

9 March 2018

General Manager
City of Parramatta Council
PO Box 32
PARRAMATTA NSW 2124

Dear Sir/Madam,

RE: DEVELOPMENT APPLICATION NO. 485/2016 - AMENDED DEVELOPMENT APPLICATION FOR PROPOSED DEVELOPMENT – 44-48 OXFORD STREET, EPPING

REQUEST UNDER CLAUSE 4.6 OF THE *HORNSBY LOCAL ENVIRONMENTAL PLAN 2013* TO VARY THE DEVELOPMENT STANDARD FOR HEIGHT OF BUILDINGS UNDER CLAUSE 4.3 OF THE *HORNSBY LOCAL ENVIRONMENTAL PLAN 2013*

1.0 INTRODUCTION

This letter has been prepared on behalf of the applicant Pirasta Pty Ltd, to further assist with the consideration of the amended Development Application submitted to Council for DA 485/2016 at 44-48 Oxford Street, Epping for a proposed mixed use development, involving:

- Demolition of all existing structures;
- Site preparation and bulk excavation works;
- Construction of 2 buildings over 4 basement levels, for shop-top housing and commercial premises, including:
 - Ground and first floor levels non-residential floor area;
 - 178 residential apartments;
 - Parking for 223 cars, 207 bicycles, 13 motorcycles; and
 - Roof top terraces and ground level communal open space with “Hidden Forest”.

This letter forms a request to grant an exception to the Height of Building map development standard in Clauses 4.3 of the Hornsby Local Environmental Plan 2013 (HLEP) through the provisions of Clause 4.6 “Exceptions to development standards” of the HLEP associated with the amended DA design for 44-48 Oxford Street, Epping.

As detailed in the Amended Statement of Environmental Effects (SEE) report which accompanies the Amended Development Application (Amended DA), the amended design seeks:

- An overall maximum height of amended building A to the top of the lift overrun when compared to the existing natural ground level immediately below of approximately 62.2 metres; and
- An overall maximum height of amended building B to the top of the lift overrun when compared to the existing natural ground level immediately below of approximately 51.12 metres.

The permitted Height of Building (HOB) control under the HLEP mapping for the site indicates the designation X = 48 metres, for the land at 44-48 Oxford Street, Epping.

Therefore, this updated request to vary the HLEP Height of Buildings mapping control has been prepared under the provisions of Clause 4.6 of the HLEP, and it is requested on this basis the HLEP height control be varied.

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

1. The NSW Department of Planning and Infrastructure's "Varying development standards: A Guide August 2011"; and
2. Relevant Case law, (established tests).

1.1 Environmental Planning Instrument and relevant clauses

The Hornsby Local Environmental Plan 2013 (HLEP) applies to the land.

Clause 4.6 of the HLEP states:

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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General 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.*

This Clause 4.6 variation request relates to a departure from a numerical development standard set out under Clause 4.3 of the HLEP Height of Buildings Map in relation to the 48m height standard applicable to the site. The HLEP Height of Buildings mapping designation X = 48m as shown in extract from the Height of Building Mapping in **Figure 1**.

