



Clause 4.6 Assessment – Building Height

Mixed Use Development

**32-44 BROOKS PARADE, 2-10 SHARP STREET & 5-11
EDGAR STREET, BELMONT**

Clause 4.6 Assessment – Building Height

Liability limited by a scheme approved under Professional Standards Legislation

Quality ISO 9001 Certified System

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PROJECT: Mixed use, multi storey development comprising 140 residential units, 4 retail/commercial areas, 1 communal multi-purpose area, basement car parking and associated landscaping – 32-44 Brooks Parade, 2-10 Sharp Street and 5-11 Edgar Street, Belmont.

CLIENT: KML Joint Venture

OUR REFERENCE: 13/0524

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CERTIFICATION: I hereby certify that this Report has been prepared in accordance with the requirement of the *Environmental Planning and Assessment Act 1979* and its associated Regulations. I certify that to the best of my knowledge the information contained within this Report is neither false nor misleading.

SIGNATURE



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1. INTRODUCTION

This submission seeks a variation to Clause 4.3 of the Lake Macquarie Local Environmental Plan 2014, which relates to the building height.

This submission has been prepared with regards to a development application for mixed use, multi storey development comprising 140 residential units, retail/commercial areas, 1 communal multi-purpose area, basement car parking and associated landscaping at 32-44 Brooks Parade, 2-10 Sharp Street and 5-11 Edgar Street, Belmont.

The proposed development meets the requirements prescribed under Clause 4.6 of the Lake Macquarie LEP 2014, as detailed in this written request for a variation to maximum building height control. Clause 4.6 states the following:

“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 a development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - i. *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
- (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- Note.** *When this Plan was made it did not include any 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*
 - (ca) *clause 2.8, 6.1 or 6.2.*

Clause 4.6 – Exceptions to development standards, establishes the framework for varying development standards applying under a LEP. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

*“4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.”*

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

- “(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”*

1.1 THE DEVELOPMENT STANDARD

The Environmental Planning Instrument to which these variations relate to is the *Lake Macquarie Local Environmental Plan 2014*. The development standard to which this variation relates to is Clause 4.3 – Height of Buildings, which reads as follows:

“4.3 Height of buildings

- (1) *The objectives of this clause are as follows:*
 - (a) *to ensure the height of buildings are appropriate for their location,*
 - (b) *to permit building heights that encourage high quality urban form.*
- (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.”*

Under the *Lake Macquarie Local Environmental Plan 2014* **building height** (or **height of building**) means:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

1.2 CONTRAVENTION OF THE DEVELOPMENT STANDARD

The proposed development exceeds Clause 4.3 under the *Lake Macquarie Local Environmental Plan 2014*. A written justification is therefore required for the proposed variation to the maximum building height development standard, in accordance with Clause 4.6 of the *Lake Macquarie LEP 2014*.

