

# 2-8 Thackeray Street, Camellia

Clause 4.6 variation to Height of Buildings

On behalf of  
Earth Power Technologies Sydney Pty Limited

May 2022



## 1 Introduction

The Development Application (DA) for 2-8 Thackeray Street, Camellia seeks approval for a storage tank at the subject site. The development application proposes an exceedance of the maximum height of building development standard applicable to the site under the Paramatta Local Environmental Plan 2011 (PLEP 2011). As such, this document forms a written request seeking to justify the contravention of this development standard in the circumstances. It is considered that a variation to the development standard will allow for an enhanced planning outcome at the site.

## 2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the PLEP 2011 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. Clause 4.6 enables a variation to the height standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

The consent authority's satisfaction as to those matters must be informed by the objectives of clause 4.6, which are:

1. To provide an appropriate degree of flexibility in applying certain development standards; and
2. to achieve sufficient planning outcomes for and from development by allowing flexibility in particular circumstances.

When considering a variation to a development standard under clause 4.6 of the LEP, a consent authority is required to be satisfied that the contravention of the respective development standard is justifiable based on the following:

- the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard;
- 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.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* through the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (**Wehbe**).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**) which was upheld by Pain J on appeal. A further recent judgement by Preston in *Initial Action Pty Ltd v*

Woollahra Municipal Council [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

*"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard."* [88]

How these tests and considerations are applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments has most recently been confirmed in the judgement of Justice Preston, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118.

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of the PLEP reads as follows:

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

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

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(3) *Development consent must not be granted 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 Secretary has been obtained.*

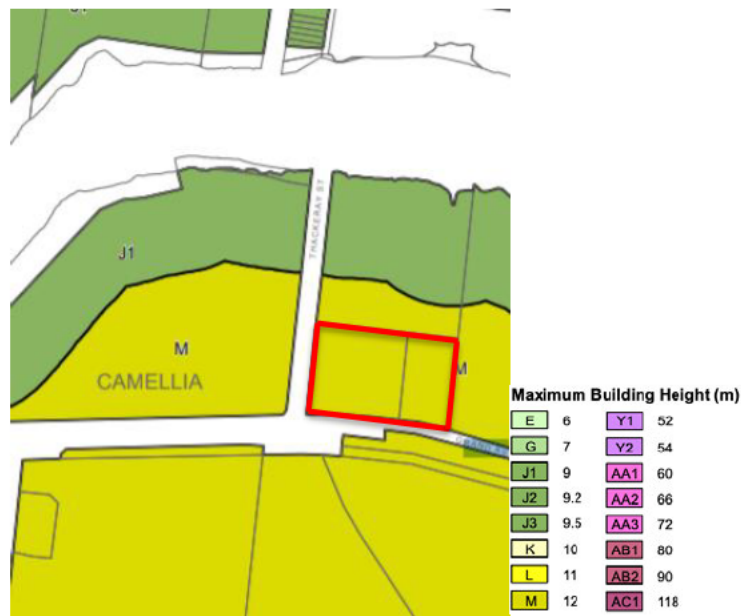
- (5) *In deciding whether to grant concurrence, the Secretary must consider—*
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) the public benefit of maintaining the development standard, and*
  - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (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) a development standard that relates to the height of a building, or a floor space ratio, in Parramatta City Centre (as referred to in clause 7.1(1)) by more than 5%,*
  - (cb) clause 8.1, 8.1A or 8.2.*

### 3 The Development Standard to be varied

The development standard seeking to be varied is Clause 4.3 Height of Buildings (HOB) in the PLEP 2011. As identified on the PLEP 2011 Height of Buildings Map, the subject site has a maximum building height limit of 12 metres. The objectives of Clause 4.3 are provided below:

- (1) *The objectives of this clause 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,*
  - (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
  - (c) to require the height of future buildings to have regard to heritage sites and their settings,*
  - (d) to ensure the preservation of historic views,*
  - (e) to reinforce and respect the existing character and scale of low density residential areas,*
  - (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.*

(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.



**Figure 1** Height of Buildings LEP Map

Source: PLEP 2011 (site identified in red)

#### 4 Extent of Variation to the Development Standard

The proposed development proposes a maximum building height of 14m, resulting in a 2m exceedance or 16.7% variation when expressed as a percentage in relation to the HOB control.

The proposed variation from the HOB control is considered to not have any adverse impacts to the site and surrounding buildings noting the existing tank/buildings on site exceed the HOB control.

