

## Clause 4.6 – Request to Vary a Building Height Standard under Newcastle LEP 2012

### Proposed Mixed Use Development (Residential Flat Building & Commercial Premises)

**Property:**

69 – 79 Railway Lane, Wickham  
Lot 110 DP 1018454 & Lot 11 DP 1106378

**Applicant:**

Blake Organisation

**Date:**

April 2016

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## 1.0 INTRODUCTION

Blake Organisation are seeking Development Consent from Newcastle City Council for a proposed mixed use development (residential flat building (206 units) and commercial premises (two tenancies total 960m<sup>2</sup>)), at 69 - 79 Railway Lane, Wickham. The proposal is described in further detail within the Statement of Environmental Effects that this report forms part of.

The proposed development will result in a new 15 storey building consisting of a podium design with ground level commercial development fronting the street and two residential towers above. The development will have a main roof height of 48m with blade walls extending a further 1m above. The proposal exceeds the prescribed height limit shown on the building height map (24m) under Clause 4.3(2) of NLEP 2012.

The applicant under Clause 4.6 of the LEP proposes this objection to the development standard to enable the application to be approved.

The site provides an excellent opportunity to make a quality contribution to the desired future character of the area, and the revitalisation of Wickham. The objective of the development is to enable the site to develop to its fullest potential, contributing to the revitalisation of the area, capitalising on the sites proximity to the new Wickham Interchange (public transport infrastructure) shops and service within the CBD and open space, and ensuring a design outcome that not only positively contributes to the evolving neighbourhood but also acknowledging the adjoining industrial and heritage buildings.

It is considered in this instance that a fully compliant design would result in a poorer design outcome.

The proposed development (with the additional height) is a superior outcome for the site, being architecturally designed to achieve a balance between maximising the capacity of the site whilst still achieving the requirements of SEPP 65 and the associated Apartment Design Guide. The proposal will provide appropriate amenity for future residents, and have acceptable impacts on adjoining and surrounding development.

The design approach seeks to deliver the available site FSR in a slender tower format instead of a block form. This objection has been prepared in pursuit of this approach.

Discussion with Newcastle City Council Strategic Planners indicate that they are supportive of additional height on the subject site, especially given the prime location, with respect to the new Wickham Transport Interchange, as well as the city centre.

The following report addresses the requirements of Clause 4.6 and demonstrates that Council can consent to the proposed development on the grounds of the objection made.

## 2.0 VARIATION SOUGHT

The standard to which exception is sought under Clause 4.6 of Newcastle LEP 2012 is Clause 4.3 of the NLEP 2012 which prescribes a maximum building height of 24m for the site (refer **Figure 1** below).

The proposed development has a maximum building height of 49m (main roof height of 48m with 1m blade walls on top).

A variation of 25m to the height control of 24m to permit an overall development height of 49m, is sought to allow the proposed development to proceed.