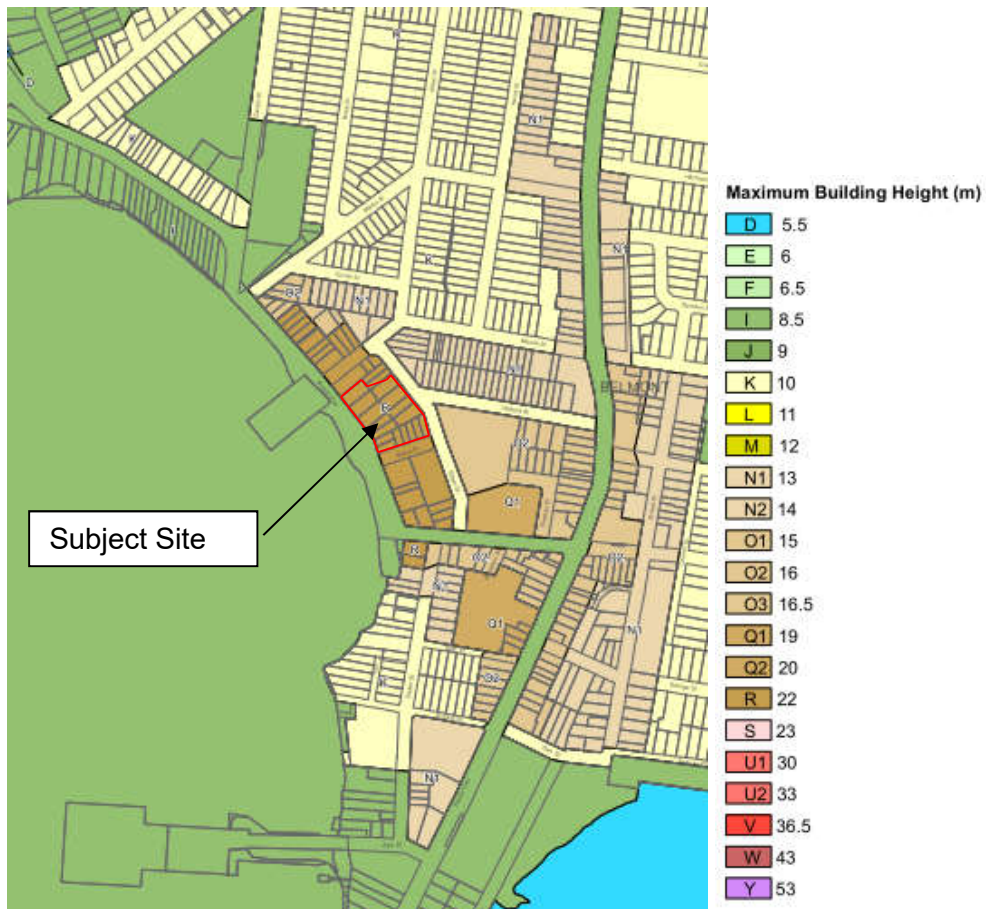
Clause 4.3 of the *Lake Macquarie LEP 2014* states that the maximum building height for the site is 22m (refer to Figure 1).

The current proposal seeks a building height of 28.94 metres and 22.94 metres. The extent of the variation to Clause 4.3 is as follows:

- Building A – Seeks a maximum building height of 28.94 metres. This variation is equivalent to 6.94 metres;
- Building B – Seeks a maximum building height of 22.94 metres. This variation is equivalent to 0.94 metres;
- Building C – Seeks a maximum building height of 22.94 metres. This variation is equivalent to 0.94 metres; and
- Building D – Seeks a maximum building height of 22.94 metres. This variation is equivalent to 0.94 metres.

It is our submission that the breach to the building height control, will not impact on the amenity of the development or adjoining properties, nor will the variation compromise the architecture of the building or the bulk and scale of the development or the character of the area. The proposed additional height is consistent with the objectives of Clause 4.3 of the *Lake Macquarie LEP 2014*, the zoning objectives the objectives of the Environmental Planning and Assessment Act 1979 (EP&A Act), and justifiable on environmental planning grounds and is in the public interest. In this instance, compliance with the development standard is unreasonable or unnecessary.

Figure 1: Building Height



Source: Lake Macquarie Local Environmental Plan 2014 - Height of Buildings Map - Sheet HOB_010CA

2. PLANNING CONTEXT

2.1 ZONING

The site of the proposed development is zoned B4 Mixed Use under the *Lake Macquarie Local Environmental Plan 2014*. The objectives of the B4 Mixed Use zone are as follows:

- *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 enable development that complements and enhances the core retail function and trading performance of Zone B2 Local Centre and Zone B3 Commercial Core.*

2.2 RELEVANT PLANNING DOCUMENTS

The subject site is covered by several statutory and strategic planning documents as identified below.

Hunter Regional Plan 2036

Published in 2016 this Plan identifies the site as being within the Belmont a major sub-regional centre in Lake Macquarie. The Plan identifies Belmont for higher density development and a compact mixed use centre.

Greater Newcastle Metropolitan Plan 2036

Published in 2018 this Plan builds upon the Hunter Regional Plan 2036. Similar to the Hunter Regional Plan the Greater Newcastle Metropolitan Plan identifies significant redevelopment opportunities in Belmont, building upon the significance of the town centre and its well serviced public transport links.

Draft Lake Macquarie 2050 Strategy

The Draft Lake Macquarie 2050 Strategy identifies Belmont as a key strategic town centre and a target for higher density growth.

Lake Macquarie Local Environmental Plan (2014)

As noted the subject site is zoned B4 Mixed Use under the Lake Macquarie LEP. Mixed use development as proposed is permissible with consent.

