

20 July 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

UPDATED 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*

INTRODUCTION

1. This letter has been prepared on behalf of the applicant Pirasta Pty Ltd (applicant) to further assist with the consideration of the proposed mixed-use development application and the variation sought to Clause 4.3 of the *Hornsby Local Environmental Plan 2013* (HLEP).
2. As detailed in the Addendum Statement of Environmental Effects (SEE) letter which accompanied the Amended Development Application (DA), the design of the proposed development has had consideration of the Height of Building (HOB) standard contained in Clause 4.3 of the HLEP, the proposal will result in a variation to the HOB standards in Clause 4.3 of the HLEP Height of Building Mapping.
3. The permitted 48m HOB standard under Clause 4.3 of the HLEP applies as the land under the HOB Map, for the land at 44-48 Oxford Street, Epping.
4. Therefore, this request is to vary the HLEP HOB standards under the provisions of Clause 4.6 of the HLEP.
5. This Clause 4.6 variation request has been prepared having regard to:
 - The NSW Department of Planning & Environment's Guideline *Varying Development Standards: A Guide*, August 2011, and
 - has incorporated as relevant principles identified in the applicable Case law, (established tests) in the following judgements:
 - *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
 - *Wehbe v Pittwater Council* [2007] NSWLEC 827
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
 - *Moskovich v Waverley Council* [2016] NSWLEC 1015
 - *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191

▪ *Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)*

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

WHAT IS THE ENVIRONMENTAL PLANNING INSTRUMENT (EPI) APPLICABLE?

7. The Environmental Planning Instrument (EPI) to which this variation relates is the Hornsby Local Environmental Plan 2013 (HLEP).

WHAT IS THE ZONING OF THE LAND?

8. In accordance with Clause 2.2 of the HLEP the site is zoned B2 Local Centre.

WHAT ARE THE OBJECTIVES OF THE ZONE?

9. The land use table to Clause 2.2 of the HLEP provides the following objectives for the B2 Local Centre zoning:

1 Objectives of zone

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*

WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

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

UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

11. The development standard being varied is prescribed under Clause 4.3 of the HLEP. Clause 4.3 is detailed below. The HLEP HOB Map identifies the subject site with the designation 'X = 48m', see Figure 1. The land is zoned B2 under the HLEP zoning map. Therefore, under Clause 4.3, the HLEP HOB Map and this clause apply.

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 HLEP Height of Buildings mapping designation X = 48m is shown in extract from the Height of Building Mapping in **Figure 1 below**.

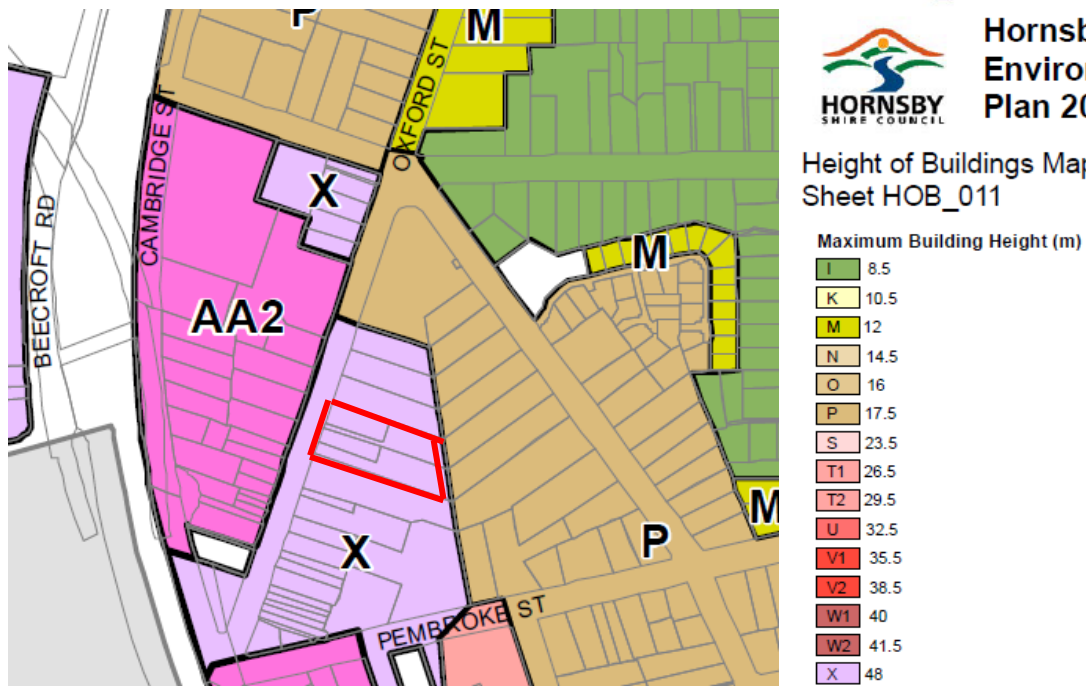
**Height of Buildings Map -
Sheet HOB_011**


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**).

