

61-75 Forest Road and 126 Durham Street, Hurstville

Clause 4.6 – Building Height Development Standard

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**61-75 FOREST ROAD AND 126 DURHAM STREET,
HURSTVILLE**

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1.0 CLAUSE 4.6 REQUEST – BUILDING HEIGHT

1.1 Introduction

This request for an exception to a development standard is submitted in respect of the height of buildings development standard contained within Clause 4.3 of the Hurstville Local Environmental Plan 2012 (HLEP). The request relates to an application for the demolition of all existing structures and construction of a mixed use development containing 4,273 square metres of commercial floor space, a hotel with 145 rooms and 254 apartments, within 4 buildings ranging in height from 3 to 20 storeys above a 4 basement levels containing 524 car parking spaces, and stratum subdivision at 61-75 Forest Road and 126 Durham Street, Hurstville.

1.2 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the HLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the HLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that development consent must not be grant 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the height of buildings development standard be varied.

1.3 Development Standard to be varied

Clause 4.3 states:

- (1) The objectives of this clause are as follows:
 - (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,
 - (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas and public domain, including parks, streets and lanes.
 - (c) to minimise the adverse impact of development on heritage items,
 - (d) to nominate heights that will provide a transition in built form and land use intensity,
 - (e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,
 - (f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,

(g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

(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.

Building height (or height of building) is defined in the dictionary of THLEP as the vertical distance between ground level (existing) at any point 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.

There are six height zones for the site with 12, 15, 21, 28, 40 and 65 metres across the site as shown in Figure 1 below.

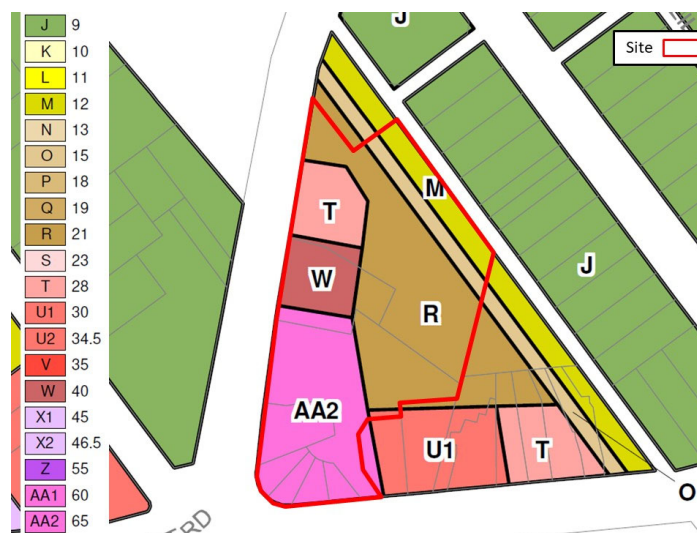


Figure 1:

Extract from the HLEP Height of Buildings Map

1.4 Extent of Variation to the Development Standard

Whilst the proposed building has been designed with the anticipated number of storeys for the site under the Planning Proposal, due to fall across the site and the provision of lift overruns and associated plant and screening, there are some minor variations to the height controls for Buildings B, C and D as follows:

Building	Height Control	Max Height	Variation
B	28/40m	Roof feature: 40.33m (in 40m height zone)	0.33m or 0.82%
C	65m	<ul style="list-style-type: none"> Parapet: 66.4m Screen and plant: 66.45m 	<ul style="list-style-type: none"> Parapet: 1.4m or 2.15% Screen and plant: 1.45m or 2.23%
D	65m	<ul style="list-style-type: none"> Parapet: 65.35m Screen and plant: 67.4m 	<ul style="list-style-type: none"> Parapet: 0.35m or 2.15% Screen and plant: 2.4m or 3.69%

The encroachments are illustrated in the Figures below:

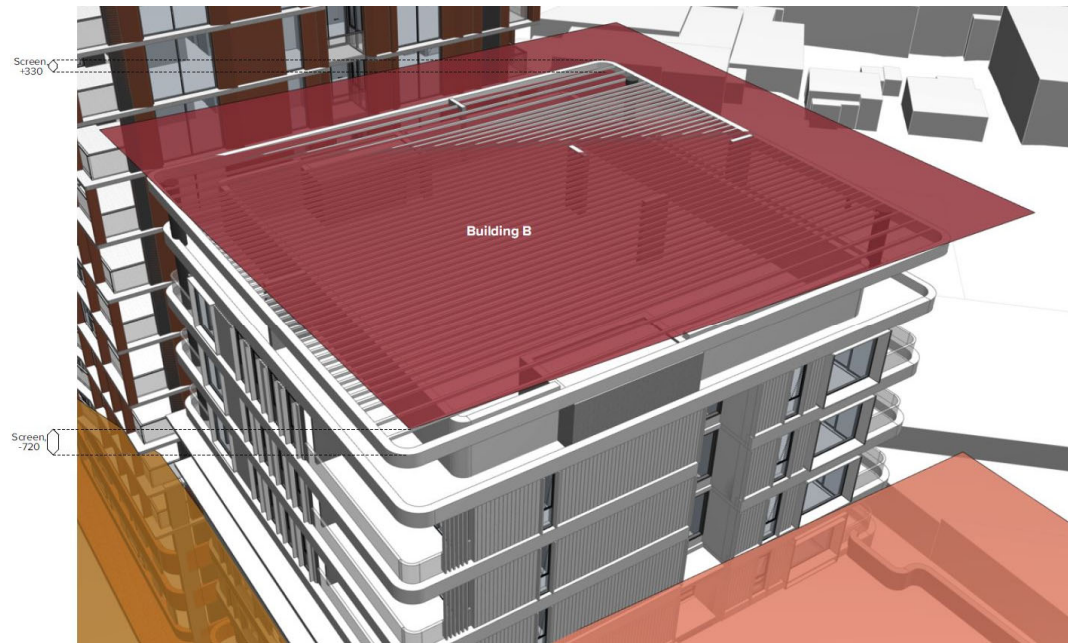


Figure 2:

Height plane drawing which illustrates the components which are above the height control for Building B

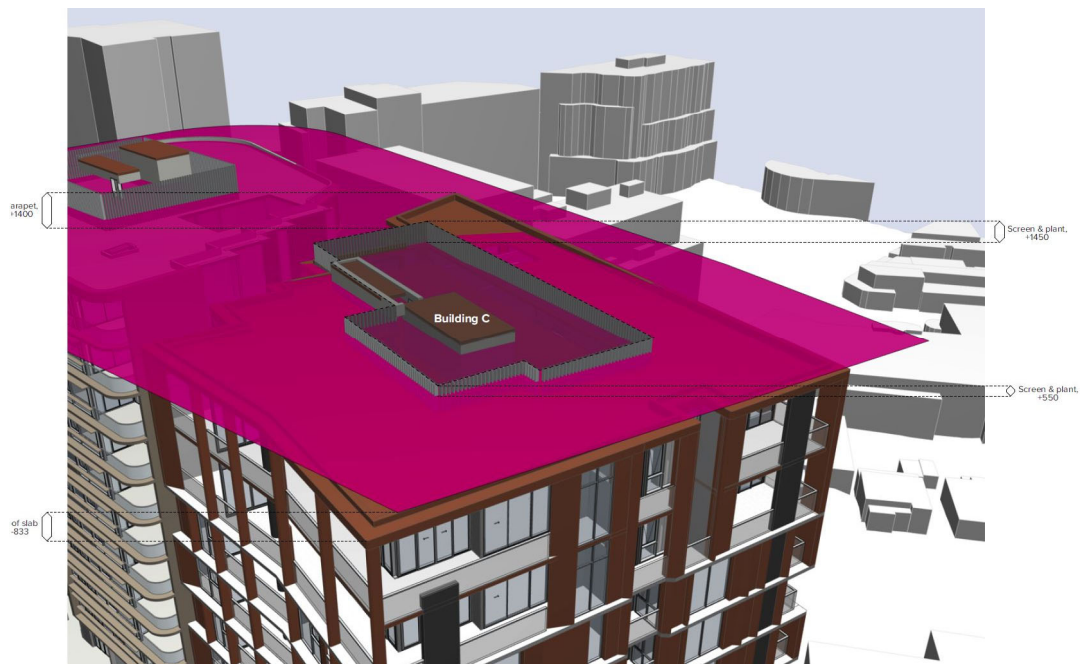


Figure 3:

Height plane drawing which illustrates the components which are above the height control for Building C

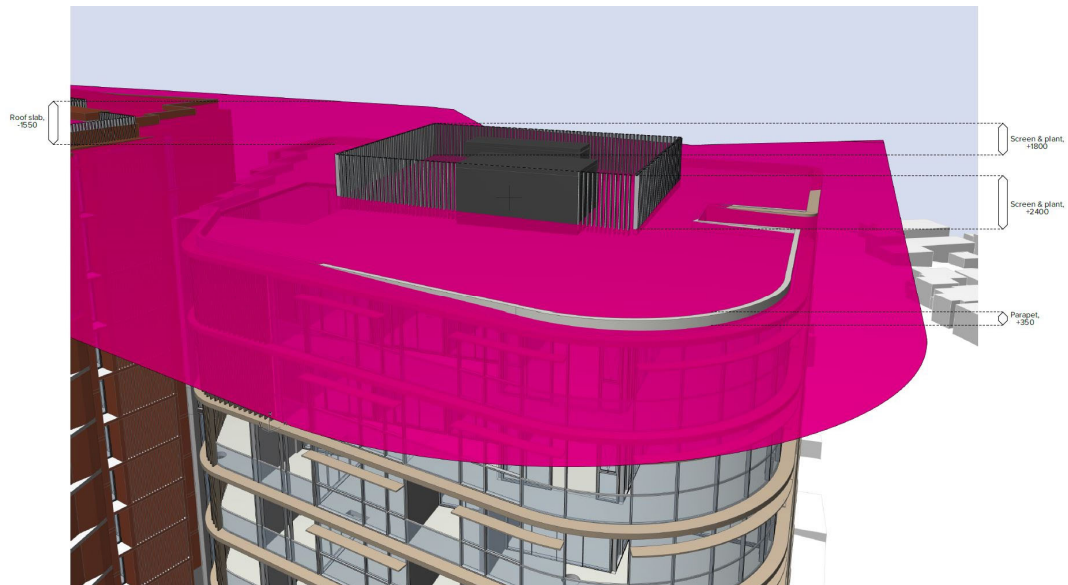


Figure 4:

Height plane drawing which illustrates the components which are above the height control for Building D

1.5 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In addition, in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34] the Chief Justice held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This request addresses the five part test described in *Wehbe v Pittwater Council*. [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

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

The specific objectives of Clause 4.3 of the HLEP are identified below. A comment on the proposal's consistency with each objective is also provided.

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

Careful consideration has been given to the location, size and design of the proposed development to ensure that a high quality outcome will be achieved which will sit comfortably within the forthcoming streetscape.

The proposed departure from the height control on the site occurs only as a result of the fall across the site and the need to provide sufficient floor to ceiling heights and lift overruns and associated plant, with some minor protrusion of parapets, lift overruns and plant. There is no habitable floor space above the height control. The proposal presents with the number of storeys as anticipated by the new planning controls for the site and has a scale as anticipated by the DCP and therefore achieves an appropriate contextual fit which is compatible with the future adjoining development and the future streetscape, notwithstanding the height non-compliance.

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

Visual Impact and Disruption of Views

The visual impact of the proposed height variation is considered to be acceptable as discussed above in relation to Objective (a) as the area of increased height is especially minor and the increase in height for the lift overruns and plant is located centrally on the roof such that they will not be readily perceptible from the public domain, nor will they result in any meaningful impact to views. The proposal fits appropriately within the future desired character of the area.

Privacy

The proposed development provides ADG compliant separation from the adjacent properties (or sufficient privacy measures), such that the proposed variation in height does not result in any adverse privacy impacts to adjacent properties.

Overshadowing

The areas of additional height for the parapets are particularly minor, whilst the lift overruns are centrally located on the roof of the development, such that the variation does not result in any meaningful difference in shadow to the adjacent properties to the south beyond a compliant scheme.

(c) to minimise the adverse impact of development on heritage items,

The minor nature of the height variations and the location of these areas at a significant height above, and distance from, the nearby Hurstville Scout Hall is such that the areas of encroachment will not result in any adverse impact to the heritage item.