Belmont Area Plan

The Belmont Area Plan is part of the Lake Macquarie development control plan (DCP). While only a guideline the Area Plan identifies intensification of development for the subject site.

Review of the Town Centres DCP and Belmont Area Plan for 32 Brooks Parade Belmont

This document is an internal working document prepared by Council officers. This document feeds into the development of the Belmont Area Plan.

3. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

3.1 PRINCIPLES OF ESTABLISHING WHETHER A DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Wehbe vs Pittwater Council 2007

A proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827. In the matter, the Commissioner stated within the judgement the following, in reference to a variation:

“...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1.”

It is therefore our submission that the Wehbe test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary in the circumstances of the case and it is evident, the above test is relevant.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

- First –** The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.
- Second –** A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
- Third –** A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
- Fourth –** A fourth way is to establish that 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.

- Fifth –** A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.”

Initial Action Pty Ltd vs Woollahra Municipal Council 2018

More recently the case of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 has reinforced the establishment of matters for consideration under Clause 4.6. In *Initial Action Pty Ltd v Woollahra Municipal Council* an appeal was lodged in relation to the interpretation (or mis-interpretation) of Clause 4.6 of the Woollahra LEP (WLEP). Preston CJ identified that Clause 4.6(2) of the WLEP allows a consent authority to grant development consent for a development that contravenes a development standard subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant consent for a development that contravenes a development standard.

As Preston CJ notes the consent authority must form two positive opinions of satisfaction under Clause 4.6(4)(a)(i) and (ii). The first opinion of satisfaction, in Clause 4.6(4)(a)(i), is that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)). The written request needs to demonstrate both of these matters.

An applicant does not need to establish all of the ways that compliance is unreasonable or unnecessary. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

As to the second matter required by Clause 4.6(3)(b), the grounds relied on by the applicant in the written request under Clause 4.6 must be “environmental planning grounds” by their nature. The environmental planning grounds relied on in the written request under Clause 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”.

First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of Clause 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The consent authority must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by Clause 4.6(3)(a) and (b). As Preston CJ noted in *Randwick City Council v Micaul Holdings Pty Ltd*, the consent authority does not have to directly form the opinion of satisfaction regarding the matters in Clause 4.6(3)(a) and (b), but only indirectly form the

opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)(a) and (b).

The second opinion of satisfaction, in Clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under Clause 4.6(4)(a)(ii) differs from the first opinion of satisfaction under Clause 4.6(4)(a)(i) in that the consent authority must be directly satisfied about the matter in Clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in Clause 4.6(4)(a)(ii).

The matter in Clause 4.6(4)(a)(ii), with which the consent authority must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest *because* it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

3.2 CONSIDERATION OF WHETHER THE DEVELOPMENT STANDARD IS UNREASONABLE AND/OR UNNECESSARY

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

The objectives supporting the maximum building height control identified in Clause 4.3 are discussed below, in particular the additional height as proposed. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

With respect to the building height objective, we need to acknowledge that the subject site is located at the corner of Brooks Parade, and Sharp and Edgar Streets and part of the Belmont Town Centre. Development within the Belmont Town Centre, located in the immediately vicinity of the subject site, have a height commensurate with the height proposed. With no FSR provisions within the LEP, enabling a better understanding of scale, use intensity and dominance a maximum building height limits consideration to quality of built form and appropriate transition in built form.

The site is currently underutilised and presents an opportunity to fulfil the vision for a sustainable and emerging vibrant commercial precinct. The proposal is supported by a detailed urban design review outlining good urban outcomes including increasing employment, well serviced by public transport and other amenities, increased housing diversity and responding to the desire for activated, vibrant streets and neighbourhoods.

In view of the sites prominent corner location and position, its relationship to the Belmont Town Centre and immediate locality are key considerations. Supplementary considerations are the availability of local infrastructure shading/shadowing and public transport services. The proposed building height would reinforce the position of the subject site creating a landmark/development to the town centre, reinforcing noted urban design considerations of the Belmont 'bump'. It is therefore considered the proposal is in keeping with the locational attributes, consistent and in keeping with the surrounding established character of the area.