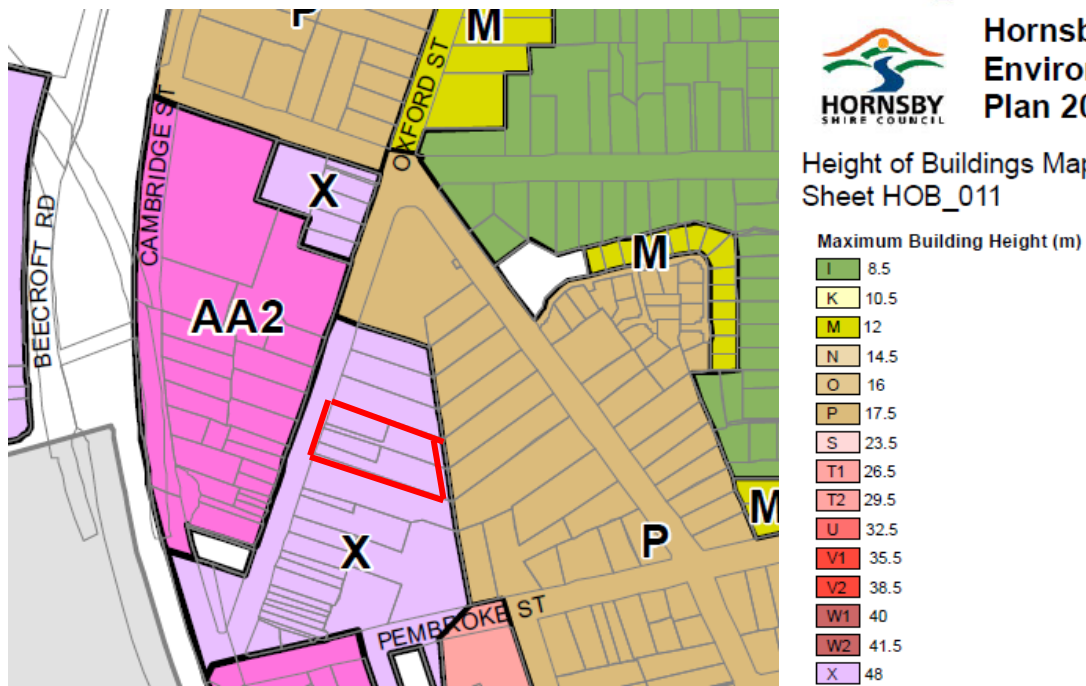


Figure 1: HLEP Height of Buildings Map extract (site outlined in red)

Source: NSW Legislation

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

Clause 4.3 of the HLEP contains a development standard for buildings proposed in the B2 Local Centre zone which states:

4.3 Height of buildings

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

(a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

(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.*

The provisions of subclause 2 apply and the designation for the portion of subject site under the height of building map is 48m maximum building height under subclause 2.

Therefore under Clause 4.3(2) of the HLEP any part of the buildings greater than 48m as set by Clause 4.3(2) of HLEP is a variation of a development standard. The proposed development seeks a minor variation to the HOB mapping. This is shown with the “blue line” in the extract from architectural drawing “Section B and Section C” in **Figure 2** below.