(d) to nominate heights that will provide a transition in built form and land use intensity,

The proposal is predominantly consistent with the varied heights across the site with the exception of some minor encroachments, such that the proposed development reflects the intended transition in heights across the site as intended by the LEP Building Heights which apply to the site.

(e) to establish maximum building heights that achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre,

The Building Height control for the site have been established to achieve appropriate urban form consistent with the major centre status of the Hurstville City Centre. The proposed variations are minor and do not compromise this objective in that the proposed heights of the buildings still achieve an appropriate urban form as anticipated by the planning controls which apply to the site.

(f) to facilitate an appropriate transition between the existing character of areas or localities that are not undergoing, and are not likely to undergo, a substantial transformation,

The proposed height encroachments are minor such that they do not compromise the overall transition in scale across the site. In particular, it is noted that Building A which is located on the eastern part of the site and required to be much lower in order to achieve a sensitive transition in scale to the lower density residential context to the east is height compliant.

(g) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

The minor extent of the areas of height encroachment and the central location of the lift overruns and plant are such that the proposed variations to the height control do not result in any meaningful or adverse environmental impacts on the use or enjoyment of adjoining properties and the public domain.

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

The underlying objectives and purpose of the height control are relevant to the proposed development. However, the proposed development is consistent with those objectives on the basis that the proposed height is compatible with the existing and future scale of the surrounding buildings and will sit comfortably with the context of the site with no significant adverse impacts to adjacent properties.

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

The underlying objectives and purpose of the standard relates to compatibility and impact and are relevant to the proposed development. The underlying objective and purpose would be satisfied by a compliant proposal, but is also demonstrated to be satisfied in this instance notwithstanding the proposed height variation.

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;

The development standard has not been virtually abandoned.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Strict compliance with the maximum height of buildings development standard is considered to be unnecessary and unreasonable in the circumstance of this site as discussed below:

- The proposed variations arise as a result of the fall of the site as well as the need to provide appropriate floor to ceiling heights for the commercial component, and the need for lift overruns and associated plant and the proposed development provides a scale of buildings exactly as anticipated by the master planning process for the site as part of the recent Planning Proposal and also as reflected in the Figures in the new Section 8.2 of the Hurstville Development Control Plan No. 2 – Hurstville City Centre.
- The proposed departure from the height control on the site occurs predominantly within the centre of the site for the lift overrun, plant and screening which are setback from the edges of the building, such that they are recessive which eliminates their visual impact to the surrounding streets. The only area of breach of the height control at the perimeter of the buildings for parapets is generally minor and balanced by areas of parapet which are equally below the height control.
- The locality is undergoing a transition in its character and other similar developments are occurring within the vicinity of the site. The proposed variation to the height control is minor and will not result in a building which is inconsistent with the emerging character of development in the zone and locality generally.
- The proposed areas of height non-compliance do not result in any significant or meaningful additional overshadowing to the surrounding properties due to the minor nature of the height exceedances and the central location of rooftop elements such as the lift overrun, plant and screening.
- There are no adverse impacts in terms of privacy impacts to adjacent sites resulting from the proposed variation to the height development standard which would warrant strict compliance.
- The proposed variation allows for the most efficient and economic use of the land.
- Having regard to the planning principle established in the matter of Project Venture Developments v Pittwater Council [2005] NSWLEC 191 most observers would not find the proposed development offensive, jarring or unsympathetic to its location and the proposed development will be compatible with its context.
- Requiring strict compliance would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public and instead would impact on the capacity to provide appropriate floor to ceiling heights, or the number of storeys as anticipated for the buildings on the site.

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

The Land & Environment Court matter of Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and
- there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

There are only some very minor areas of height non-compliance for the parapets and slightly greater variation for the lift overruns and associated plant. The environmental planning grounds that justify this component of the development are:

- The proposed development provides for a scale for each building as anticipated by the DCP and therefore the proposal provides for a compatible outcome with the forthcoming context of the site notwithstanding the height non-compliance.
- The height non-compliance is as a result of the significant fall across the site and is balanced by other areas of the development which are equally below the height control.
- The proposed areas of height non-compliance do not result in any meaningful difference in shadow impact both to adjacent properties and also within the development itself when compared to a compliant height.
- Part of the reason for the height non-compliance for Building D results from the provision of a hotel within this building. The LEP provides a floor space bonus for providing a hotel and part of the reason for the height variation is to accommodate the additional floor space associated with the floor space bonus. Strict compliance with the height control in this instance would discourage the provision of a hotel, contrary to the Council's objective for a hotel in this location.
- The proposed development demonstrates a high quality outcome for the site which will result in the delivery of an integrated community of buildings with appropriate apartment size and mix, significant separation around a central courtyard, as well as significant open space opportunity and amenities which will contribute significantly to the amenity afforded to future occupants. This approach is only possible with a variation to the height control as proposed.