The built form of the development is the outcome of the physical and locational expression considered in the detailed urban design review as attached in the SOEE. The review considers the relationships, shape and size of buildings, structures and spaces and the context and setting of the proposed buildings.

At a finer grain level the development is expressed through clean vertical proportions creating a distinctly modern idiom. The proposal will also increase housing density and diversity; improved streetscape interfaces; and enhanced connectivity and amenity.

In understanding these opportunities, and the reasoning behind the proposed increase in height it is worth noting that the proposal identified a number of limitations with the current provisions, particularly height and block controls. This includes a lack of any technical feasibility relating to the intended outcomes of the built form for the Belmont town centre.

The proposed building envelope ensures that a tower on the south east corner of the site will reflect the current and evolving character of the urban context of this section of Belmont. As noted above, the proposal will complete the Belmont 'bump', consider both in the urban design review, peer reviewed by Peter Annand and Associates and the Council's '*Review of the Town Centres DCP and Belmont Area Plan for 32 Brooks Parade Belmont*', prepared by Lake Macquarie Council's Integrated Planning Department.

The use of a traditional, site responsive materials in contemporary ways is highly supportable. The continuity of the material across the podium is a direct and successful response to the issue of sea level rise. The development, design, character and materiality provides block pattern that has a good balance between providing a cohesive, podium and the need to design for a good level of daylight and natural ventilation and the inclusion of appropriate commercial floor plates.

The proposal is a response to the existing grit, grain and character of Belmont and is a well considered design outcome. The location of a ground floor commercial offerings on the corner provides excellent opportunities for streetscape activation during the day, and opportunities for additional subtle lighting to the pedestrian realm at night and is considered an excellent response.

In response to objective (1)(b), the proposed development is of a high quality urban form and responds to the constraints of the site. The proposed development provides for four free standing buildings to reflect the size and nature of the site. The proposal provides for consistent setbacks to the side and front boundaries enabling a clearly definable, modern form that acts as an exemplar exhibition of built form to the Belmont Town Centre.

As demonstrated in the perspectives provided and the urban design report, the development promotes an attractive and active street frontage, albeit limited due to minimum podium level to address flooding constraints. Large commercial spaces and glazed shopfronts addressing both the Brooks Parade and Sharp Street street frontages. The residential lobbies are clearly defined and the form is reinforced through a strong vertical element which spans across all of the proposed six and eight storeys.

The subject site is within 400 metres of several major bus stop routes bus stops (see map below). Public transport is provided by government and private bus companies. Newcastle Buses provides several routes to various local centres, town centres, north to Newcastle City Centre and south to Swansea, and weekday services to Morisset Rail Station. Private bus companies also service Belmont town centre.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard. As demonstrated, the objectives of these standards have been achieved.

It is apparent that notwithstanding the proposed variation, the building envelope will not result in any adverse impacts on the amenity of the locality. The proposed building envelope for the south east tower has been assessed for its potential impacts on the desired future character of the area, overshadowing, views, and environment, and has been found to be acceptable in each of these cases.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard, as demonstrated below. In particular the proposed development will meet the objectives of the standard in the following ways:

- The site is in the Belmont Town Centre and is identified in both regional and local planning strategies as a major town centre capable of higher density redevelopment.
- The scale of the development is consistent with approved developments in the area. The Belmont Town Centre has been undergoing redevelopment over the last few years with higher rise mixed use development being constructed.
- The proposed additional height will not affect the urban form. The site is in a town centre and the additional height does not affect the urban form of the town centre.
- The scale of development is consistent with regional strategies and plans for higher densities are key public transport nodes.
- The additional height does not create any significant additional overshadowing impacts. The towers basically overshadow themselves. There is some minor overshadowing on the façade of Belmont Towers to the south but the additional height has negligible impacts.
- The additional height is able to meet relevant design standards in regards to solar access and cross ventilation.
- The additional height does not detract from the sites strategic vision of a major town centre.
- The additional height does not affect any proposed public domain works or proposed road upgrades.

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

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above. Therefore, this clause is not applicable.