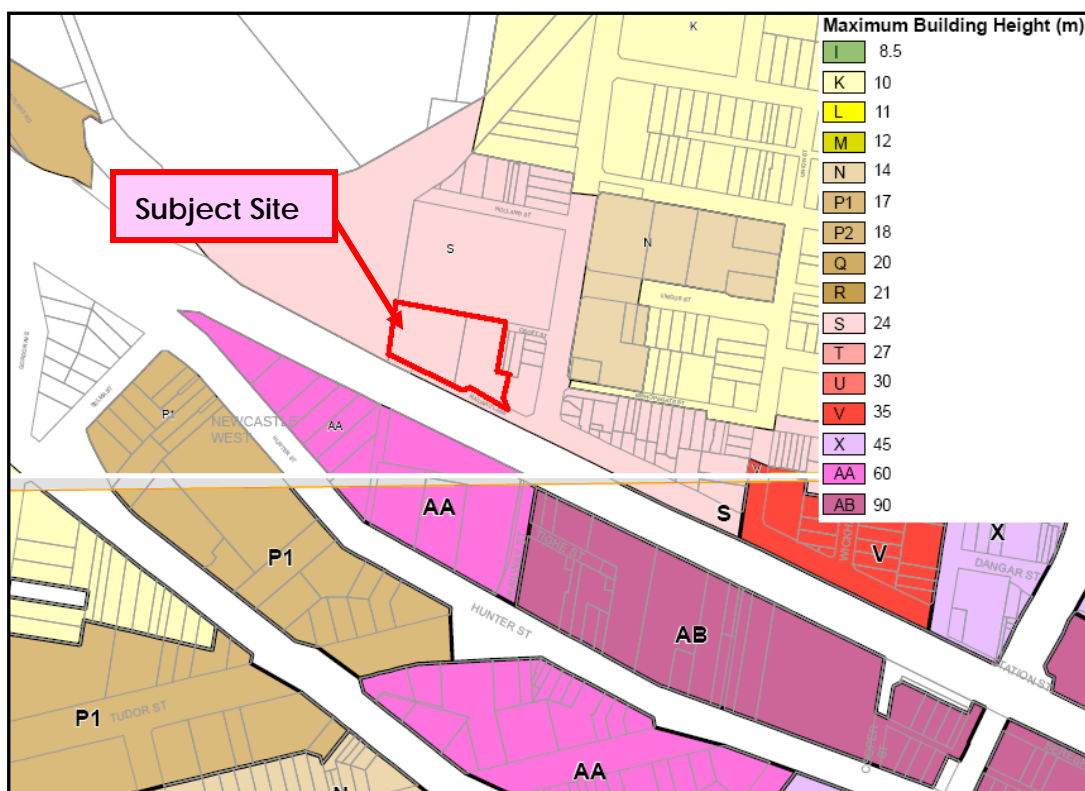


Figure 1 – Extract from Newcastle LEP 2012 Maximum Building Height Map.

### 3.0 GROUNDS FOR VARYING THE STANDARD

The subject site is ideally located within the inner city to provide high density residential development that will support the renewal of the city, and capitalise on the sites proximity to the new Wickham Transport Interchange, Wickham Park, the Newcastle Foreshore and Honeysuckle Precinct, the CBD, and Market Town Shopping Centre (Refer **Figure 2** below). The locality can offer future residents a lifestyle opportunity with high amenity and excellent access to public transport, and public open space, as well jobs, education and everyday community services and facilities.



Figure 2 – Locality Plan.

The proposed development aligns with Council's planning strategies and controls for the locality which promote increased densities to improve the contribution Wickham makes to the functionality, vibrancy and liveability of Newcastle City.

The proposed development is also consistent with the objectives and strategies of the Lower Hunter Regional Strategy, and the Draft Plan for Growing Hunter City, which supports increased densities and heights, in and around the city centre. These strategic documents detail many benefits to compact settlement within the city centre, including:

- Better use of existing infrastructure, and reduced travel by placing people, jobs, education and services closer together;

- Proximity to public transport will reduce reliance on car travel, which is a better outcome for the environment and Newcastle traffic congestion;
- Reduce the need to develop the urban fringe which has cost savings in terms of cost of infrastructure delivery and is a better outcome in terms of conservation;
- A need for additional housing and housing types to support the growing population; and
- Higher density housing within Newcastle will contribute to the revitalisation and renewal of the City centre.

From a strategic planning perspective there is therefore strong reason to achieve as much development outcome in this location as is reasonably possible. This is consistent with the broad principles of urban consolidation and Ecologically Sustainable Development. Indeed, this is consistent with the Act itself which has as an objective the efficient use of land.

Accordingly, achieving floor space as close as is reasonably possible to the available FSR for the site of 4:1 is considered to be responsible planning. This can be achieved by either providing a building that is lower in height but that is filling all of the available height envelope within the height standard (so a more squat building form) or by providing a building form that is taller than the maximum permitted height but that does not use all of the available envelope, and so producing a more slender building form (or tower).

