PLANNING INGENUITY

AMENDED CLAUSE 4.6 VARIATION STATEMENT

MAXIMUM BUILDING HEIGHT – CLAUSE 4.3, SSLEP 2015

Demolition of existing structures and the construction of an affordable rental housing development with basement parking

310-314 Taren Point Road
Caringbah NSW 2229

Prepared for: MBD Developments

Ref. M180014
14 May 2020

Clause 4.6 variation statement – maximum height (clause 4.3)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Sutherland Shire Local Environmental Plan 2015 to accompany an amended application for a five storey residential flat building at Nos. 310-314 Taren Point Road, Caringbah ('the site').

2. PROPOSED VARIATION

Clause 4.3(2) of Sutherland Shire LEP 2015 relates to the maximum height requirements and refers to the *Height of Buildings Map.* The relevant map identifies the subject site as having a maximum permitted height of 16m. Building height is defined as follows:

> *" building height (or height of building) means the vertical distance between ground level (existing) and 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."*

When measured in accordance with the above definition, the proposed lift overrun, rooftop plant room, planter box edge and parts of the rooftop communal open space are over the maximum 16m height limit reaching a maximum height of 19.14m (a reduction in 500mm from the original proposal). The largest extent of non-compliance is measured to the lift overrun, which is centrally located within the building and not visible from the public domain. Lift access to the communal roof space is required for equitable use by all residents.

The extent of non-compliance is indicated in the height blanket diagram at Figure 1. The amended plans have reduced the size of the rooftop common open space and therefore reduced the amount of building that is above the height limit. Nonetheless, it remains that, due to the centralised location of the primary non-compliance, and minor extent of non-compliance created by the planter box edge and communal open space, the proposal will appear to have compliant height to the casual observer. The difference between the original and amended proposal height non-compliance is visually described in Figures 1 and 2, respectively.

