SPECIALIST TOWN PLANNING SERVICES

Precautionary Clause 4.6 Variation Request – Building Height (Clause 4.3)

Residential Apartment Development

51 Railway Street, Granville NSW 2142

(Lot A, DP 324641)

September 2021

Table of Contents

List of Images

1. Introduction

The proposed development includes architectural roof feature which is permissible under Clause 5.6 of Holroyd Local Environmental Plan 2013 (HLEP 2013). The statement of environmental effects (SEE) submitted with the development application provides detailed discussion on the architectural roof feature. This Clause 4.6 Variation Statement is prepared in the interest of abundant caution with an intention to remove any impediment to approval of the application should the Council not agree with our position to consider the architectural roof feature from the height exceedance point of view.

This report has been prepared on behalf of the applicant Idraft Architects Pty Ltd to further assist with the consideration of the Development Application (DA) for the proposed demolition of existing structures and construction of a part 4 part 5 storey residential apartment development accommodating a total of 6 units over ground and basement level parking and associated works and the variation sought to Clause 4.3 of the HELP 2013.

Therefore, this request is to vary the HELP 2013 HOB standards under the provisions of Clause 4.6 of the HELP 2013.

1.1 Height of Buildings Standard

As detailed in the SEE which accompanies this DA, the design has had consideration of the Height of Building (HOB) standard contained in Clause 4.3 of HELP 2013, the proposal will result in a variation to the HOB standards in Clause 4.3 of the HELP 2013 Height of Building Mapping.

Clause 4.3 of HELP 2013 refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum height of 15m. Building height is defined as:

> ***building height*** *(or* ***height of building****) means—*
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
>
> *including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The relevant map [sheet HOB_008] indicates that the maximum building height permitted at the subject site is 15m.

