

Stage 1 Development Application– Clause 4.6 – Exceptions to Development Standards – Height of Buildings (cl 4.3)

Address: 163 and 169-185 Hunter Street, Newcastle

Proposal: Development of a mixed use development comprising a retail premises and shop-top housing, of between ten (10) and 11 storeys, basement carpark, 228 apartments and 3600m² of retail floor area and adaptive reuse of the former David Jones building.

1. Introduction

This is a written request to seek an exception to a development standard pursuant to clause 4.6 – Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012 (NLEP 2012). The development standard for which the variation is sought is clause 4.3 Height of Buildings under the NLEP 2012.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline *Varying development standards: A Guide*, August 2011, and has incorporated as relevant principles identified 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 No 2')
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')

2. Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Newcastle Local Environmental Plan 2012 (NLEP 2012).

2.2 What is the zoning of the land?

The land is zoned B4 Mixed Use.

2.3 What are the Objectives of the zone?

The objectives of the zone are:

Zone B4 Mixed Use

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

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

2.4 What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

2.5 Is the development standard a performance based control? Give details.

No.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the NLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in subclause 4.3(1)(a) and (b), and are:

- (a) to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,
- (b) to allow reasonable daylight access to all developments and the public domain.

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3(2) establishes a maximum height of building control for the site. The building height control is expressed as a maximum RL at three (3) sections of the site and as a range of height in metres for the balance of the site.

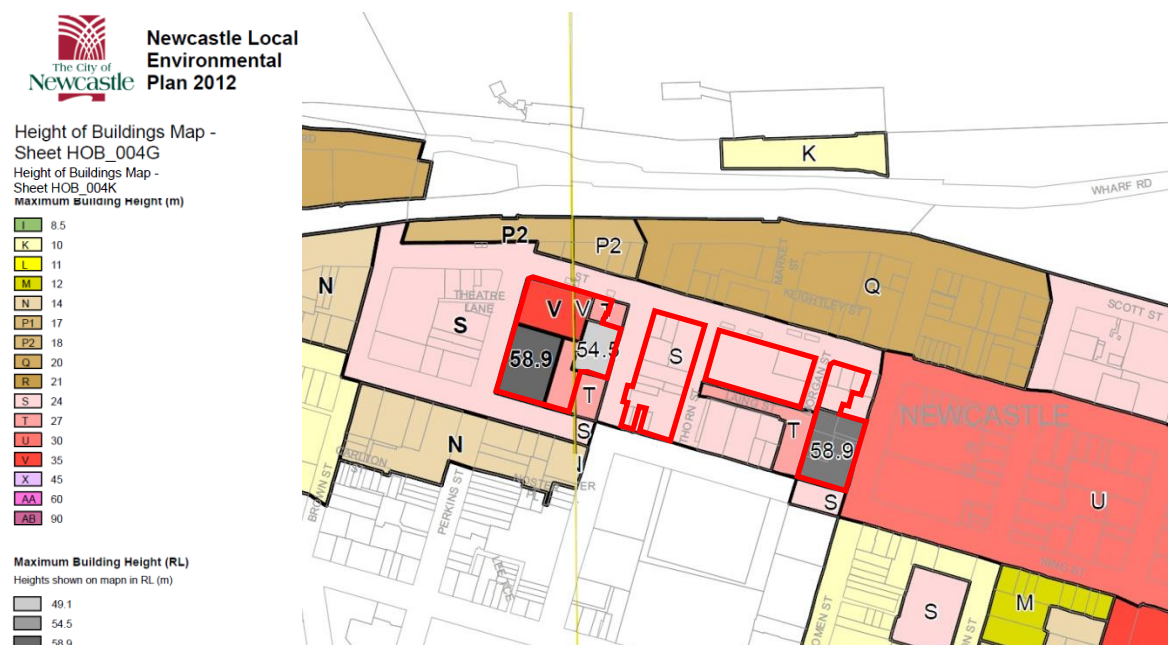


Figure 1: Extract of NLEP 2012 Height of Building Map (site outlined in red)

Maximum building heights are variable across the block and are:

- 27m and 35m on Hunter Street;
- 27m on the south-eastern portion of the site;
- RL54.5 on Wolfe Street; and
- RL58.9 on the corner of Perkins Street and King Street.