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

The underlying objective or purpose would not be defeated or thwarted if compliance was required. However, on balance the proposed development provides a better outcome. The objectives of Clause 4.3 of the Lake Macquarie LEP aim to ensure a scale of development consistent with established centres hierarchy and permit building heights to encourage a high quality urban form. The proposed additional height is consistent with the future desired character of the Belmont City Centre. The additional height does not affect and solar access or other design provisions than the current height limit would. It is also noted that as part of the strategic work that feed into the Belmont Area Plan there has been community engagement that lead to the proposed height limits identified. Council would have also had to

consider the objectives of the LEP including Clause 4.3 when preparing the Belmont Area Plan, and Draft 2050 Strategy to identify the future desired character and form of the area as being able to have higher density developments.

- iv. 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; and**

While the standard has not been abandoned or destroyed, Lake Macquarie Council has varied LEP standards in the past. As demonstrated in this letter, the proposal will not result in any significant adverse environmental impacts and will result in a high quality mixed use development consistent with the surrounding character and commensurate with the development expectations for the site.

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

Not applicable as the zoning of the site is appropriate.

4. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

The assessment above and shown throughout the Statement of Environmental Effects demonstrates that the resultant environmental impacts of the proposal will be satisfactory. The proposal addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the submitted specialist studies with the DA.

As detailed within this submission, the subject site is located within the Belmont Town Centre at the corner of Brooks Parade and Sharp and Edgar Streets. Development located in the immediate area and opposite the subject site is of a similar height. The bulk and scale of development within the area will also be of a consistent density although the LEP contains no FSR controls. In fact, the proposed FSR of the site is less than 2:1 which is significantly less than the densities in other major town centres.

We submit that the prominent location of the subject site, its locational context within the Belmont Town Centre, the availability of local infrastructure and its position to public transport services all support the development outcomes sought. The proposed building height would be consistent with development to the south and the north and would reinforce the missing middle noted as the Belmont 'bump'. The bump is referenced in the attached urban design report and previous urban design assessments for the area. The subject site development will create a landmark development which contextually unites and visually integrates into the surrounding built form and character of the locality. Furthermore, the proposal will contribute towards, and espouse, Belmont's reputation as a preeminent precinct.

In this case, strict compliance with the development standard for building height in the Lake Macquarie LEP 2014 is unnecessary and unreasonable. The additional height does not create any additional environmental, social or economic impacts than a building at the current LEP height limit.

Objectives of the EP&A Act

In relation to the objectives of the Environmental Planning and Assessment Act 1979, being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- (c) to promote the orderly and economic use and development of land,
- (d) to promote the delivery and maintenance of affordable housing,
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- (g) to promote good design and amenity of the built environment,
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

- (j) to provide increased opportunity for community participation in environmental planning and assessment.

In regards to (a), (b), and (c) the proposal is in a major town centre area close to a major public transport hub and within walking distance of employment and services in the Belmont town centre. There are regional and local planning policies that have been on exhibition that promote higher density development in the Belmont area. The site is an existing urban area and does not have any significant environmental issues or degrade the natural resources of NSW. The site has positive economic and social benefits through construction jobs, ongoing economic flow on effects from additional residents and allowing increased walking and public transport trips by its location in the Belmont City Centre precinct.

In relation to point (d) the proposal includes the construction of units which will create more affordable housing in the Belmont area, as also identified in the urban design report attached to the DA.

In relation to (e) and (f) there are no significant environmental issues as identified in the statement of environmental effects, and no cultural or historic heritage will be impacted.

In relation to point (g) the proposal has been through the Lake Macquarie urban design panel. Changes were made to the original proposal in regards to the panel's comments. The additional height has been identified to have no additional impacts than what would be interpreted from the design if it met the LEP height limit. That is, relevant design considerations (e.g. solar, ventilation) are still meet by the additional height. The design was also peer reviewed by Annand and Associates.

In relation to (h) there will be a condition of consent ensuring compliance with the Building Code of Australia (BCA). In regard to point (i) the Belmont City Centre is identified for urban renewal and densification under both Regional and Local planning documents. And in regards to point (j) all these regional and local planning documents including the Belmont Area Plan have been through extensive community consultation processes.

Matters for Consideration under Section 4.15 of the EP&A Act

Under Section 4.15 of the EP&A Act, the matters for consideration include:

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
 - (i) any environmental planning instrument, and
 - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
 - (iii) any development control plan, and
 - (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and
 - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
 - (v) (Repealed)

- that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
 - (c) the suitability of the site for the development,
 - (d) any submissions made in accordance with this Act or the regulations,
 - (e) the public interest.