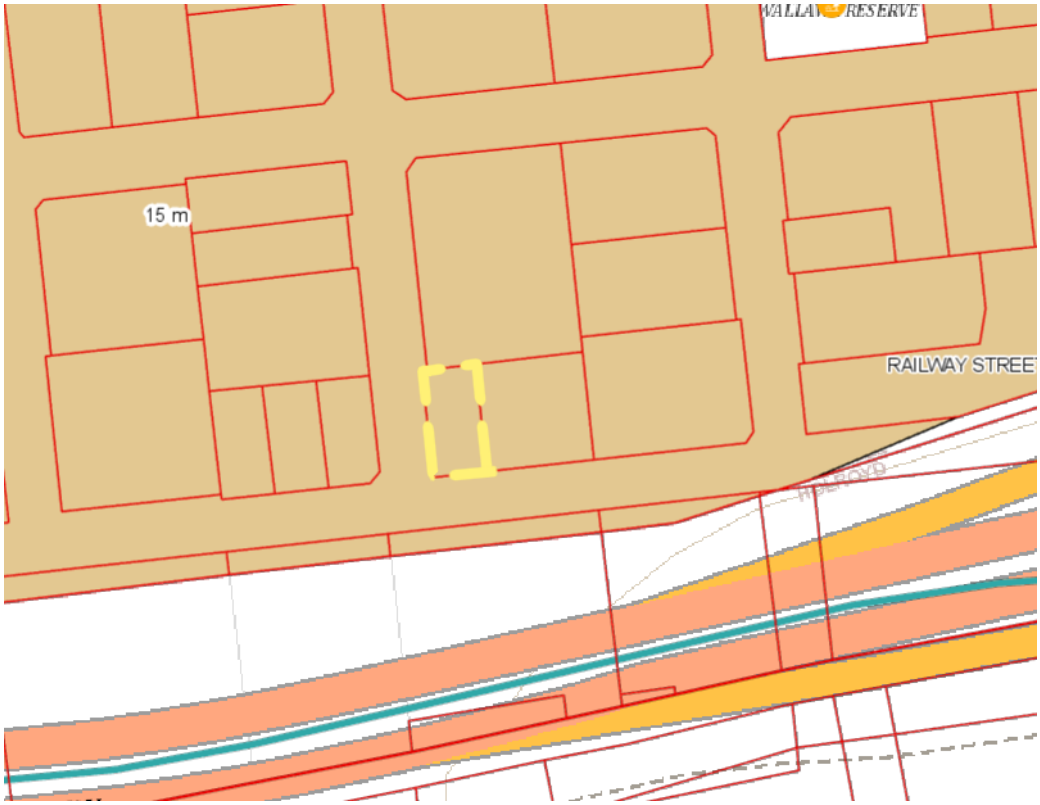

Image 1 – Height Map – 15m - Source – HELP 2013

1.2 Proposed Variation to HOB Standards

The architectural plans submitted with the DA indicate that the proposed development has a maximum height of 17.6m when measured to the maximum ridge height (RL31.655) from the natural ground line in accordance with the definition of height under HELP 2013. The proposal is therefore non-compliant with the development standard and seeks a maximum variation of 2.6m or 17.4%. This is depicted in the following images 2 to 7 below. As mentioned, Clause 5.6 of the HELP 2013 allows council to determine the proposal with an architectural roof feature despite an exceedance of the height development standard in HELP 2013. However, for abundant caution, this written request is submitted in accordance with Clause 4.6 of HELP 2013 to vary the maximum building height development standard under Clause 4.3 of HELP 2013.