2.9 What is the proposed numeric value of the development standard in the development application?

The maximum breach of the height of building standard is 3.16m for the proposed building to the eastern portion of the retained portion of the former David Jones building. Table 1 and Figures 2 to 4 illustrate the numeric breach. The breach is restricted to Building C.

Proposed Building	Control	Proposed Height	Compliance	Variation	% Varied
King and Perkins Street Building (Block 1)	RL58.9m/ 27m	RL40 (plant at RL42)	Yes	N/A	N/A
Former DJ's Building (west) (Block 1)	35m	Existing Building	Yes	N/A	N/A
Former DJs Building (east) (Block 1)	27m/35m	36.96m/38.16m	Yes (27m) No (35m)	1.96m to 3.16m	5.6% - 9%
Wolfe Street Building (Block 1)	RL54.5	RL40 (allowance for plant to RL42)	Yes	N/A	N/A

Table1: Numeric variation to development standard

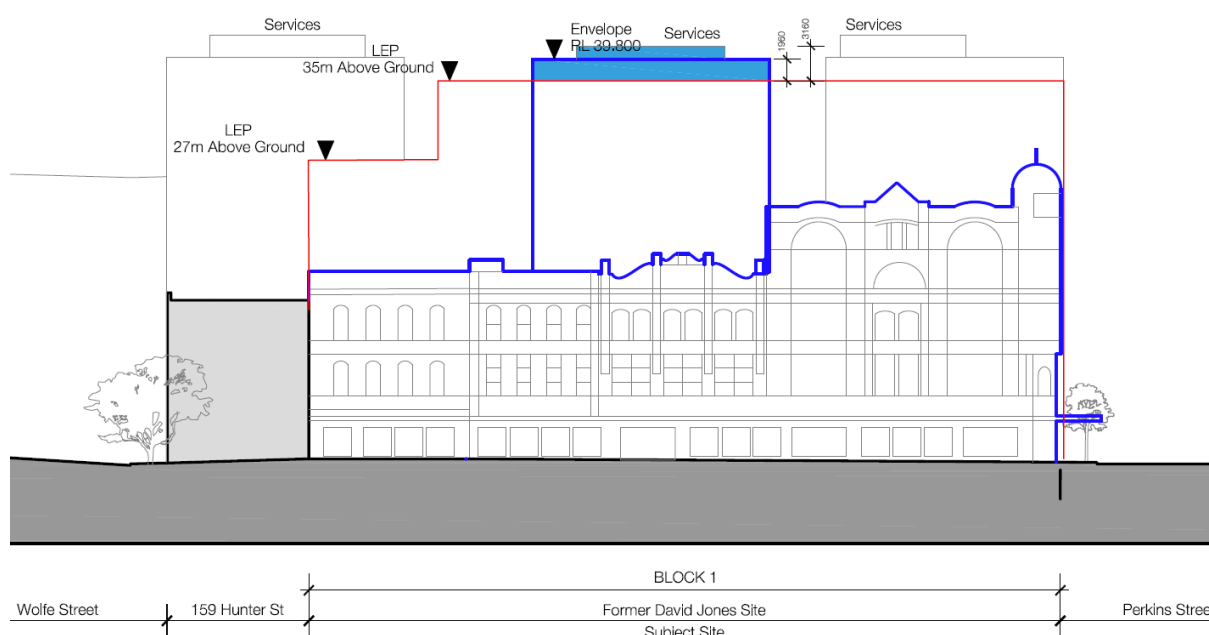


Figure 2: Variations to Height of Building Standard – Block 1

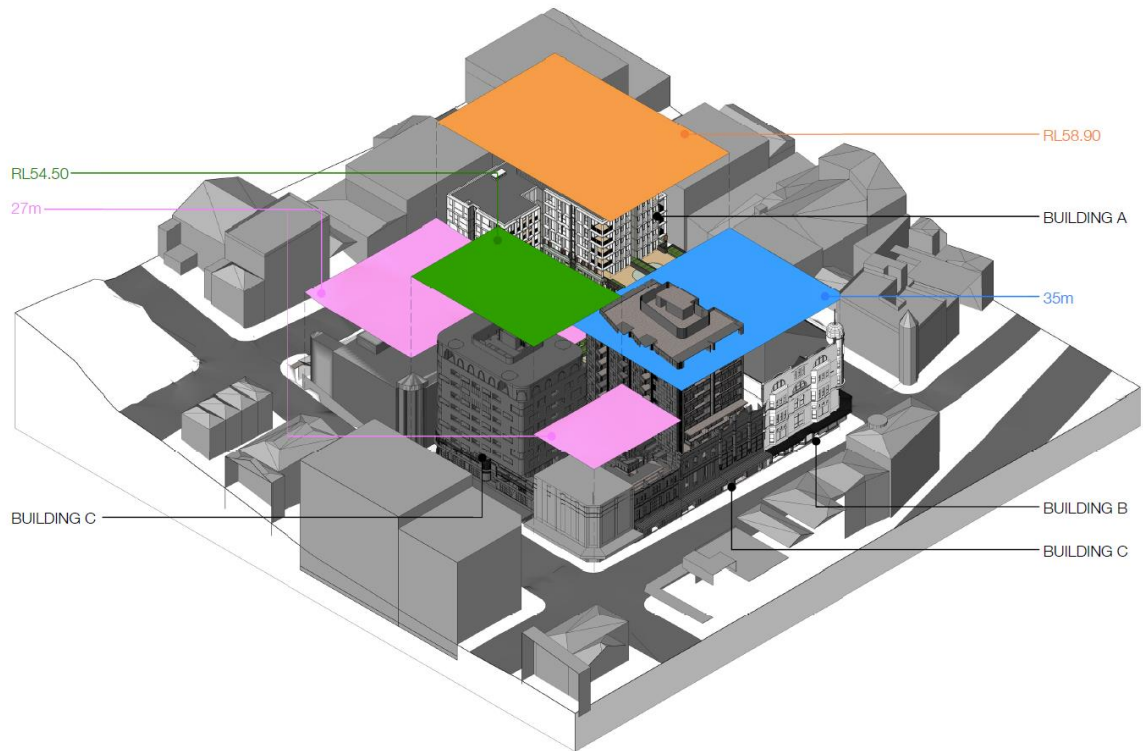


Figure 3: Height Planes – View 1

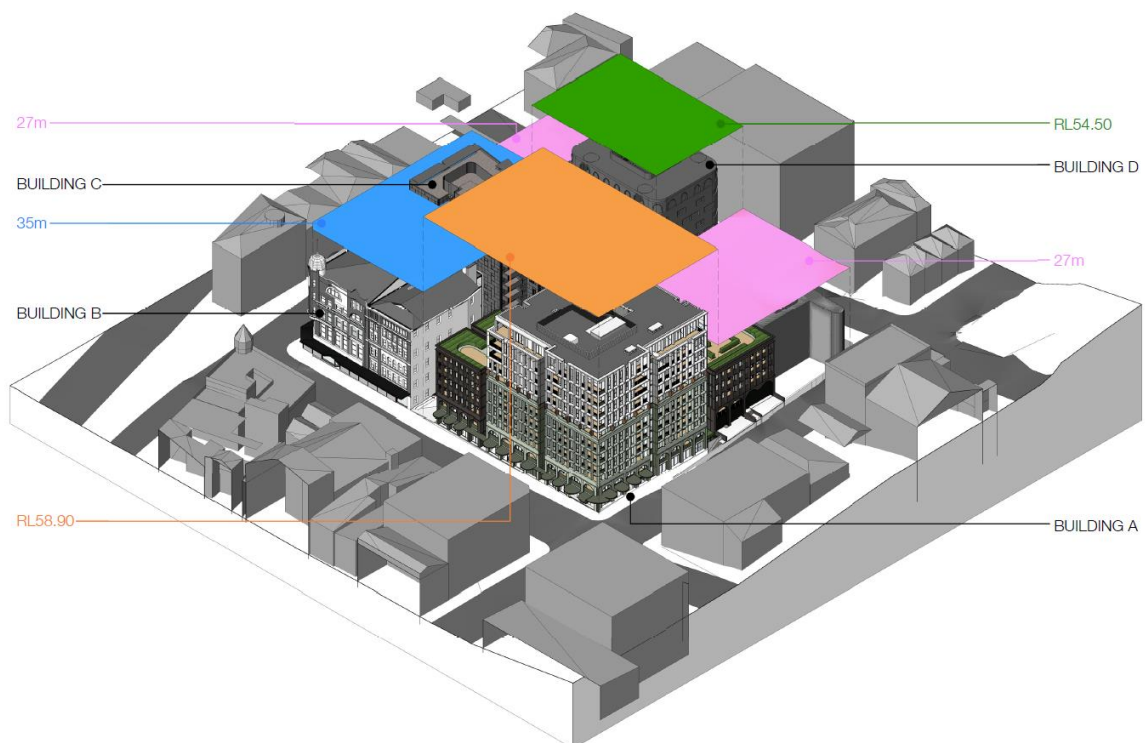


Figure 4: Height Planes – View 3

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

Table 1 identifies the percentage variation from the relevant development standard expressed as metres.

3. Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to clause 4.6 at 4.6(1) 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require 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:

- (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.*

Clause 4.6(4)(a)(i) and (ii) require 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*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained and clause 4.6(5) requires the Secretary in deciding whether to grant concurrence 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.*

This request has been prepared having regard to the latest authority on clause 4.6, contained in the following guideline 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')