In relation to part (a) of Section 4.15, the development is permissible on the subject site. The proposal is consistent with the zone objectives being compatible with existing land uses, provides residential/commercial development adjacent to a major public transport node and in walking/cycling distance to employment areas in the Belmont city centre and nearby Belmont hospital, but does not detract from the viability of the town centre precinct. Some additional retail/commercial premises are provided in the development. There are some SEPPs that apply (e.g. SEPP 55) which has been addressed as part of the Statement of Environmental Effects and no inconsistencies were identified with relevant SEPPs.

There are no draft EPI's that apply and there are no Planning Agreements identified at the time of writing. The Statement of Environmental Effects has detailed consistency with the Lake Macquarie DCP, while recognizing the site is an infill site. No inconsistencies with Regulations are identified. The issue relating to the Clause 4.6 variation is height under the LEP.

In relation to the environmental, economic and social outcomes. There has been identified a positive economic outcome through construction jobs and ongoing effects through new residents in purchasing goods and services. Socially, the development proposes a mix of units and sales prices which is considered of significant benefit to the Belmont area given the site location to services and public transport, particularly through the provision of more affordable housing stock. No significant design impacts have been identified from the additional height proposed. There has been no significant environmental impact identified for the site.

Consideration of the Zone Objectives

The proposal is consistent with the zone objectives being compatible with existing land uses, provides residential/commercial development adjacent to a major public transport node and in walking/cycling distance to employment areas in the Belmont city centre, but does not detract from the viability of the City Centre precinct. Some additional retail/commercial premises are provided in the development

Assessment Against the Clause 4.3 Objectives

Clause 4.3 of the Lake Macquarie LEP relates to building heights. The proposals consistency with the objectives is addressed elsewhere in this document. In sum, the objectives of Clause 4.3 of the LEP continue to be met by the additional height as discussed above. The proposed additional height does not provide any additional significant impacts in relation to design impacts such solar access, overshadowing, ventilation, than would be the case if the building met the current LEP height limit. It is also noted that Council would have considered these issues in formulating their strategic planning documents

The proposal allows, and meets, solar access requirements in the Apartment Design Guideline. The public domain is not significantly impacted by the proposal. The public streetscape in the vicinity of the site is proposed to be enhanced as a result of the proposal.

Relevant Planning Principles

The relevant principles for proposing a variation to a development standard as identified in *Wehbe vs Pittwater Council* (2007) LEC 827 are presented earlier in this document. In the matter of *Veloshin v Randwick Council* [2007] NSWLEC 428 a number of planning principles were considered in assessing height and bulk. These principles include:

- Are the impacts consistent with impacts that may be reasonably expected under the controls?
- How does the proposal’s height and bulk relate to the height and bulk desired under the relevant controls?
- Does the area have a predominant existing character and are the planning controls likely to maintain it?
- Does the proposal fit into the existing character of the area?
- Is the proposal consistent with the bulk and character intended by the planning controls?
- Does the proposal look appropriate in its context?

In relation to these principles the development proposes a mixed use building over the current LEP height limit. Higher density buildings are supported in this area, which is part of the Belmont Town Centre. Some developments have already been built of similar size in the area. The building will not be out of character with the area, and will not look out of place in the future character and context of the town centre as outlined in the vision by Council.

5. IS THE VARIATION IN THE PUBLIC INTEREST?

Clause 4.6 states that the 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 to be carried out.

It is considered that this submission in conjunction with the Statement of Environmental Effects provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

As noted in Section 1 of this report the objective of the Clause 4.3 (1) are as follows:

- (a) to ensure the height of buildings are appropriate for their location,*
- (b) to permit building heights that encourage high quality urban form.*

As previously discussed in Section 3 and 4 of this report the proposed development and its supporting documentation demonstrates that the proposed height is appropriate given its locational context within the Belmont Town Centre and its future desired character. It has also been demonstrated that the proposed height of the buildings encourage high quality urban form. As such, the development as proposed will be in the public interest as it is consistent with the objectives of Clause 4.3.