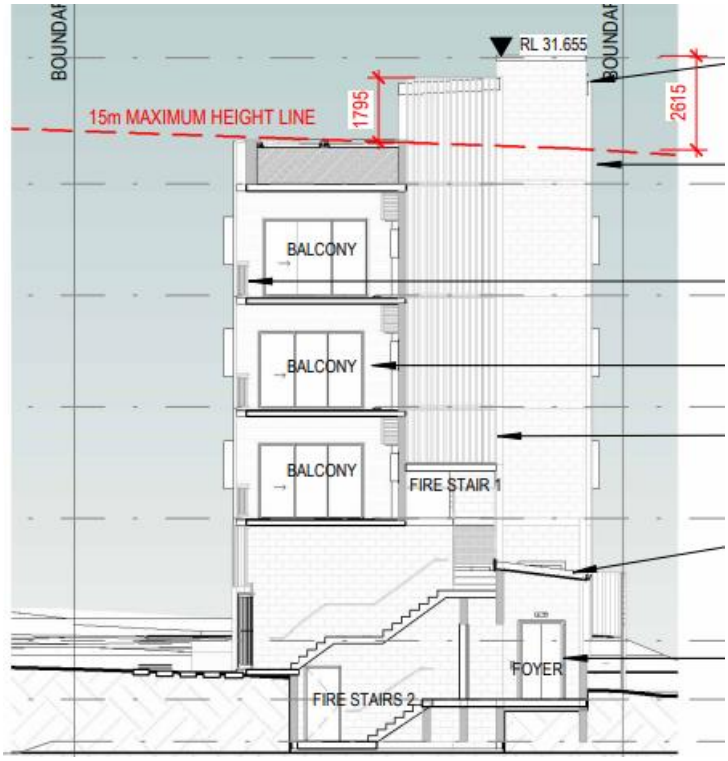

Image 2 – Extent of Height Variation – Extract from Architectural Plans

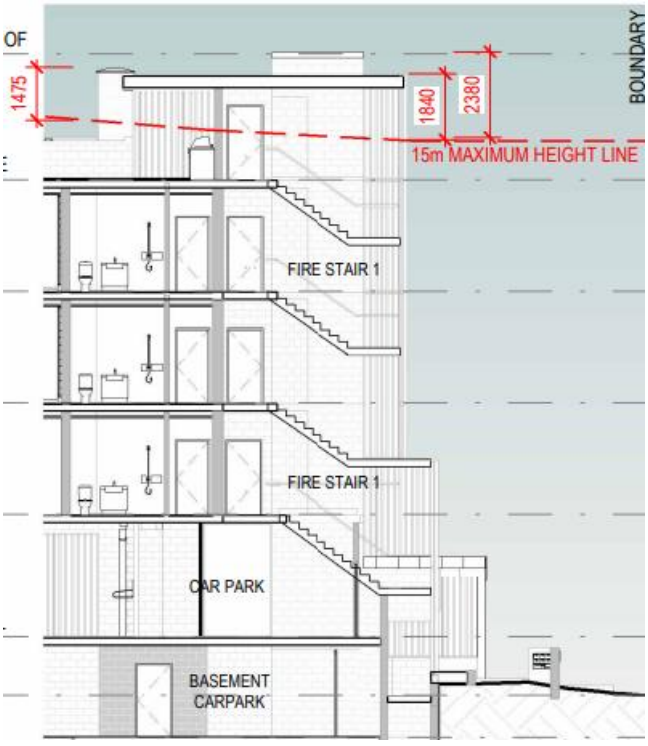

Image 3 – Extent of Height Variation – Extract from Architectural Plans

Image 4 – Extent of Height Variation – Extract from Architectural Plans

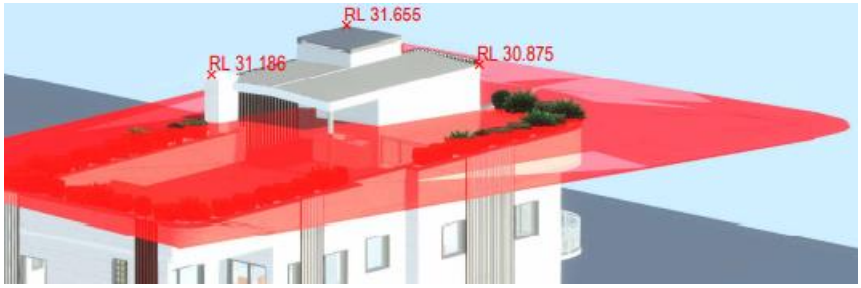

Image 5 – Extent of Height Variation – Extract from Architectural Plans

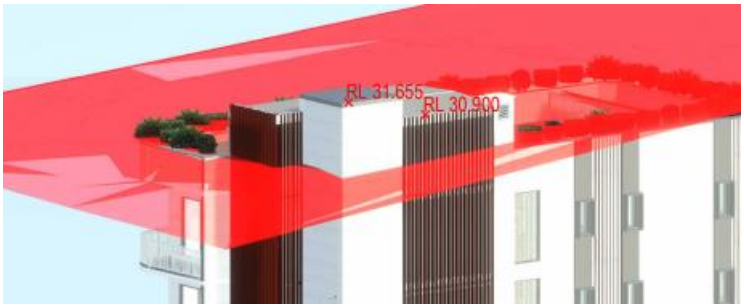

Image 6 – Extent of Height Variation – Extract from Architectural Plans

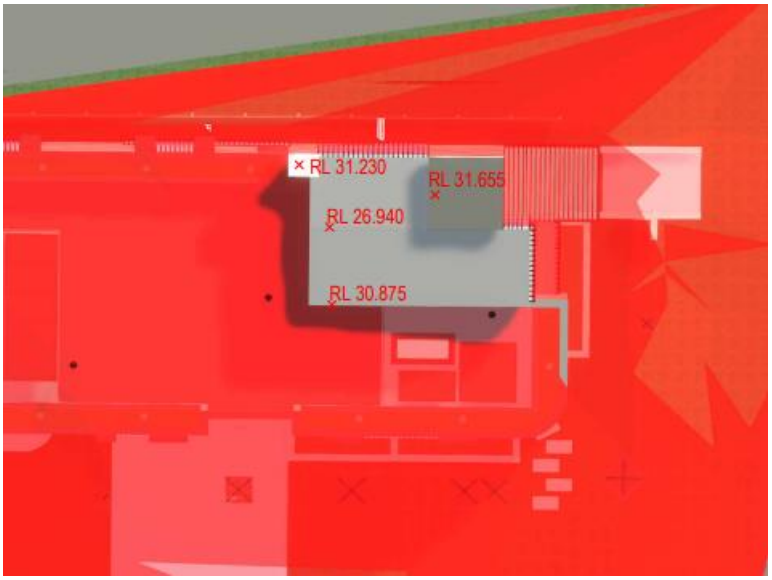

Image 7 – Extent of Height Variation – Extract from Architectural Plans

2. Clause 4.6 Variation Request

This Clause 4.6 variation request has been prepared having regard to:

- The NSW Department of Planning & Environment's Guideline Varying Development Standards: A Guide, August 2011, and
- Relevant principles identified in the applicable Case law, (established tests) in the following judgements:
    - Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
    - Wehbe v Pittwater Council [2007] NSWLEC 827
    - Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')
    - Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90
    - Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')
    - Project Venture Developments v Pittwater Council [2005] NSWLEC 191
    - Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)
    - Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118:

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a '*neutral or better'* environmental planning outcome than one that does not.

The relevant paragraphs from "Initial Action" have been considered below:

> *[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*

[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is 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 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 (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

[16] As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

[17] The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

[18] A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

[19] A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

[20] A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

[21] A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the

circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

[22] These 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, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

[23] As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

[25] The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

[26] The second opinion of satisfaction, in cl 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 opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).