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. The objective in Clause 4.3 of the HLEP, is as follows:

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

WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE EPI?

13. An extract of the HLEP HOB map is shown in **Figure 1**. The map prescribes the site being within ‘X’ = 48m’ for the subject site.

WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION PROPOSED?

14. The proposed development seeks a minor variation to the HOB mapping. This is shown with the “red line” in the extract from architectural drawing section of each building in **Figure 2** below.

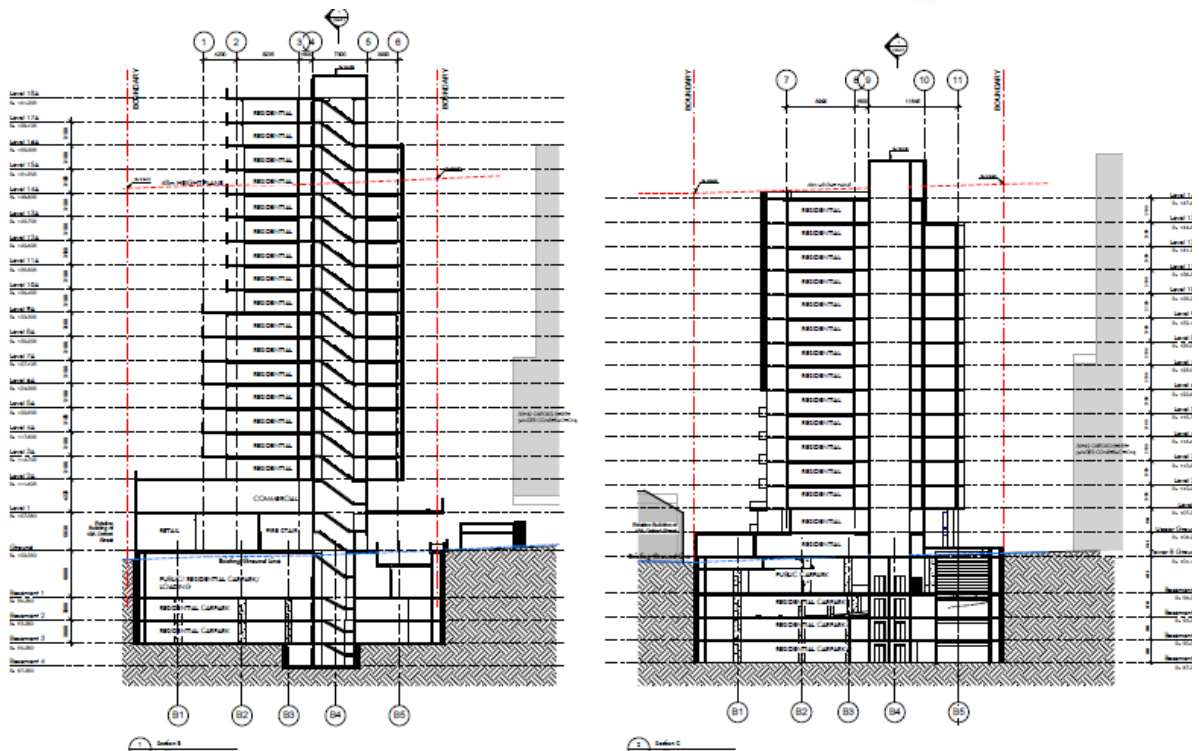


Figure 2: Extract from Drawing showing 48m in dashed red and the maximum RL for Building A of RL164.205 and Building B of RL152.700

Source: Nettleton Tribe Architects

15. 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%).
16. 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:
 - a) 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.
 - b) 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.
 - c) 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 an accessible path of travel 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.

- d) 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.
- e) 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.
- f) 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.
- g) 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.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

17. 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.

18. **Table 1** below provides a summary of the key matters for consideration under Clause 4.6 of the HLEP and response to each consideration.

Table 1: Matters for Consideration under Clause 4.6

Clause 4.6 Consideration	Response
<p>(1) The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> (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. 	<p>The objectives of this clause expressly indicate a degree of flexibility should be applied "in particular circumstances". This is such a circumstance to enable a flexible approach to the outcome sought by this Amended DA.</p>
<p>(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.</p>	<p>The Height of Building (HOB) standard is not excluded from operation of this clause.</p>
<p>(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</p>	<p>The Addendum Statement of Environmental Effects submitted with the Amended DA indicates a specific request is included with the application to seek a variation of the HOB development</p>