The objects specified in section 5(a)(i) and (ii) of the EP&A Act are:

'to encourage:

- i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- ii) the promotion and co-ordination of the orderly and economic use and development of land...'

The proposed development is consistent with the aims of the Policy and the objects of the EP&A Act in that:

- Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits to the owners or occupants of the surrounding properties or the general public.
- Strict compliance would prevent the attainment of the necessary floor to ceiling heights within the development, or require manipulation of the ground floor plane levels with less than optimal outcomes to squeeze the development below the height plane, notwithstanding that the proposal has the same number of storeys as anticipated for the site.
- The proposed variation allows for the most efficient and economic use of the land, enabling an appropriate built form without impacting on amenity of surrounding properties.

On the basis of the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed height non-compliance in this instance.

1.7 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

1.8 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

Objective of the Development Standard

The proposal's consistency with the objectives of the development standard have been addressed in detail in this clause 4.6 request.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the B4 Mixed Use zone.

The objectives of the B4 Mixed Use zone are:

- 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 allow for residential development in the Hurstville City Centre while maintaining active retail, business or other non-residential uses at street level.

The proposal provides a mixture of compatible uses comprising speciality retail, supermarket, food and drink premises, a hotel, and residential apartments and will contribute to the vibrancy of the area. The site is also particularly well located in relation to public transport being only 450 metres from Allawah train station and 750 metres from Hurstville train station and town centre and therefore provides a transit-oriented development that intensifies and diversifies activity around public transport infrastructure allowing for multiple activities and services, local employment and diverse housing options. The proposal is also in very close proximity to a range of recreational opportunities and services and facilities including Kemp Field which is directly opposite the site to the south.

The architecture of the development with buildings addressing the street frontages and the internal common landscaped open space, combined with a high quality public domain outcome will result in activated and vibrant places that are used both during the day and evening, increasing safety.

For the reasons given the proposal is considered to be consistent with the objectives of the B4 Mixed Use zone.

The proposal has been demonstrated to be consistent with both the objectives of the building height development standard as well as the objectives of the zone and therefore the consent authority can be satisfied that the proposal is in the public interest. Furthermore, the public interest is appropriately served by maximising the provision of housing, employment and hotel uses provided by the development, within the identified environmental capacity of the site.

1.9 Clause 4.6(5) Secretary Considerations

The matters for consideration under Clause 4.6(5) are addressed below:

(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,

The contravention of the standard does not raise any matters of significance for state or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of state or regional significance.

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

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

This Clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. There is no material impact or benefit associated with strict adherence to the development standard and in my view, there is no compelling reason or public benefit derived from maintenance of the standard.

1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

(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.

As demonstrated above the proposal is consistent with the objectives of the zone and the objectives of Clause 4.3 notwithstanding the proposed variation to the maximum height of buildings development standard.

Requiring strict compliance with the height of buildings development standard on the subject site would result in an inferior built form that would contextually be essentially no different from the proposed development and would not result in any meaningful benefit to the streetscape or the amenity of adjoining properties. Strict compliance would force a reduced floor to ceiling height or a lowering of the ground floor.

Allowing the flexible application of the maximum height of buildings development standard in this instance is not only reasonable but also desirable given the context of the site and desire to deliver a positive result for the site which will provide increased housing and employment choice within the Landmark Square Precinct.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the minimum height of buildings development standard and will achieve a better urban design outcome in this instance in accordance with objective 1(b).

1.11 Conclusion

Strict compliance with the minimum height of buildings development standard contained within clause 4.3 of Hurstville Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. In addition there are sufficient environmental planning grounds to justify the variation. Finally, the proposed development and height variation is in the public interest because it is consistent with the objectives of the standard and the zone. In this regard it is reasonable and appropriate to vary the building height development standard to the extent proposed.