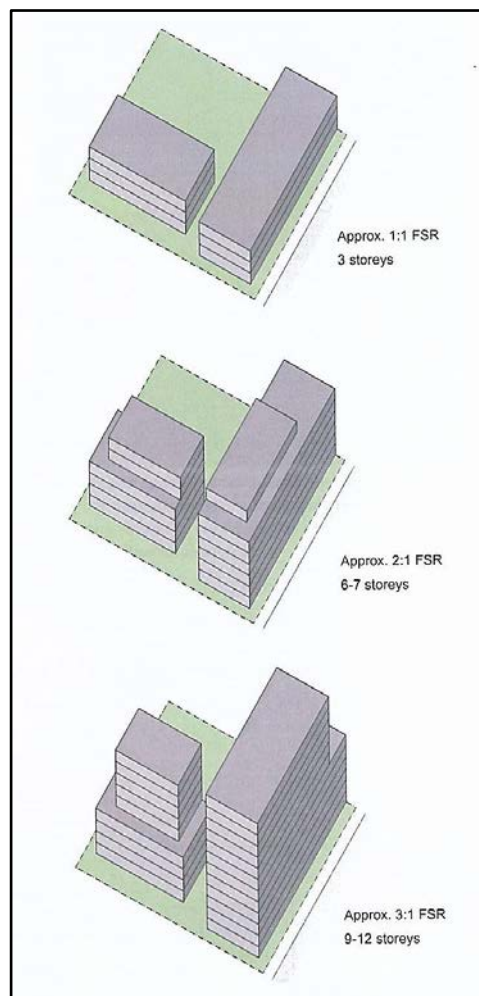
The slender built form (tower) approach is considered to be more aesthetically pleasing for achieving larger floor space, as it prevents large block like appearance and promotes a skyline that has separation and space around tower forms. Best practice urban design principles generally support the slender built form approach. This is evidenced in the Apartment Design Guideline as follows:

- Page 19 "Towers are suited to central business districts, major centres and urban renewal areas. This building type can be freestanding or combined with block developments (podiums)." The proposed development is for two towers on a podium
- Page 21 "Strategic centres are characterised by an established commercial core with a full range of services, taller buildings and a network of retail and commercial streets with active street frontages."

Taller building forms are consistent with strategic centres such as the inner city of Newcastle.

- Page 32 in particular identifies relationships between height and FSR and provides relevant diagrams for residential flat buildings, see below.





**Figure 3 – Sketches from Apartment Design Guide page 32.**

It can be seen that a FSR of 3:1 results in a suggested 9 – 12 storeys or say 25m to 32m in height conservatively. The FSR of 4:1 adopted by Council for this site should therefore adopt a height of around 14 – 17 storeys or 38m to 46m in height conservatively. The height to the predominate roofline of the proposed development is 38m.

The slender tower form is also generally supported in the Apartment Design Guide, it provides for buildings with appropriately sized building floor plates and building depths that provide superior amenity to residents in terms of access to solar, cross ventilation and views from buildings.

If the preferred slender design approach was to be adopted for the site, but within the height limit under the LEP, a significant loss of building floor space would result. This would result in a poor planning outcome noting that it is highly desirable in this strategic location to achieve as much density as is reasonably possible.

Accordingly, a design outcome that promotes both the preferred slender built form outcome, maintaining near the maximum FSR but that exceeded the height was explored

(Note: it can be seen that the additional height is not proposed to get an unreasonable floor space, but is proposed to get a better urban design outcome).

Below we consider the context and potential impact of the additional height proposed.

In **Figure 1** above we can see that the site is positioned adjacent heights within the city, to the south of the site, of 60m and 90m, significantly greater than that of the subject site. It is considered that a height of 38m as proposed within this context is acceptable and serves as a transition between development to the south and then to the north. It is considered that within the context of the overall city structure the proposed height would be acceptable, and would not look out of place.