The existing tank on the site is measured to the crown at AHD 21m and the proposed tank will be 19.3m AHD. Noting the proposed tank will be much smaller in scale and bulk to the existing tank on site, the proposed height exceedance is seen as to have minor and negligible impacts on the existing character and area.

The proposed dimensions of the tank are necessary to provide for additional storage space for incoming waste to site and to allow for a consistent feed to the Digester machine.

#### 5 Objectives of the Standard

(1) The objectives of this clause 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,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,

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

(d) to ensure the preservation of historic views,

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

(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.

(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.

## 6 Objectives of the Zone

The objectives of the IN3 Heavy Industry zone are as follows:

- To provide suitable areas for those industries that need to be separated from other land uses.
- To encourage employment opportunities.
- To minimise any adverse effect of heavy industry on other land uses.
- To support and protect industrial land for industrial uses.
- To allow a wide range of industrial and heavy industrial uses serving the Greater Metropolitan Area of Sydney and beyond.
- To ensure that opportunities are not lost for realising potential foreshore access on land that is contaminated and currently not suitable for public access.

## 7 Assessment

### **Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case**

It is considered that strict compliance with the Height of Building control is unreasonable and unnecessary given the following circumstances of this case.

As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* tests 1, as described in *Williams*, are relevant for the subject site:

- **Wehbe Test 1** - the objectives of the standard are achieved notwithstanding non-compliance with the standard;

This is considered further below in relation to the height of buildings clause and relevant objectives provided in PLEP 2011.

### **4.3 Height of Buildings**

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

### **Applicant Response**

The exceedance in height proposed at the subject site will not restrict the ability of the

area to deliver development which transitions in height and land use intensity appropriately. This is based on the following:

- The location of the site, which is a significant distance from Grand Avenue and any roads, which means any variation from the height control will not impact upon the locality's ability to provide a transition in built form and land use intensity.
- Almost the entirety of the Camellia Industrial Precinct has a height limit of 12m. In this case, it is considered that the objective to provide an appropriate transition of land use and intensity is of less significance with reference to the context of the site. The height control is also relevant to protection of heritage views, which this site is outside off and does not impact.

In addition, it is also noted that the site forms part of the *Draft Camellia–Rosehill Place Strategy* where height planning controls for the precinct are expected to result in significant uplift. Heavy industrial land uses (changing from IN3 to E5 zoning) are subject to changes for a maximum height of building of 16m.

Such uplift being considered indicates that the additional height proposed would be in keeping with any transition in building height in the future.

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

#### **Applicant Response**

The exceedance in height will not result in any adverse visual impacts, disrupt views, result in a loss of privacy or solar access. This assessment is based on the following:

- The distance from the site to adjacent roads and developments, and
- The location of the proposed storage tank in the environment.

The proposed development is located 29.5m setback from Thackeray Street and 5.85m from the rear boundary. The distance from the proposed works to the closet surrounding building on the adjoining lot to the north is approximately 13m. The significant distance of the proposal from other roads or developments in the environment is considered to not generate visual impacts, disrupt views, loss of privacy or solar access.

In addition, it is also noted that the works are located in proximity of a Tram alignment, where no impacts on view are proposed from this infrastructure.