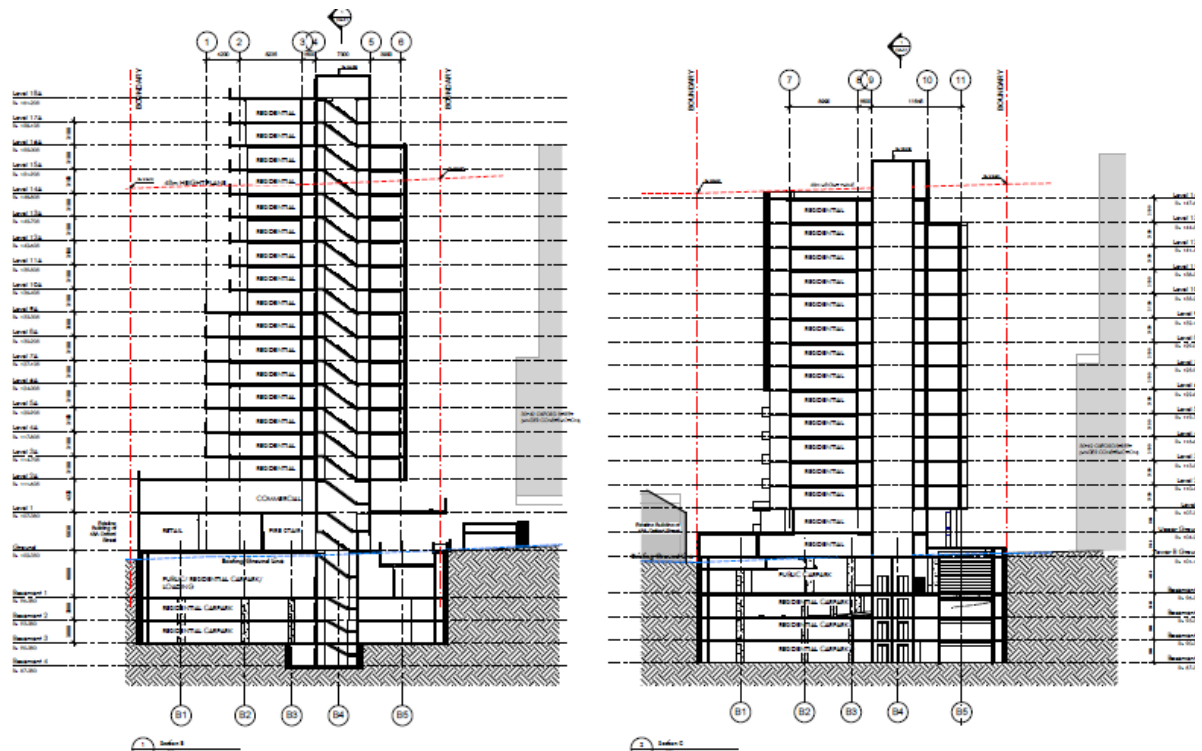


Figure 2: Extract from Drawing showing 48m in dashed red and the maximum RL for Building A of RL164.205 and Building B of RL152.700

Source: Nettleton Tribe Architects

The portion of Building A which encroaches the 48m HOB control has a maximum 14.2m variation (or 29.6%), and the portion of Building B encroaches the 48m HOB control has a maximum 3.12m variation (or 6.5%).

2.0 DEVELOPMENT STANDARDS

2.1 Clause 4.3(2) Height of buildings development standard:

Based on the provisions of Clause 4.3(2) of the HLEP, a 48m height of buildings development standard is identified under the Height of Buildings Map. The proposed development has a maximum height of 62.2m for Building A and 51.12m for Building B as shown on the architectural drawings included at **Appendix C** of the Amended Statement of Environmental Effects.

Therefore, the amended DA design does not comply with the maximum height of building permitted on the subject site in accordance with the provisions set out in the HLEP.

This is the applicant's formal request to vary the height of building control in Clause 4.3(2) of the HLEP development standard under Clause 4.6 of the HLEP.

Further, this formal Clause 4.6 request seeks to vary the provisions of Clause 4.3(2) of the HLEP, which demonstrates that in the circumstances of this case, the strict application with the standard is unreasonable and unnecessary and will not result in a departure from the standard which is not in the public benefit.

3.0 REASONS FOR NON-COMPLIANCE WITH THE DEVELOPMENT STANDARD

There are a number of reasons for the non-compliance with Clause 4.3(2) of the HLEP and these factors when combined, have contributed to the amended design as proposed:

- The site topography along its Oxford Street frontage (western boundary) to its rear boundary (eastern boundary) represents a change in topography of just over 2m or the majority of 1 storey.
- Given the provisions of the Apartment Design Guide (ADG) associated with *State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development*, the project seeks the inclusion of a “roof top terrace” on each building as the exclusive private communal open space for all future occupants of each residential flat building component of the development, so as to be distinct from the ground floor level communal open space. The ground floor level publicly accessible private open space has been designed to enable both residents and members of the public to access the deep soil plantings in the “Hidden Forest” as an outlook from and into the commercial floor areas at the ground floor level to provide for natural surveillance.
- The inclusion of a 1.2m depth for the “Hidden Forest” and the communal open space on the ground floor level, must provide universal access to all users, therefore the ground floor level of Building A and Building B, have been designed to enable accessible access to and from Oxford Street, along with a direct line of sight to Oxford Street. These factors have resulted in the finished level to be the same as the existing street edge to Oxford Street, which means the ground level of Building B is higher than natural ground level by approximately 1.5. As previously discussed the land has a fall towards its rear boundary.
- The design seeks to ensure the roof top terraces on Building A and Building B are each privately located and designed communal open spaces which successfully mitigate, to an acceptable degree, overlooking and attenuating noise both within the development and from adjoining properties, while at the same time provide for an outlook.
- In order to achieve equitable access to the private roof top terraces of each building, the lift is required to finish at each roof top terrace level. As a result, the lift overruns extends through the permitted building height.
- As the buildings on the southern side of the property at 30-42 Oxford Street, are taller apartment buildings, with windows and balconies on the northern façade which have the potential to overlook the subject site, it was considered by the designers at Nettleton Tribe important to “finish” the top of each building.