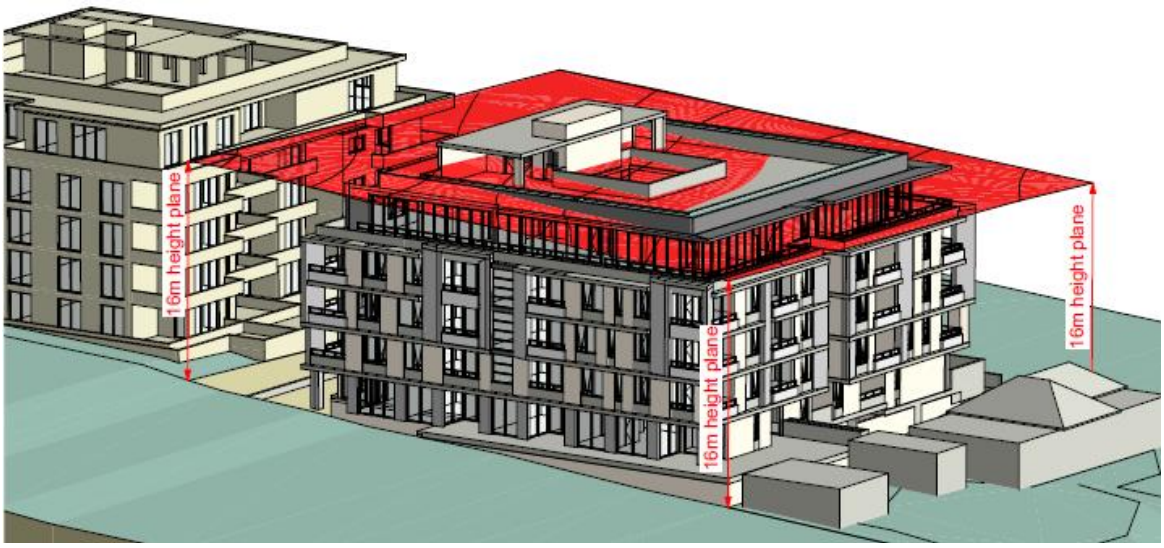

Figure 1 Original Height Blanket Diagram

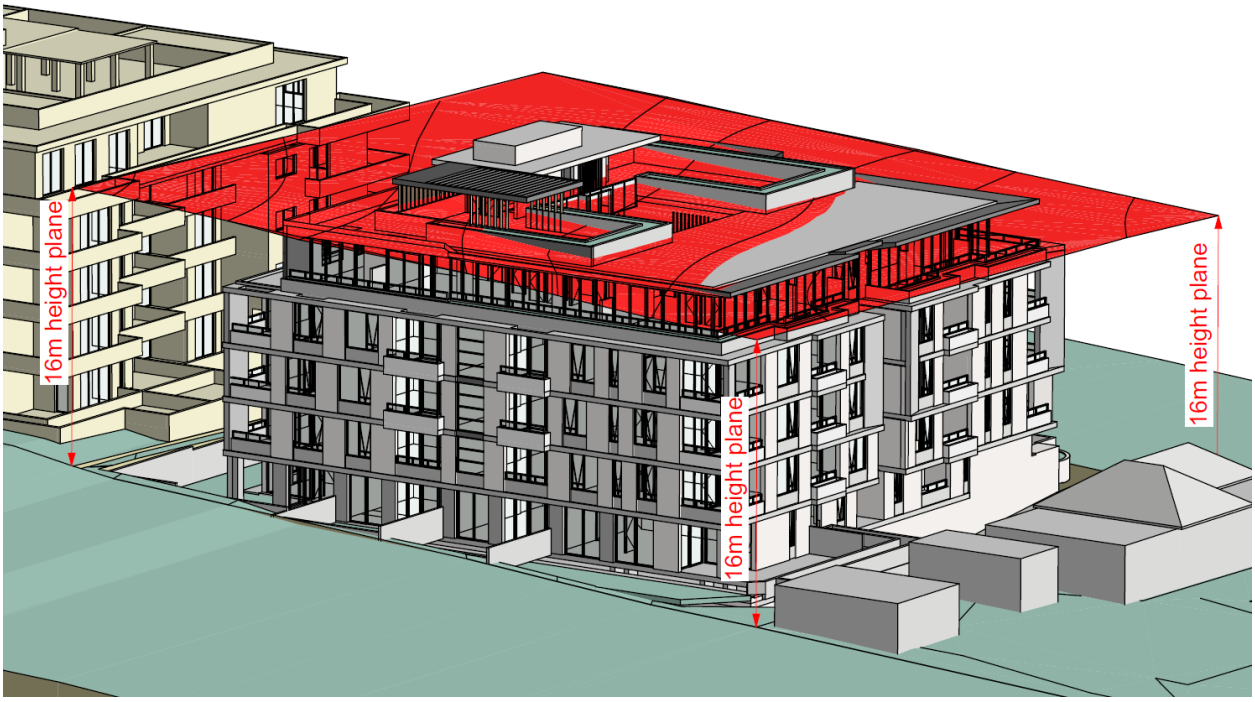

Figure 2 Amended Height Blanket Diagram

Within the street, the building will also appear to have comparable scale to the development that was recently constructed for the neighbouring site to the south (No.316 Taren Point Road), and for which development consent is anticipated for Nos. 306-308 Taren Point Road.

The maximum building height control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of clause 4.6 are 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.

(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 all of these zones.

(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."

The development standard in clause 4.3 is not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

4. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (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. This list is not exhaustive. 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 non-compliance with the standard.*

The judgement goes on to state that:

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

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, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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 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.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

"…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."

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

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, it is considered that there is an absence of significant impacts of the proposed non-compliance on the amenity of future building occupants, on area character and on neighbouring properties. The non-compliance will not be readily visible from the public domain or surrounding sites, does not contribute significantly to overshadowing and does not impact any significant views. To require strict compliance would mean removing parts of the building without resulting in a real planning benefit to neighbourhood character or amenity. In fact, removal of units would be counterproductive as it would result in the loss of affordable rental accommodation within the locality.

To insist on strict compliance would thwart and preclude the redevelopment of the land to a reasonable standard, and not allow the site to reach its full development potential. There is no planning purpose to be served by limiting the height strictly to the maximum height allowable given the absence of amenity related impacts and the provision of a lift which enables equitable access to the communal roof space.

On “planning grounds” the proposal provides rooftop communal open space that will increase the amenity of the development for future residents. The lift continues to this level to give disabled access. The communal open space is setback from elevations below to ensure no overlooking will occur.

The variation to building height does not adversely impact on solar access, views or outlook and the streetscape appearance is not impacted by the variation. As indicated, the proposal provides for a floor space ratio which complies with the maximum permitted and accordingly, the height breach is not associated with additional density beyond what is expected by the controls or planned for the locality.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is in any case considered that the proposal will provide for a better planning outcome than a strictly compliant development due to the enhanced occupant amenity and equitable access provided for. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. Clause 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion 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). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, 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) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion 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 opinion 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 7 below.

