** have already demonstrated how the Proposed Development is consistent with the objectives of Clause 4.3 and the R1 General Residential zone under GTLEP2010. Accordingly, the Proposed Development is considered to be in the public interest, as it is consistent with the overarching height objectives. It would also contribute towards meeting the demand for increased housing targets within the MidCoast LGA, as identified within the strategic framework applicable to the Site. Specifically, the proposed development would be of significant social and economic benefit to the immediate and wider localities, as it would revitalise and maximise the built form potential on a site zoned for permissible residential land uses such as the proposal, for which it provides an array of apartment typologies capable of housing all demographics.

There are no significant public disadvantages which would result from the Proposed Development.

The Proposed Development is therefore considered to be justified on public interest grounds.

3.5 MATTERS OF STATE OR REGIONAL SIGNIFICANCE

The proposed non-compliances with Clause 4.3 of GTLEP2010 would not raise any matters of significance for State or Regional environmental planning. It would also not conflict with any State Environmental Planning Policies or Ministerial Directives under Section 9.1 of the EP&A Act.

It is noted, that Planning Circular – PS 08-014 – issued by the NSW Department of Planning, Industry and Environment (DPIE), requires that all Development Applications including a variation to a standard of more than 10% be considered by Council (in this instance the LEC as the consent authority), rather than under delegation. The Proposed Development would result in exceedances of the relevant planning controls as follows:

- GTLEP2010, Clause 4.3 Height of Buildings at:
 - 39 Josephine Boulevard, Harrington: **9.86 m** (or by 16%)
 - Part Lot 49 DP 1239209: **16.9 m** (or by 16.6%)

This non-compliance is more than the 10% prescribed in the stipulated Planning Circular – PS 08-014.

3.6 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Given that strict compliance with Clause 4.3 of GTLEP2010 would result in:

- Not contribute towards the dwelling density targets and diverse array of housing typologies within the MidCoast LGA (Harrington Region), as identified within the *Hunter Regional Plan*, the *MidCoast 2030 Shared Vision, Share Responsibility: Community Strategic Plan 2018-2030*, the *Housing Diversity and Affordability Strategy* and the *draft Local Strategic Planning Statement* (MidCoast Council, July 2020).
- Threaten the commercial viability and residential yield of the Subject Site for future built form, by reducing the overall achievable maximum height across the Site, which would impact on the overall outcome for the Site.
- Not be able to achieve a height, that is being driven by the existing groundwater levels experienced across the Site, for which the built form cannot undergo further cut requirements as part of the proposed bulk earthworks strategy.
- Fail to meet the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act) by making orderly and economic use of the Site for its full planning potential.

As such there is no genuine public benefit in maintaining this strict height of building control at the Subject Site. Accordingly, by allowing for the proposal to proceed with the height variation, this would result in the following positive attributes:

- Reduce potential environmental impacts to the groundwater table, flood planning constraints, and potential exposure to Acid Sulfate Soils;
- Attract a greater demographic of future tenants towards the Site;
- Contributes positively to the residential character of the R1 General Residential zone via the introduction of a conducive architectural treatment and aesthetically pleasing landscape design that present positively towards the streetscape;
- Emulates a development outcome that is compatible with the existing and emerging residential character of the area;
- Provisions to revitalise an underutilised land portion and redevelop a site, coupled with increased landscaping (beyond the requirements of any detached residential dwelling) that will form a synonymous relationship with the adjoining land uses creating a sense of place and wellbeing; and
- Facilitating development that is a permissible land use and consistent with the R1 General Residential zone objectives.

The proposed development is therefore considered to be justified on public interest grounds and there is no material public benefit in maintaining the standard.

3.7 OBJECTS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the Objects of the Act in accordance with Section 1.3 of the EP&A Act. **Table 2** assesses the proposed development against the Objects of the Act.