- The approved buildings to the south each breach the 48m HOB control and do not provide for the direct public benefit as proposed in this amended DA with the creation of the ground level publicly accessible private open space with the deep soil Hidden Garden as a “refuge” for future users of Oxford Street including residents and occupants of each building on the site.

4.0 ASSESSMENT OF THE PROVISIONS OF CLAUSE 4.6 “EXCEPTIONS TO DEVELOPMENT STANDARDS”

The provisions of Clause 4.6 “Exceptions to development standards” under the NLEP, provides the determining authority with the flexibility to vary a development standard where the circumstances of the development demonstrate that an exception to the development standard will maintain the objective of the standard and the development achieves a better outcome. The provisions of Clause 4.6(1) and (2) of the HLEP states:

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.

...

Clause 4.6(3) further states:

- (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.*

The provisions of Clause 4.6(3)(a) and (b) have been considered in the preparation of this exception request to vary the development standard as set out in **Table 1** below.

Table 1: Clause 4.6(3) assessment

Objective	Comment
<i>(a) that compliance with the development</i>	Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the stated aim of Clause 4.3 of the HLEP:

Objective	Comment
standard is unreasonable or unnecessary in the circumstances of the case	<p><i>(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.</i></p> <p>A. In light of the aim above which clearly encourage a flexible approach to compliance with design principles where the design of the development responds to the site and its form, strict compliance with the standard under Clause 4.3(2) is unnecessary because:</p> <p>I. The design of the building results in a better urban design outcome particularly as the building allows for disabled access throughout without resulting in unacceptable streetscape presentations and does not propose to unacceptably alter the existing site topography while creating a separate residential address to each building and a publicly accessible private open space off Oxford Street, which is considered to be consistent with objective (a);</p> <p>II. The application is accompanied by an extensive series of diagrams prepared by Nettelton Tribe included in the architectural drawings at Appendix C, which demonstrate the changes associated with the amended design and the solar access to adjoining properties.</p> <p>The shadow diagrams delineate at hourly intervals between 9am to 3pm on 21 June (winter solstice) and 23 March (autumn equinox) the shadow line of the original DA, the amended DA and a complying design, on the approved development to the south. These diagrams indicate that the amended DA design will cast a minor amount of additional shadowing.</p> <p>As is further demonstrated in the elevation shadow diagrams on the buildings to the south, it is considered that at least 2 hours solar access between 9am and 3pm on 21 June and the degree of shadow impact from the portions of each building which seeks a breach of the height of building control is minor and not considered to generate an unacceptable shadow impact.</p> <p>Therefore, based on these diagrams in the architectural drawings, the shadow analysis demonstrates that the minor breaches of the building height control will not result in an unacceptable impact on the amount of solar access available to the buildings to the south.</p> <p>The design of the amended buildings includes no windows with a direct aspect towards the south other than “eye-lid” windows on its southern elevation. Therefore the design of each building will not result in any loss of privacy to the approved development to the south at 30-42 Oxford Street.</p> <p>The amended design has sought to orientate its windows and balconies of living areas primarily towards its eastern and western outlooks.</p> <p>Therefore the design will adequately maintain privacy for residents of existing and future dwellings and promotes privacy for the future residents of the new building which is consistent with the objective of the building height control in Clause 4.3.</p> <p>A zone boundary interface occurs on the eastern rear boundary, where the</p>