The subject site was originally prescribed a maximum building height of 60m and an FSR of 6:1 when the Newcastle LEP 2012 was gazetted on 15<sup>th</sup> June 2012 (refer **Figures 4** and **5** below). However these standards were amended (to the current standards with Height control of 24m and FSR control of 4:1) as part of the Newcastle Urban Renewal Strategy (NURS) and subsequent amendments to zoning, FSR and Height controls throughout the city centre that were gazetted on 29<sup>th</sup> July 2014.

The NURS cited reasons for the change of height control on the subject site which included '*testing has confirmed a lack of feasibility*' and '*transition is needed between the taller city building and surrounding lower scaled areas*'; the proposal is consistent with these statements.

As previously stated It is considered that a height that is a transition between the taller buildings to the south is acceptable and the proposed height of 38m achieves this more appropriately compared with the current LEP height of 24m and the former LEP height of 60m.

A meeting was held with Council's Strategic Planners to discuss the proposed height for the site. It is understood that Council was supportive of additional height given the proximity to the proposed Wickham Transport Interchange. We understand that Council is again reviewing heights for this site and Wickham as a whole.

Given the commercial arrangements surrounding the current option to purchase the site, this development opportunity is time limited and such as the proponent seeks to submit the Development Application prior to the Master Plan review of the area and zone, height and FSR controls. To this end it, compliance with the standard would mean a missed opportunity for the site and the contribution it can make to the overall growth and revitalisation of Wickham and the city centre generally.