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

#### **Applicant Response**

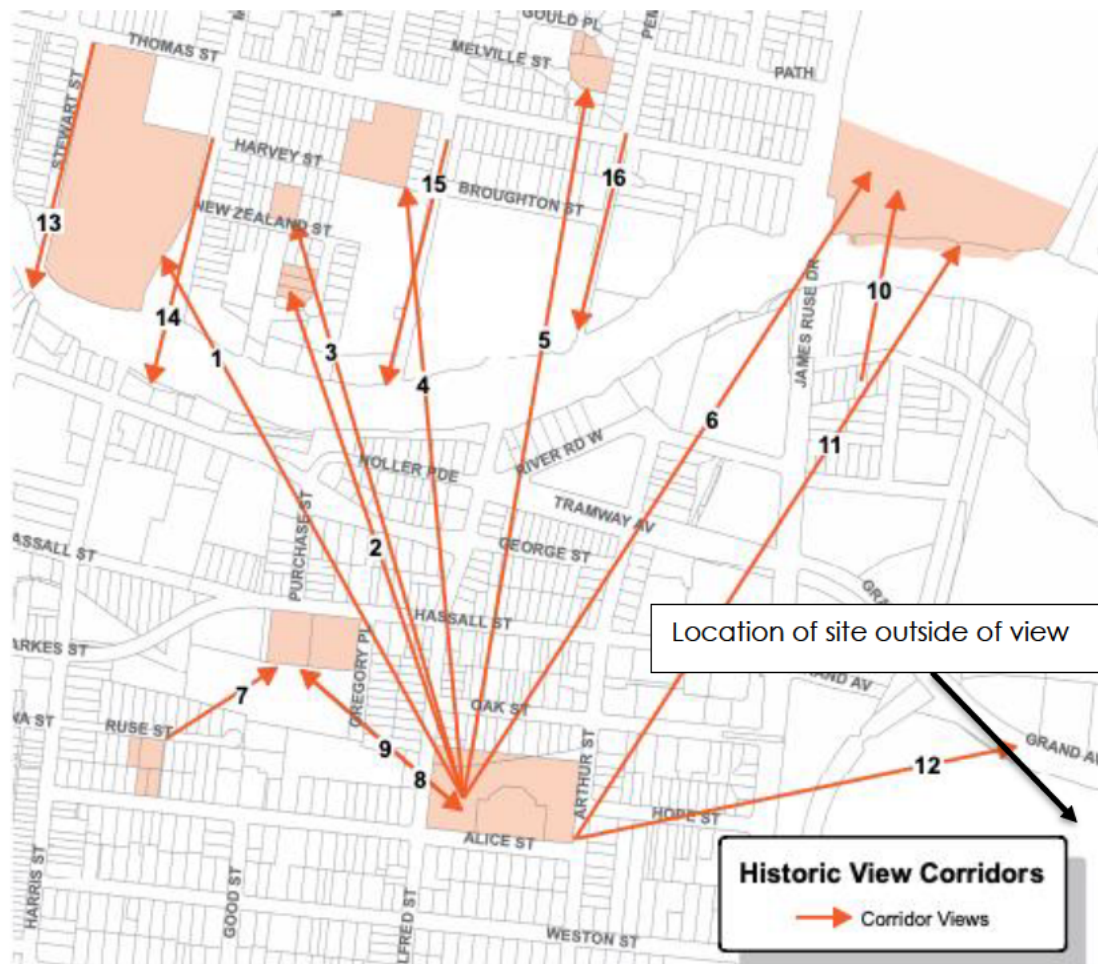
The proposed development will not impact any heritage items nor their surrounds. The closest heritage items to the site are the Pumping Station and Tram alignment, which are located directly south of Grand Avenue. The tank is located at the rear of the site and distanced over 70m from Grand Avenue. The site will generally maintain the same built and form from that previously approved.

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

#### **Applicant Response**



The proposed development will largely be obscured from public view and will not have any impact on historic view corridors identified within the Parramatta Development Control Plan (PDCP) 2011. The site is located outside of the closest Historic View Corridor, View 12, located to the south east beyond the extent of the view:



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

#### **Applicant Response**

The proposal is zoned IN3 Heavy Industrial and is located within the Camellia Industrial Precinct, far from any low density zoned land. As such, the proposal is not expected to have any impacts on the amenity of R2 zoned land.

(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.

#### **Applicant Response**

As discussed above, the site is located within the Camellia Industrial Precinct so will



therefore have no impact on commercial development. It is noted that whilst the Camellia Precinct rezoning will introduce commercial development, the proposal is significantly setback from Grand Avenue (over 70m).

The request to vary the development standard is consistent with Part 1 of the 'five part test' established in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which provides that a development standard is unreasonable or unnecessary where the objectives of the standard are achieved notwithstanding non-compliance with the standard. Given the proposed development achieves the objectives of Clause 4.3 height of buildings it is considered that the non-compliance is justified and therefore acceptable in the circumstances of the case.

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

As discussed above, Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed. On appeal, Leeming JA in *Four2Five vs Ashfield Council* [2015] NSWCA 248 acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

*"matters of consistency with objectives of development standards remain relevant, but not exclusively so."*

Further recent findings by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 also found that:

*"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]*

There are sufficient environmental planning grounds to justify contravening the development standard as the proposed development allows for the promotion and co-ordination of the orderly and economic use and development of the land in the following ways:

- The additional height affords the ability to provide a sufficient volume of storage space to contribute to overall site usability and environmental efficiency, in order to assist food waste storage process.
- The existing tank on the site is significantly larger and has a greater height than the proposed tank.