Table 2: Objects of the Act – EP&A Act	
Object	Proposed Development Compliance
The objects of this Act are as follows:	
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,	The Proposed Development would provide housing near to the centre of Harrington, where people can access local services and facilities including a supermarket and Council library. It would also positively contribute towards dwelling targets within the MidCoast LGA. The Proposed Development can furthermore be progressed without any significant

	<p>environmental impacts.</p> <p>The Proposed Development would not create the risk of serious or irreversible damage to the environment.</p> <p>Indeed, the proposed building levels have been designed in order to appropriately respond to the Site's shallow groundwater and Acid Sulfate Soils, as well as the Site's flood planning controls.</p> <p>Ultimately, the Proposed Development would not create any threats of serious or irreversible environmental damage which would require further scientific study to fully ascertain.</p> <p>The Proposed Development would contribute towards the provision of affordable housing in the locality. The Proposed Development would therefore maintain the health, diversity and productivity of the environment for the benefit of future generations.</p> <p>The Proposed Development would not impact on the conservation of biological diversity or the ecological integrity of the locality.</p> <p>The Proposed Development would not require any Environment Protection Licence or other mechanism to compensate for any pollution generating activities at the Site.</p>
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	
<i>(c) to promote the orderly and economic use and development of land,</i>	<p>The Proposed Development would make use of unused residentially zoned land for orderly, economically beneficial development without resulting in any unacceptable economic, environmental or social impacts.</p> <p>Indeed, it is considered that the need for additional height at the Site to comply with flooding planning controls effectively sterilizes some of the height which would otherwise be available to use at the Site, meaning that compliance with the Site's prevailing height controls would prove inconsistent with the objective of promoting orderly and economic use and development of land, by effectively sterilizing potential development heights at the Site.</p>
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	<p>The Proposed Development would contribute towards the provision of affordable housing in the locality.</p>
<i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,</i>	<p>No clearing of threatened plant species, ecological communities or other fauna habitat elements would be undertaken as part of the Proposed Development.</p> <p>The Proposed Development would therefore not impact on the conservation of biological diversity or the ecological integrity of the locality.</p> <p>It is furthermore considered that the Proposed Development levels would avoid the need to not only intercept groundwater levels within this coastal environment, but also the possibility of encountering acid sulfate soils which could cause impacts to the surrounding environment.</p>
<i>(f) to promote the sustainable management of built and cultural</i>	<p>The Proposed Development would not impact on any Aboriginal or non-Aboriginal heritage at the Site or its</p>

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Proposed Residential Flat Building
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<i>heritage (including Aboriginal cultural heritage),</i>	surrounds.
<i>(g) to promote good design and amenity of the built environment,</i>	The Proposed Development would constitute a quality design to make use of the Site's outstanding amenity without significant impacts to the amenity of surrounding land users.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The Proposed Development can be constructed and maintained without health and safety risks to future tenants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	The Proposed Development would be determined by MidCoast Regional Council.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The DA for the Proposed Development would be subject to the relevant public notification requirements.

PART E CONCLUSION

It is requested that the LEC (via concurrence with Council) exercise their discretion and find, that this Clause 4.6 Variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of the GTLEP2010 (refer to **Section 2.1**).

It is request, that the LEC (and Council) support the proposed variation to Clause 4.3 Height of Buildings under GTLEP2010 for the following reasons:

- Consistency with the objectives of the standard and zone is achieved.
- Compliance with the Development Standard is unreasonable and unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the Development Standard.
- No unreasonable environmental impacts are introduced as a result of the Proposed Development.
- There is no public benefit in maintaining strict compliance with the standard.

Given the justification provided above, this Clause 4.6 Variation under GTLEP2010 is well founded and should be favorably considered by the determining authority. As each of the relevant considerations are satisfied for the reasons outlined elsewhere in this Report, concurrence can be assumed under Clause 4.6(5).

The proposed variation to the height of buildings development standard contained within clause 4.3(2) of the GTLEP has been found to be reasonable and appropriate in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the height of buildings development standard to the extent proposed.