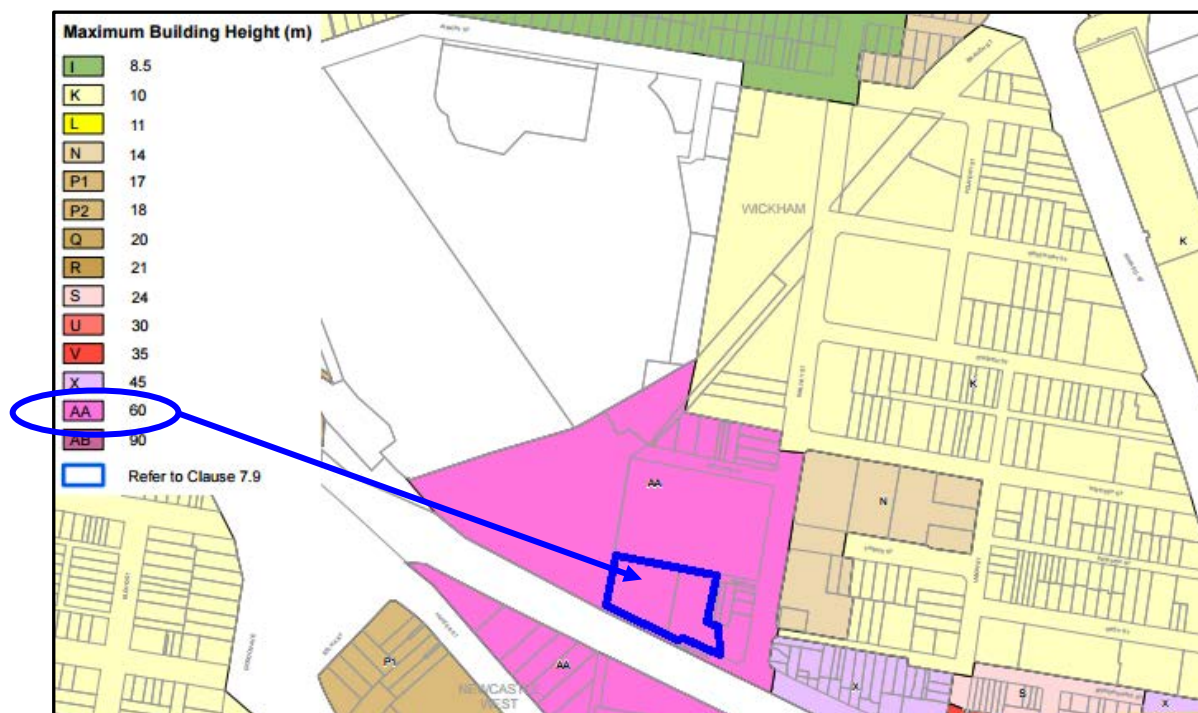


Figure 4 - Repealed Newcastle LEP 2012 Height Map (15.06.12 – 28.07.14).

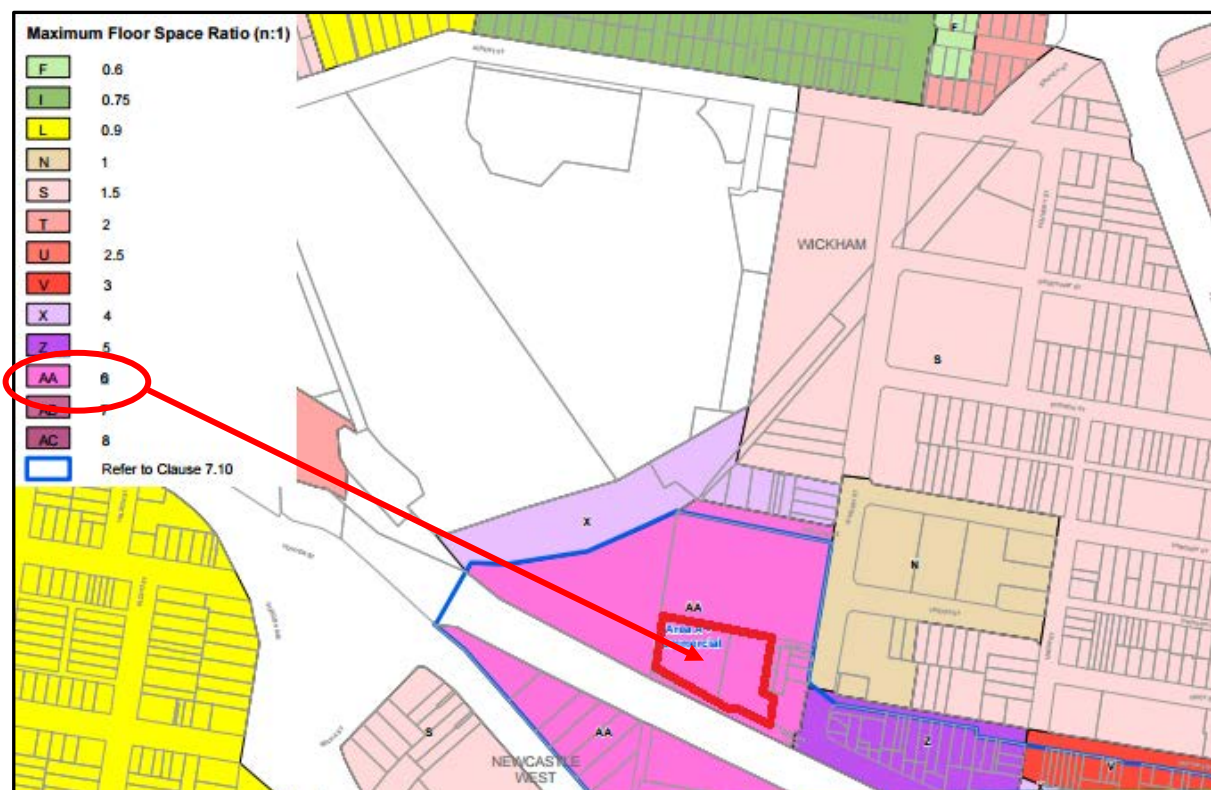


Figure 5 - Repealed Newcastle LEP 2012 FSR Map (15.06.12 – 28.07.14).