Objective	Comment
	<p>property is zoned R4 High Density Residential. This was previously considered in the urban design report by GMU with the original SEE report. Therefore, it is considered that Building B is of an appropriate scale, density and promotes the character envisaged in this area, being consistent with objective (a) of Clause 4.3.</p>
III.	<p>The proposed development will not result in an unacceptable adverse impact in terms of loss of solar access, loss of privacy or loss of views to or from adjoining properties. The proposed development is of a compatible design with its context and is of a scale and density as envisaged with the future character of the area. Therefore, strict compliance with the development standard is unnecessary as the development will still achieve the environmental and planning objective of Clause 4.3, as discussed above.</p>
IV.	<p>The assessment provided previously in the Clause 4.6 prepared with the original SEE report by SJB remain valid which stated:</p> <p><i>The context of the site is a key consideration in this case. The site is within an identified Priority Planning Precinct introduced by the NSW's Government in recognition of the proximity to the existing Epping Railway Station and the future Sydney Metro Northwest. As a Priority Precinct, Epping Town Centre will deliver higher density housing, increased employment opportunities, additional retail, business uses, public spaces and improved transport and pedestrian linkages. To implement this vision building heights and floor space ratios were increased across the centre, with the greatest increases occurring around the station.</i></p> <p><i>The proposed site has a height limit of 48m and an FSR of 4.5:1. The proposed development has an FSR of 4.29:1. Any further reduction in the height would potential require further reductions in FSR, thereby compromising the overall desired character for higher density development.</i></p> <p><i>Furthermore, there are four significant planning controls that the development proposal is expected to comply with: FSR and height under the HLEP 2013, setbacks as prescribed in the SEPP 65 Apartment Design Guide (ADG), and the maximum floor plate/building dimension controls for residential towers above podiums applying the Hornsby Development Control Plan 2013 (HDCP 2013). The development proposal complies with FSR. As identified in the Urban Design Analysis included at Attachment 4 to the SEE, the proposed development provides a better response to the desired character and controls under the HDCP 2013 and the setback distances applying under the ADG, then a complying scheme for reasons outlined below:</i></p> <ul style="list-style-type: none"> • <i>Greater separation distance between Towers A and B, which contributes to improved privacy and solar penetration for the residential units on the site and on surrounding sites;</i> • <i>A slimmer and more elegant profile for Tower A, owing to the changes in proportion of the tower form;</i> • <i>Stronger street presence for Tower A as the height increases;</i> • <i>More interesting urban form by having two towers of different heights;</i> • <i>Better transition to the adjoining site to the east from Tower A;</i> • <i>Greater area at the podium level available for communal open space; and</i>

Objective	Comment
	<ul style="list-style-type: none"> Increased amenity as the added separation for Tower A allows for the provision of active habitable windows to Tower A's north eastern elevation; <p>The amended design has a FSR 4.35:1, which remains compliant with the maximum permitted of 4.5:1 under the FSR Mapping for the site. For reasons outlined above a development which is made to comply with the planning control is unreasonable in the circumstances.</p> <p>A development that strictly complies with the 48m height standard is unreasonable or unnecessary in the circumstance for the following reasons:</p> <ul style="list-style-type: none"> The non-compliance with the height limit does not result in a building that will be out of scale with surrounding future development. It allows for a 17 level rather than 15 level building for Tower A and a partial non-compliance attributed to the lift overrun providing access to the communal open space on Tower B. Removing the non-compliance would not significantly alter the perceived height of the building as viewed from the public domain or from other surrounding development. Compliance with the height standard would also require the redistribution of floor space, which is compliant, ensuring that greater pressure is placed upon the other controls of setbacks and maximum floor plate. These controls are considered to be more important in achieving a development that maintains high levels of amenity and compatibility with adjoining developments. A complying development would be less successful in achieving this transition. The additional height creates a stronger vertical element to the building that better balances the bulk of the building. It also is more successful in making the transition in heights from the precincts to the west and south that have building heights of 72 metres. There is no discernible difference in the environmental impacts between a building that strictly complies with the height control in terms of: <ul style="list-style-type: none"> <u>Visual and acoustic privacy impacts</u> <p>The non-compliant levels of the building do not generate any privacy impacts over or above those that exist with a fully compliant building height. This is the same for acoustic privacy;</p> <ul style="list-style-type: none"> <u>Visual impacts</u> <p>There is a nominal difference in visual impacts between the proposed building and a complying building. When viewed from a distance, Buildings A and B will be located amid other tall buildings ranging in height, including those on adjoining sites up to 72 metres. This will be so from a range of different viewing locations and angles. Whether Building A is 15 or 17 levels would not be noticeable and it would require a conscious effort to count the levels to confirm which building is compliant and which is not. Proposed Building B includes in its design a podium level where the ground floor 2 levels at the rear boundary have been designed in a form similar to row housing, and then steps away from the rear boundary to the tower element which has a greater setback when compared to the approved building to the south and Building B has a comparable height to the approved tower to the south, which was considered</p>