7. 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 (CLAUSE 4.6(4((a)(ii))

7a. Objectives of Development Standard

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

" *(a) to ensure that the scale of buildings:*

(i) is compatible with adjoining development, and

(ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and

(iii) complements any natural landscape setting of the buildings,

(b) to allow reasonable daylight access to all buildings and the public domain,

(c) to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,

(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,

(e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,

(f) to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas."

The *Height of Buildings Map* nominates a maximum height of 16m for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit a maximum height of 19.14m for the lift overrun.

Objectives (e) and (f) are not applicable to the proposal. In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 are addressed in turn below.

Objective (a)

Objective (a) refers to being "compatible" with adjoining development. It is considered that "compatible" does not promote "sameness" in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191:

> *"22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is*

generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve."

The proposed encroachments into the maximum building height applies mainly to the lift overrun with other minor building components that sit within the footprint of the proposed roof space. The majority of the building is below the maximum building height. The siting and scale of the proposed development has been designed to distribute building mass in a manner that best minimises impact on adjoining development and achieves appropriate separation from neighbouring dwellings. To the casual observer, the building will visually appear to have compliant height and will therefore be compatible with future nearby development. The proposed height non-compliance will not impact on any natural features of the site.

Accordingly, it is considered that the scale of the buildings is compatible with the desired future character of the locality and the site context. The minor height breach does not offend this compatibility in any noticeable way. The proposal therefore satisfies Objective (a).

Objectives (b) & (c)

In terms of daylight access to buildings and the public domain, the proposed height non-compliance does not contribute towards any unreasonable overshadowing of the adjoining public domain or adjoining development and the shadow diagrams provided with the amended plans demonstrate reasonable solar access to southern adjoining units, given the allotment pattern and orientation in the locality. It is noted that the portion of the building casting the greatest shadow (being the parapet of the roof at the southern elevation) has a compliant height and setback, and is therefore not contributing to unreasonable overshadowing not anticipated by the controls. The shadow impacts are a result of the east-west lot pattern in the locality.

In terms of views, the height of the building will not result in any significant additional view loss compared with a compliant building. There are no significant views from adjoining properties as a result of the topography of the area.

In terms of privacy, the non-compliance will not have any additional impacts on adjoining properties, as described in Section 4.1.4.1 of the submitted Statement of Environmental Effects. The proposed non-compliance will not compromise the use or enjoyment of neighbouring properties.

The proposal is therefore consistent with objectives (b) and (c).

Objective (d):

Matters of visual bulk have largely been addressed in relation to Objective (a). In essence, it is considered that given the location of the proposed non-compliance, architectural treatment of the building in terms of setbacks, materials and viewing points from which the non-compliances would be seen, visual impacts will be minimal. The proposed development provides for a floor space ratio that complies with the maximum allowed for an affordable rental housing development. Accordingly, the proposal satisfies Objective (d).

The proposed development is therefore consistent with the objectives for maximum height, despite the numeric non-compliance.

7b. Objectives of the Zone

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The objectives of the Zone R4 High Density Residential are as follows:

" *-To provide for the housing needs of the community within a high density residential environment.*
-To provide a variety of housing types within a high density residential environment.
-To enable other land uses that provide facilities or services to meet the day to day needs of residents.

-To encourage the supply of housing that meets the needs of the Sutherland Shire's population, particularly housing for older people and people with a disability.
-To promote a high standard of urban design and residential amenity in a high quality landscape setting that is compatible with natural features.
-To minimise the fragmentation of land that would prevent the achievement of high density residential development."

The zone objectives overlap to a large extent with the objectives of the height control and have been addressed above. In addition, it is noted that Council regularly support height variations to access to rooftop common open space, providing housing options with high amenity for future occupants. Further to that, it is considered that the proposal directly responds to the housing needs of the community by providing a high quality residential flat development, which includes 50% dedication as affordable rental housing for a 10 year period. The proposal includes a variety of apartment sizes, and adaptable and 'livable' apartments. The proposal will not fragment land for redevelopment, as outlined in the submitted Statement of Environmental Effects.

The height variation does not contravene any objectives for the zone and for that reason the proposed variation is acceptable.

8. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (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 (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice 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.

9. WETHER 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.

10. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

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. Whilst the proposed building height exceeds the maximum permitted on the site by 3.14m (19.63%), the proposed development 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.

11. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.