- The proposed storage tank will provide will assist the food waste storage process to turn into energy. The proposed works will contribute to the economic use and development of the land.
- The proposed height breach, resulting from the need to address the bespoke user needs of the facility, is not expected to cause any adverse environmental impacts.
- The development will not impact upon any heritage or significant view corridors given its location and the low-lying industrial peninsula.
- The design provides for a contemporary industrial design that provides for appropriate levels of articulation whilst facilitating high technology uses, mitigating potential visual impacts.
- Furthermore, the siting of the tank above the height limit will ensure that no unreasonable overshadowing of surrounding properties will be experienced. It is noted that existing structures and buildings on site also exceed the height limit.
- The height of the proposed development provides a built form within the locality which is consistent with the objectives and requirements outlined within PLEP 2011 and PDCP 2011 for industrial land. The proposed development provides an example of appropriate building height within an industrial block that is largely obscured from public view. Furthermore, given the expected transition of the Camellia–Rosehill Place Strategy, the relatively minor height breach is considered acceptable and in keeping with the height, bulk and scale of the desired future character of the locality.
- Strict compliance with height controls would result in the objectives of the PLEP 2011 being neglected and would not result in the orderly and economic use and development of land. The proposal represents an under-utilised building envelope, especially when compared to typical warehouse development, resulting in 0.16:1 FSR, where the maximum permissible FSR on site is 1:1. The proposed development, whilst breaching the height limit, is isolated to specific parts of the site, rather than being spread across the site as a whole.

The preconditions that must be satisfied in the opinion of the Consent Authority before consent can be given are detailed in Clause 4.6(4).

**Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance (Wehbe Test 1).
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Commissioner Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

**Clause 4.6(4)(a)(ii) - Is the proposed development 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?**

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings:

*The objectives of the particular standard*

In previous sections of this request, the development has been proven to be consistent with the objectives of the Clause 4.3 Height of Building clause within the PLEP. It has been demonstrated elsewhere in this report that the development achieves the objectives of Clause 4.3 Height of buildings within the PLEP notwithstanding the non-compliance with the standard.

*The objectives for development within the zone in which the development is proposed to be carried out.*

The site falls within the IN3 Heavy Industrial zone. As outlined below the proposed development is in the public interest because it is consistent with the objectives of the IN3 Heavy Industrial zone as demonstrated in the table below.

Zone Objective(s)	Statement of Consistency
<i>To provide suitable areas for those industries that need to be separated from other land uses</i>	The proposed development is suitably located within an industrial zone.
To encourage employment opportunities.	The proposed development will support both direct and indirect development opportunities.
<i>To minimise any adverse effect of heavy industry on other land uses.</i>	The development will not result in any adverse impacts or exacerbate the impact of surrounding land uses.
<i>To support and protect industrial land for industrial uses.</i>	The development is a type of industrial land use.
<i>To allow a wide range of industrial and heavy industrial uses serving the Greater Metropolitan Area of Sydney and beyond</i>	The proposed development will service the greater metropolitan area through providing critical infrastructure.
<i>To ensure that opportunities are not lost for realising potential foreshore access on land that is contaminated</i>	Not applicable.

Zone Objective(s)	Statement of Consistency
and currently not suitable for public access.	

Taking into consideration the above the proposed development serves the public interest as it is consistent with the objectives of the development standard and the IN3 Heavy Industrial zone. Furthermore, there is no significant benefit in enforcing strict compliance given the circumstances of the case. The proposed height exceedance facilitates a significantly better planning outcome with several environmental constraints mitigated and an ultimately better scheme adopted. The contravention results in no significant adverse environmental impacts but rather a better planning outcome to what is currently approved.

## 8 Any matters of significance for State or regional environmental planning

The development as proposed provides an opportunity to provide an appropriate planning response which aligns with the strategic direction for Camellia within the Central District Plan. The proposed development will contribute to employment generation within Camellia and reinforce the role of the wider Camellia Precinct.

## 9 Conclusion to variation to height standard

This is a written request for an exception to the building height under Clause 4.6 of the PLEP 2011. It justifies the contravention to the height under Clause 4.3 of the PLEP 2011, and in particular demonstrates that the proposal provides a significantly better planning outcome, with no significant adverse environmental impacts resulting, and therefore in the circumstances of the case:

- Full compliance with the 12m building height control is unreasonable and unnecessary;
- The proposed development has been demonstrated not to have adverse environmental impacts on surrounding development and is supportable on environmental planning grounds;
- It is in the public interest in being consistent with the objectives of the standard and the objectives of the zone;
- The proposed exceedance of the height standard will result in an enhanced planning outcome at the site; and
- The proposed development can demonstrate consistency with actions outlined in the Central City District Plan for the Camellia Precinct.

Yours Sincerely,



Adam Coburn

**NSW Director**