Objective	Comment
	<p>to be acceptable to the determination authority in terms of providing a suitable transition to the land to the east given the rear boundary of the site is also the HOB boundary to a lower HOB control; and</p> <p>– <u>Overshadowing impacts</u></p> <p>There is a negligible difference in shadow impacts of a compliant building and the proposed building.</p> <p>B. Strict compliance is unreasonable as no environmental or planning purpose would be served by enforcing the development standard and would not bring about a good planning outcome, on the following grounds:</p> <ul style="list-style-type: none"> • An assessment of the proposal demonstrates it is consistent with the desired future character of the B2 zone; • The proposed development is considered to be compatible with the streetscape along Oxford Street; • The proposed development will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the areas of non-compliance is in a portion of the site which does not dominate the streetscape; and • The scale of the desired future surrounding development has been considered carefully and the proposed development is considered to be compatible. <p>For these reasons it is considered that strict application of the height standard is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minor and there are no significant adverse impacts flowing from the non-compliance.</p>
<i>(b) that there are sufficient environmental planning grounds to justify contravening the development standard</i>	<p>The minor impacts of the exceedance of the development standard are considered to be negligible.</p> <p>The minor non-compliance with the development standard is far outweighed by the development achieving the aims in Clause 4.3 in promoting the principles outlined in the Sydney Regional Growth Plan – A Plan for Growing Sydney and the draft amendment Greater Sydney Region Plan. For example, the development promotes a use in an urban area which supports:</p> <ul style="list-style-type: none"> • Existing urban housing; and • Increasing jobs and better utilising land already zoned B2 Local Centre which permits this form of development under the HLEP. <p>In this regard, the development is also consistent with the State and regional objectives.</p>

5.0 ACHIEVING THE UNDERLYING OBJECTIVES OF THE STANDARD

Clause 4.6(4) of the HLEP states:

(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 Director-General has been obtained.*

It is considered that the variation still achieves the stated objective of the development standard:

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The proposed development achieves the above stated objective for the reasons stated in **Table 1**, notwithstanding the minor non-compliances with the height standard for Buildings A and B of the amended DA design.

6.0 CLAUSE 4.6(5) CONSIDERATIONS

Clause 4.6(5) of the HLEP states:

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

The matters for consideration in Clause 4.6(5) have been addressed in **Table 2** below.

Table 2: Clause 4.6(5) assessment

Matter of Consideration	Comment
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning	The minor non-compliances with the development standard does not raise any matters of significance for State or regional planning as the development meets the stated objective of the development standard.
(b) the public benefit of maintaining the development standard	As the development substantially complies with the stated objective of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance.
(c) any other matters required to be taken into consideration by the Director-General before granting concurrence	It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.

7.0 CONCLUSIONS

This Clause 4.6 variation request to Clause 4.3(2) height control of HLEP should be supported on the basis that the strict application of the development standard to the development is both unreasonable and unnecessary given that the development meets the stated objective of Clause 4.3:

- An assessment of the proposal demonstrates it is consistent with the desired future character of the B2 zone;
- The proposed development is considered to be compatible with the streetscape along Oxford Street;
- The scale of the proposed development has been considered carefully and the proposed development is considered to be compatible with the desired future surrounding development;
- The design is complementary to the streetscapes and will not unacceptably impact on the available solar access to the adjoining residential properties;
- The minor non-compliances with the HOB control will not impact on any heritage item, will accommodate the floor levels to enable disabled access throughout the building and the associated communal spaces;
- The development will not generate any adverse traffic impacts and therefore the variation does not result in the intensification of the land outside of what is permissible development given the FSR of the amended design is 4.35:1 which is well below the maximum permitted of 4.5:1; and
- There will not be any unacceptable detrimental overshadowing of adjoining properties, loss of privacy or views for adjoining properties nor will there be any unacceptable adverse visual impacts upon the streetscape or the public domain given the area of non-compliance is in a small portion of the development and one that does not dominate the streetscape.

For the reasons set out above, the development should be approved with the minor exception to the numerical height standard in Clause 4.3(2). Importantly, the development as amended still achieves the stated objective of the standard notwithstanding the minor numerical non-compliances with the development standard.

Should you have any queries or require clarification on any matters please do not hesitate to contact the undersigned on (02) 9929 4044.

Yours faithfully,



Marian Higgins
Planning Manager
Higgins Planning Pty Ltd