Clause 4.6 Consideration	Response
<p><i>contravention of the development standard by demonstrating:</i></p> <ul style="list-style-type: none"> a. <i>that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</i> b. <i>that there are sufficient environmental planning grounds to justify contravening the development standard.</i> 	<p>standard. This letter is the applicant's updated formal written request.</p> <p>Refer to table 2 below for an assessment under Clause 4.6(3)(a) and (b).</p>
<p>(4) <i>Development consent must not be granted for development that contravenes a development standard unless:</i></p> <ul style="list-style-type: none"> a. <i>the consent authority is satisfied that:</i> <ul style="list-style-type: none"> i. <i>the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i> ii. <i>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</i> b. <i>the concurrence of the Director-General has been obtained.</i> 	<p>This written request addresses all requirements of subclause (3).</p> <p>As set out in table 2 of this written request, the proposed development will be in the public interest because it is consistent with the objective of the HOB standard (refer to table 2) and the objectives for the zone (refer to table 3). Concurrence may be assumed but is a matter to be determined by the Consent Authority.</p>
<p>(5) <i>In deciding whether to grant concurrence, the Director-General must consider:</i></p> <ul style="list-style-type: none"> a. <i>whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i> b. <i>the public benefit of maintaining the development standard, and</i> c. <i>any other matters required to be taken into consideration by the Director-General before granting concurrence.</i> 	<p>Potential matters of significance for State or regional environmental planning is addressed in paragraphs 37, 38 and table 4.</p> <p>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.</p> <p>Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 40, 41 and 42.</p> <p>As the development is consistent with the stated objective of the development standard, and as such requiring strict compliance with the development standard is unreasonable and unnecessary. There is no public benefit of maintaining the development standard in this instance.</p> <p>All matters required to be considered by the Secretary (formerly Director-General) before granting concurrence have been addressed as part of this Clause 4.6 variation request.</p>
<p>(6) <i>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:</i></p>	<p>The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.</p>

Clause 4.6 Consideration	Response
<p>(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</p> <p>(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.</p> <p>Note. When this Plan was made it did not include all of these zones.</p>	
<p>(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).</p>	<p>The Consent Authority must keep a record after determining this DA.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following:</p> <ol style="list-style-type: none"> a development standard for complying development, 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, clause 5.4. 	<p>This subclause does not affect the subject site.</p>

19. Table 2 below provides an assessment against Clause 4.6(3):

Table 2: Clause 4.6(3) assessment

Objective	Comment
<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case</p>	<p>Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the stated objective of Clause 4.3 of the HLEP:</p> <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> <ul style="list-style-type: none"> In light of the objective above which 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 is unnecessary because: 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); The application is accompanied by an extensive series of diagrams prepared by Nettleton Tribe Architects included in the architectural drawings at Appendix C of the Amended DA package, which demonstrate the changes associated with the amended design and the solar access to adjoining properties. <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>

Objective	Comment
	<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 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> <ul style="list-style-type: none"> • 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. • The assessment provided previously in the Clause 4.6 prepared with the original SEE report by SJB remain valid which stated: <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</i></p>

Objective	Comment
	<p><i>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> • <i>Increased amenity as the added separation for Tower A allows for the provision of active habitable windows to Tower A's north eastern elevation;</i> <p>The amended design has an 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> – <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</p>

Objective	Comment
	<p>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 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> <ul style="list-style-type: none"> • Strict compliance with the development standard is unnecessary as the development will still achieve the environmental and planning objectives of Clause 4.3, as discussed above. • 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: <ul style="list-style-type: none"> I. An assessment of the proposal demonstrates it is consistent with the desired future character of the B2 zone; II. The proposed development is considered to be compatible with the streetscape along Oxford Street; III. 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 IV. 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 HOB control in Clause 4.3 is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minor and there are no 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 exceedance of the development standard for the lift is a very minor part of the proposed built form change, as the design seeks the inclusion of lift access to allow for maintaining existing landscaped areas while providing accessibility throughout the existing building and land. 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 Greater Sydney Region Plan – A Metropolis of Three Cities. 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>

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

21. The proposed variation from the development standard is assessed below against the accepted "5 Ways" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, it has been generally applied in the consideration of a request under Clause 4.6 of the HLEP, as confirmed in *Four2Five*.

HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

22. The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).
23. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

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

24. Clause 4.3 does have stated objectives, and it is considered that the variation still achieves the stated objectives of the development standard as detailed previously in Table 2 above:
- (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, including parks, streets and lanes,*
 - (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
 - (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*
25. The proposed development achieves the above stated objectives for the reasons stated in Table 2, notwithstanding the minor increase in the non-compliances with the HOB standard.
26. The breach of the HOB standard does not cause inconsistency with this objective, and therefore the intent of clause 4.3 of the HLEP is also achieved.

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

27. There are stated objectives of the standard in Clause 4.3 and as discussed above, the objectives of Clause 4.3 are relevant to the development and can be maintained by the proposed variation.