Also noted in Section 1 of this report the objectives of the sites B4 Mixed Use zone are as follows:

- 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 enable development that complements and enhances the core retail function and trading performance of Zone B2 Local Centre and Zone B3 Commercial Core.*

The proposed development also provides a mixture of compatible land uses and integrated uses by enabling maximisation of public transport. The proposal will furthermore, complement and enhance the core functions of the Belmont Town Centre creating retail function, trading performance, employment opportunities and residential density and precinct activation. As such, the development as proposed will be in the public interest as it is consistent with the objectives of the B4 Mixed Use zone.

The proposal before Council provides for a well-considered development that responds to the context of the site and its surrounds. In terms of ADG provisions, the development is compliant with respect to solar access, ventilation, common open space provisions and deep soil planting requirements.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standards, noting the development will be in the public interest.

In sum, the proposed development will be in the public interest as required by clause 4.6(4)(a)(ii). The proposed development is consistent with the objectives of the development standard in the following ways:

- The site is in the Belmont City Centre and is identified in both regional and local planning strategies as a city centre.
- The scale of the development is consistent with approved developments in the area.
- The scale of development is consistent with the vision outlined in the Council's local planning strategy.
- The scale of development is consistent with regional strategies prepared by the Department of Planning and Environment which identify higher densities around key public transport nodes.
- The additional height does not create any additional design impacts such as overshadowing impacts.
- The additional height is able to meet relevant design standards in regards to solar access and cross ventilation.
- The additional height does not affect any proposed public domain works or proposed road upgrades as identified in Council's plans/policies.
- The proposal is consistent with the objectives of Clause 4.3 of the Lake Macquarie LEP (as discussed above), and the objectives of the zone and EP&A Act.

6. PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standards. The proposed development, particularly the additional height will allow for the creation of a high quality mixed use development which as stated above meets the desired objectives of the standard and zone objectives.

It is not considered that the variation sought raises any matter of significance for State or regional environmental planning.

The departure from the building height control within the *Like Macquarie LEP 2014* allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

The future urban form in this area of Belmont are higher heights and intensification of land uses. The departure from the building height control within the Lake Macquarie LEP allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

The community have been consulted on the regional strategies applying to Belmont and the Belmont area plan. Any concerns were considered prior to the adoption of these documents, and proposals for higher height limits in Belmont.

There are no heritage or conservation matters that are created from the additional height and the proposal will ensure that taller buildings in the city centre continue to be located near major transport nodes.

7. IS THE VARIATION WELL FOUNDED?

It is considered that this has been adequately addressed in Parts 4 and 5 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the *Lake Macquarie LEP 2014* in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development (including the additional height) meets the objectives of the standard to be varied (building height) and objectives of the B4 Mixed Use zoning of the land;
- The proposed additional height of the development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State or Regional Significance; and
- The development submitted aligns with the development expectations for the Belmont Town Centre.

Based on the above, the proposed variation is considered well founded.

8. GENERAL

Clause 4.6 also states that:

- “(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 any 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*
 - (ca) clause 2.8, 6.1 or 6.2”*

This variation does not relate to the subdivision of land. The variation sought is thus not contrary to subclause (6). Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission. A BASIX certificate will be provided for the development.

Clause 2.8, 5.4, 6.1 or 6.2 of the *Lake Macquarie Local Environmental Plan 2014* does not apply to the proposal.

9. CONCLUSION

The proposal does not strictly comply with the maximum building height control as prescribed by Clause 4.3 of the *Lake Macquarie Local Environmental Plan 2014*. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the *Lake Macquarie LEP 2014* are satisfied as the breach to the controls does not create any adverse environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance, and that the use of Clause 4.6 of the *Lake Macquarie LEP 2014* to vary this development controls is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the maximum building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.

The applicant considers that the consent authority can be satisfied that:

- (a) This request adequately addresses the matters required to be demonstrated by clause 4.6(3), being:
 - (i) Compliance with the development standard is unreasonable or unnecessary in the circumstances; and
 - (ii) There are sufficient environmental planning grounds to justify contravening the development standard.

- (b) The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the relevant zone objectives.

In those circumstances, and on the basis of assumed concurrence from the Secretary the consent authority is permitted to grant development consent for the development under clause 4.6, notwithstanding the contravention of the development standard.