## 4.0 LAND USE ZONE AND HEIGHT OBJECTIVES

With consideration to the grounds of objection above the following considers the variation relative to the objectives of the Zone and the Height as provided for under the LEP.

### 4.1 LANDUSE ZONE & OBJECTIVES

The subject site is zoned B4 Mixed Use Zone under the Newcastle Local Environmental Plan 2012. The objectives of the B4 zone are to:

- *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 support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

The proposed development, with the varied height, remains consistent with the objectives of the B4 Mixed Use Zone providing integrated high density residential and commercial development within a city central location. The subject site is well located with respect to public transport, and is within close proximity to the CBD, Hunter Street and Honeysuckle precinct to promote walking and cycling as alternative transport. The proposal will support the viability of the city centre (CBD, Hunter Street Mall, Honeysuckle precinct and Darby Street precinct) through an increase in population and patronage within the locality.

### 4.2 CLAUSE 4.3 – HEIGHT OF BUILDINGS

The objectives of Clause 4.3 (Height of Buildings) are outlined within the LEP as follows:

- (a) *to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*

It is considered that the variation sought provides a better opportunity at achieving this objective compared with compliance with the height standard within the LEP. This is particularly the case given also the planning objective of ensuring that the development provides as much as reasonably possible of the FSR given the sites strategic location.

The proposed slender (tower) built form on top of podium is consistent with best practice urban design for residential buildings in urban areas as outlined in the Apartment Design Guide. By allowing the additional height the building will be consistent with this best practice approach.

The slender tower form will make a greater contribution toward the desired outcomes for the city compared with a reduced height squat building.

The proposed height in this location will not appear out of context, noting the available heights under the LEP on land to the south of the site.

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

The proposed height does not interfere with this objective being achieved as demonstrated in the documentation and plans submitted with the Development Application.

### 4.3 PREVIOUS CASELAW

Wehbe v Pittwater Council (2007) NSWLEC 827 established a series of five tests for variation of a development under the former SEPP 1 provisions.

The Whebe tests for variation of a development standard are outlined and addressed as follows:

- i) *The objectives of the standard are achieved notwithstanding the noncompliance with the standard.*

As demonstrated above, the proposed development is consistent with the objectives of the standard.

- ii) *The underlying purpose is not relevant in the circumstances.*

The underlying purpose is more likely to be achieved via the proposed alternative to the standard.

- iii) *The purpose of the standard would be thwarted if compliance was required.*

If compliance with the standard was required, then consistency with the objectives of the standard would not be achieved to the same level, noting the preference of the Apartment Design Guide to achieve a more slender tower form.

The squat perimeter building that would result from the 24m height is not as consistent with the purpose of the standard as would be the increased height which allows in achieving the available FSR a more slender tower built form.

- iv) *The standard has been abandoned via previous approvals.*

Not argued.

- v) *The zoning is unreasonable.*

Not argued.



More recently in *Moskovich v Waverley Council* [2016] NSWLEC 1015 it was found that the Whebe tests are still applicable for a Clause 4.6 variation with the qualification that previously it was required to determine achievement of the objectives of the standard, whereas under Clause 4.6 it should only be necessary to determine consistency with the objectives of the standard.

## 5.0 MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6

The relevant matters to be dealt with under Clause 4.6 for the purpose of the variation are addressed below, in the following order,

- Subclause 3;
- Subclause 4; and
- Subclause 5.

Subclause 1 is dealt with in the conclusion.

Subclauses 6 – 8 are not applicable to this application.