[27] The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

[28] 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 (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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.

[29] On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].

This report explains how flexibility is justified in this case in accordance with the matters required to be considered and addressed under Clause 4.6 in a written request from the applicant. This report also addresses where relevant other matters the consent authority is required to be satisfied when exercising the discretion of the assumed concurrence of the Planning Secretary.

2.1 Applicable Environmental Planning Instrument (EPIs)

The Environmental Planning Instrument (EPI) to which this variation relates is the Holroyd Local Environmental Plan 2013 (HELP 2013).

2.2 Zoning of the Land

In accordance with Clause 2.2 of the HELP 2013 the site is zoned R4 High Density Residential.

2.3 Development Standard to be Varied

The development standard being varied is the "Height of Building" (HOB) standard shown in the HELP 2013 HOB Map.

The development standard being varied is prescribed under Clause 4.3 of the HELP 2013. The HELP 2013 HOB Map identifies the subject site with the designation 'O = 15m', see Image 1. The land is zoned R4 High Density Residential under the HELP 2013 zoning map. Therefore, under Clause 4.3, the HELP 2013 HOB Map and this clause apply.

2.4 Objectives of the Development Standard

4.3 Height of buildings

(1) The objectives of this clause are as follows—
(a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,

(b) to ensure development is consistent with the landform,

(c) to provide appropriate scales and intensities of development through height controls.

(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.

As discussed in the SEE, the proposal is consistent with the objectives of height standard in that:

- The proposed height exceedance relates to architectural roof feature that offers visually interesting roof element without impacting on the solar access or privacy of adjoining neighbours. This architectural roof feature accommodates vertical circulation core and a small roof over outdoor communal open space.
- The subject site has a fall of approximately 2.6m from north west to south east. The proposed height variation is generally due to the land topography.
- The variation only relates to a small corner of the proposed development that does not include any habitable floor.

This development standard relates to the maximum permitted height of a building, as Clause 4.3 of the HELP 2013 falls within the scope of a "development standard" as defined under Section 4 of the Environmental Planning and Assessment Act 1979, (EP&A Act).

3. Matters to be Considered under Clause 4.6

Matters to be considered under Clause 4.6 of the HELP 2013 and associated planning commentary is provided in this section:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—
(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

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

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

(a) the consent authority is satisfied that—

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

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

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

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

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

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

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

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

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

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

Note—

When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6

Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

(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.

3.1 Objectives - Clause 4.6 (1)(a)(b)

The objectives of this clause expressly indicate a degree of flexibility should be applied "in particular circumstances". This is such a circumstance to enable a flexible approach to the outcome sought by this DA.

3.2 HOB Standard is not excluded from application of Clause 4.6 - Clause 4.6(2)

The HOB standard is not excluded from operation of this clause.

3.3 Written request to vary a development standard - Clause 4.6(3)

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 to permit a maximum building height of 17.6m which equates to a numerical variation of 2.6m, noting that the maximum height relates to the natural ground line. This results in a percentage variation of 17.3%. This variation is restricted to the lift overrun and the remainder of the architectural roof feature is restricted to a height of 16.8m or a variation of 1.8m (12%). This variation is over a small section of the roof as illustrated in Images 2 – 7 above. The SEE submitted with the DA indicates a specific request is included with the application to seek a variation of the HOB development standard. This report is the applicant's formal written request.

3.4 Compliance is unreasonable or unnecessary in the circumstances of the case - Clause 4.6(3)(a)

Of relevance to Clause 4.6(3)(a), in Wehbe V Pittwater Council (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

> *An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding noncompliance with the standard*

The judgement goes on to state that:

The rational 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 necessary (it is achieved anyway) and unreasonable (no purpose would be served).

The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of the criteria. It is acknowledged that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case and in the absence of any environmental impacts, the request is of considerable merit.

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. Those 5 ways are reproduced as follows, with our emphasis placed on number 1 for the purposes of this Clause 4.6 variation:

1. **The objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed HOB variation is assessed against the above tests in the same order as under:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

Clause 4.3 does have stated objectives, and it is considered that the variation still achieves the stated objectives of the development standard as stated earlier in this report and discussed throughout the SEE.

The breach of the HOB standard does not cause inconsistency with these objectives, and therefore the intents of clause 4.3 of HELP 2013 is also achieved.