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

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

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

29. It is noted that Council has varied the HOB standard from time to time based on the merits of each case.

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

30. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

31. The Statement of Environmental Effects prepared for this Development Application provides a comprehensive environmental planning assessment of the proposed development and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the development.
32. There are robust justifications throughout the SEE and Addendum SEE and accompanying documentation to support the proposed alterations and additions to the existing dwelling given the overall bulk and scale of the development will be essentially the same as that of the existing dwelling house and contend that the outcome is appropriate on environmental planning grounds.
33. The particular circumstances of this case distinguish it from others as detailed in Table 2 above.

IS THE VARIATION IN THE PUBLIC INTEREST?

34. Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.
35. The objective of the standard have been addressed in **table 2** and are demonstrated to be satisfied. The proposal is consistent with the zone objectives and permissible in the zone. Each of the objectives of the zone are addressed in **Table 3** below.

Table 3: Assessment of the proposed development against the zone objectives – B2 Local Centre zone under the HLEP

B2 Local Centre zone - objectives	Comment
<ul style="list-style-type: none"> <i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.</i> 	The proposed development is consistent with the objective as the design of the proposed building seeks to allow the widest possible flexibility to cater for the widest range of residential, retail, business and entertainment uses to serve the local area.
<ul style="list-style-type: none"> <i>To encourage employment opportunities in accessible locations.</i> 	The proposed development is consistent with this objective as the potential to generated direct and indirect jobs in the non-residential commercial and retail floor space components and during the construction phase of the development.
<ul style="list-style-type: none"> <i>To maximise public transport patronage and encourage walking and cycling.</i> 	In order to promote and maximise patronage of the public transport systems, the applicant has prepared a site specific Green Travel Plan. This Green Travel Plan includes a list of mechanism to encourage the use of public transport patronage and walking and cycling in the locality.

36. The objectives of the zone, as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the HOB standard is in the public interest.

MATTERS OF STATE OR REGIONAL SIGNIFICANCE (CL.4.6(5)(A))

37. 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.*

38. The matters for consideration in Clause 4.6(5) have been addressed in **Table 4** below.

Table 4: Clause 4.6(5) assessment

Matter of Consideration	Comment
<i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning</i>	The minor non-compliance with the development standard does not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.
<i>(b) the public benefit of maintaining the development standard</i>	As the development substantially complies with the stated objectives 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.
<i>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence</i>	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.

39. There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

THE PUBLIC BENEFIT OF MAINTAINING THE STANDARD (CL.4.6(5)(B))

40. Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.
41. There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standards, whilst better planning outcomes are achieved.
42. We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

IS THE VARIATION WELL FOUNDED?

43. This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.3 of the HLEP, that:

- a) Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- b) There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this case;
- c) The development meets the objectives of the development standard and where relevant, the objectives of the B2 zone, notwithstanding the variation;
- d) The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- e) The proposal results in a better planning outcome in that a compliant scheme would result in a loss of access throughout the existing site which does not impact adjoining properties or result in a loss of at surface landscaping;
- f) The non-compliance with the HOB does not result in any unreasonable environmental impact or adverse impacts on adjoining occupiers. It is considered the proposed height is appropriate for the orderly and economic use of the land and is consistent with character of this location; and
- g) The contravention does not raise any matter of State or Regional significance.

CONCLUSIONS

44. This Clause 4.6 variation request to Clause 4.3 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 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);
- The application is accompanied by an extensive series of diagrams prepared by Nettleton Tribe Architects included in the architectural drawings at **Appendix C of the Amended DA package**, which demonstrate the changes associated with the amended design and the solar access to adjoining properties.

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.

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.

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.

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.

The amended design has sought to orientate its windows and balconies of living areas primarily towards its eastern and western outlooks.

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.

A zone boundary interface occurs on the eastern rear boundary, where the 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.

- 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.
- The assessment provided previously in the Clause 4.6 prepared with the original SEE report by SJB remain valid which stated:

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.

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.

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:

- *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;*

- *A slimmer and more elegant profile for Tower A, owing to the changes in proportion of the tower form;*
- *Stronger street presence for Tower A as the height increases;*
- *More interesting urban form by having two towers of different heights;*
- *Better transition to the adjoining site to the east from Tower A;*
- *Greater area at the podium level available for communal open space; and*
- *Increased amenity as the added separation for Tower A allows for the provision of active habitable windows to Tower A's north eastern elevation;*

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.

- A development that strictly complies with the 48m height standard is unreasonable or unnecessary in the circumstance for the following reasons:
 - 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:
 - Visual and acoustic privacy impacts

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;

– Visual impacts

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 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

– Overshadowing impacts

There is a negligible difference in shadow impacts of a compliant building and the proposed building.

- 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.
45. For the reasons set out above, the development should be approved with the minor exception to the numerical HOB standard in Clause 4.3. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliance with the development standard.

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
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