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

Compliance with the development standards in relation to maximum building height under Clause 4.3 is both unreasonable and unnecessary in this particular instance for the reasons outlined above and summarised again as follows:

- Compliance with the standard is both unreasonable and unnecessary as the proposed development (including the additional height) achieves the objectives of the standard imposed under Clause 4.3 of NLEP 2012.
- Compliance with the standard is unreasonable, as it would result in a sub standard design outcome for the site, and an inferior housing product. It would significantly limit the sites potential to contribute to the desired growth and renewal of the city centre, and how the design would contribute to the city skyline.
- Compliance with the standard is unreasonable & unnecessary given the context of nearby height limits. The proposed development will not appear out of character with the locality.
- Compliance with the standard is unnecessary as the proposed development will have no negative impacts on adjoining development. The superior design is consistent with the requirements of SEPP 65 and the associated Apartment Design Guide, not only ensuring a premium housing product, but also ensuring no overshadowing, visual privacy, acoustic impacts for adjoining neighbours.

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

This report has established that there are sufficient environmental planning grounds to justify the proposed variation, noting in particular:

- The strategic location of the site with respect to the Wickham, Transport Interchange, the CBD, and public open space, and in consideration of Council's planning objectives for the locality the pursuit of achieving as much FSR as possible is good planning practice and consistent with urban consolidation objectives and ESD principles. This being the case there is sufficient planning grounds to vary the height to achieve a better distribution of FSR in a more slender tower form consistent with the Apartment Design Guide ;
- Notwithstanding the proposed increase in height, the proposal still achieves the objectives of the height control, and the B4 zone objectives.

**4(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**

The relevant matters have been addressed.

**4(a)(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**

The proposed development is in the public interest as it will make a quality contribution to the overall growth and revitalisation of the Newcastle City Centre. It will provide additional housing in an ideal location close to the Wickham Transport Interchange (within 200m) and shops, services and recreation.

Notwithstanding the proposed height, the proposal achieves the objectives of the height control, and the B4 zone objectives.

**4(b) The concurrence of the Secretary has been obtained.**

Council can assume the concurrence of the Director General under Planning Circular PS08-003 Variations to Development Standards. The circular applies to variations to development standards made under planning instruments that adopt Clause 4.6 of the Standard Instrument.

**(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**

The proposed development does not raise any matters of significance for State or regional environment planning.

The subject site is located in the city centre which is an appropriate location to accommodate additional height. Newcastle City is acknowledged as a regional city in both the Lower Hunter Regional Strategy and the Draft Plan for Growing Hunter City,



and the proposal is consistent with the objectives and strategies under these strategic documents (as detailed above in **Section 3.0**).

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

In the circumstances (detailed within this report) there is no public benefit to maintaining the standard in this instance. It is considered that a greater public benefit is achieved by allowing the proposed height.

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

No relevant matters have been identified.

## 6.0 CONCLUSION

Blake Organisation is seeking to vary the allowable height for the redevelopment of the subject site for the purpose of a mixed use development (residential flat building and commercial premises) in Wickham.

The objectives for variation of the standards (Clause 4.6(1) of Newcastle LEP 2012) are:

**(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.**

The considerations under clause 4.6 have been addressed in preceding sections. Council can approve a variation to height in accordance with the requirements of Clause 4.6.

The objectives of clause 4.6 are satisfied as:

*The proposed variation sought is consistent with an appropriate degree of flexibility in respect of the standard and the particular circumstances; and*

*The flexibility specifically allows a better outcome for the site, and the potential contribution it can make to the overall growth and development of Wickham and the Newcastle City Centre.*

This variation request has demonstrated that application of the strict numeric standard is unreasonable and unnecessary as the objectives of the standard are achieved by the proposal.

The proposal has significant environmental planning merit having minimal impact on adjoining properties and identifiable public benefits.

The development is in the public interest being consistent with the objectives of the height standard and the B4 mixed use zone.

The concurrence of the Director General can be assumed.

There are no matters of state or regional planning significance engaged by the proposal as it is essentially a local matter under Newcastle LEP 2012. The public benefit is more likely to be served by flexibility in regard to the height standard, which will assist in Council meeting both environmental planning and strategic outcomes for the LGA, rather than strict numeric compliance with the standard.