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

There are stated objectives of the standard in Clause 4.3 and as discussed above, the objectives of Clause 4.3 are relevant to the DA and can be maintained by the overall architectural design and the architectural roof feature.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

As the stated previously the objectives of the standard can still be maintained, and therefore the purpose will not be defeated or thwarted by the variation requested and strict compliance is unreasonable.

4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

It is noted that Council has varied the HOB standard from time to time based on the merits of each case. However, the standard is relevant and it is not considered abandoned or destroyed. In this particular HOB variation, the standard is considered unnecessary and unreasonable.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

Not applicable.

In summing up, requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 3.7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

3.5 Sufficient environmental planning grounds - Clause 4.6(3)(b)

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 reference can be drawn to Preston CJ in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (paragraph 24) states:

> *[24] The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning*

grounds. 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

The Statement of Environmental Effects (SEE) prepared for this DA provides a comprehensive environmental planning assessment of the architectural design and concludes that there are sufficient environmental planning grounds to support the DA. The following planning grounds are submitted to justify contravening the maximum HOB:

- The height breach is located at the south eastern corner of the site at the lowest point of the site. The proposed noncompliance of the roof form is limited to a non-habitable element which has been proposed in order to provide an interesting roof form with varying elements and to encapsulate the vertical circulation core together with a small roof element to provide weather protection over outdoor communal open space.

- The variation is over a small section of the roof area measuring 35m^2 (18% of the total roof space) and it ranges between a variation of 2.6m (lift overrun) to 1.8m for the remainder of the architectural roof feature.

- The site contains a dual frontage and has been designed to successfully address both Railway Street and Marsden Street. The non-compliant element is minor and will not be visually obtrusive form the streetscape when viewed by the casual observer. Given the non-compliance pertains to the architectural roof feature, this will not have a direct impact to the streetscape character.

- 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 diagonally across the length of the site.

- 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 is limited to non-habitable area and 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 maximum

height non-compliance is limited to a minor portion of the roof and therefore the extent of view loss caused by the non-compliant element would be insignificant.

- The social benefits of providing housing stock within a highly sought after location should be given weight in the consideration of the variation request.

- Insistence on compliance with the height control would result in a poor architectural design without any meaningful gains for the local built character or the amenity of adjoining neighbours.

- The proposed development meets the objectives of the development standard and meets the objectives of the R4 High Density Residential zone (as further detailed in Section 3.7 below):

- The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
  a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
  b. To promote the delivery and maintenance of affordable housing (1.3(d));
  c. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

The above environmental planning grounds are not generic comments. These are unique circumstances for the proposed development, given the minor nature of the non-compliance, sites isolated nature 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.

3.6 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 (reproduced under Section 2 of this report) 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 3.7 below.

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

Objectives of Clause 4.3 of HELP 2013 are as under:

(a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,

(b) to ensure development is consistent with the landform,

(c) to provide appropriate scales and intensities of development through height controls.

As discussed in Section 2.4 of this report, the proposal is consistent with the objectives of Clause 4.3.

Objectives of R4 zone:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To facilitate a vibrant, mixed-use centre with active retail, commercial and other non-residential uses at street level.*
- *To encourage the development and expansion of business activities that will strengthen the economic and employment role of the Merrylands town centre*.

The proposal is consistent with the R4 zone objectives for the following reasons and as detailed throughout the SEE submitted with the development application:

- The proposal will provide high quality accommodation with public transport, education, health, entertainment and employment opportunities available in proximity;
- The proposal will provide residential accommodation that is well-integrated with the existing high density built character of the area;
- The proposal will convert the last undeveloped remaining lot within this block that will contribute towards meeting housing targets within the Granville 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 north and east; and
- The proposed development has been designed to facilitate passive surveillance of the public domain along Railway and Marsden Streets.

3.8 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.

3.9 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.

3.10 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.

3.11 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 HELP 2013 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 residential apartment development has been designed so as to ensure the portion of the building fronting Railway Street does not involve any GFA protruding through the 15m HOB standard under Clause 4.3 of the HELP 2013.

The overall development has been designed to cater for the slope of the site from its frontage to Marsden Street (being the highest point of the site) to its frontage with Railway Street (being the lowest point of the site), in an effort to reduce the amount of level changes throughout the ground floor level across the site to ensure for accessible pathways throughout and via proposed landscaped areas.

For the reasons set out in this report, the residential apartment development should be approved with the exception to the numerical HOB standard in Clause 4.3. Importantly, the development as

proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliance with the development standard.