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The principles that stem from the relevant authorities are summarised as follows:

- (i) The relevant objectives are those stated in the controls not unidentified underlying objectives at [57] in Four2Five No. 1;
- (ii) That the sufficient environmental planning grounds have to be particular to the circumstances of the proposed development to the site at [60] in Four2Five No. 1; and
- (iii) The five (5) methods of establishing that compliance is unreasonable or unnecessary identified by Preston J in *Wehbe* remain relevant however you need something more than way 1 in *Wehbe* to satisfy the unreasonable and unnecessary test in clause 4.6(3)(a) as that test is now encompassed in clause 4.6(4)(a)(ii) where consistency with the objectives of the standard is a mandatory precondition.

Method 1 in *Wehbe* requires a demonstration that the objectives of the relevant development standard are achieved notwithstanding non-compliance with the numerical standard. As a result of Four2Five, it is now necessary to demonstrate something more than achieving the objective of the standard. A development that contravenes the development standard and as a result achieves the objective of the development standard to a greater degree than a development that complied with the standard, would suffice.

3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

The approach to the allocation of height across the site has involved a reduction and redistribution of height from the Wolfe Street frontage and south-western corners of the site, across the site to minimise impacts on public views to and from the Cathedral and mitigate any private view loss and potential overshadowing impacts that may have arisen from a development that maximised the height of building available under the NLEP 2012, and in recognition of the Planning Proposal (Amendment 26) currently applying to the site.

The variations in height are also a response to the sloping topography.

The breaches on Block 1 have arisen as part of the evolution of the design through a design excellence framework that has carefully placed the new building form in such a way as to complement and be sympathetic to the streetscape and heritage fabric of the retained and former David Jones building and retained street facades. It has arisen in response to the principle of minimising intervention to the important heritage fabric of the former David Jones building, by accommodating plant for this building in Building C.

While the placement of the building has resulted in a minor breach, it has also resulted in a better separation between building forms and less building mass along the Hunter Street frontage, with portions of the building at Hunter Street being below the 27-metre height control (refer to Figure 2).

The proposed height variation continues to respect the form and scale of the heritage buildings on site, and results in a better outcome in respect to the siting of the development to heritage items on and in the vicinity of the site.

These minor variations at particular points provide for some varied height, but do not result in unreasonable amenity impacts. The current proposal provides for a better urban outcome, while at the same time ensuring compatible and appropriate scale relationships to buildings within and adjoining the site.

Essentially the planning framework provides for a variety of building heights within a city centre as opposed to a uniform height. This means that there will be taller buildings juxtapositioned against shorter buildings. This condition is typically seen in the evolution of an urban area over extended periods. It is a relationship that is evident in the residential apartment block “Segenhoe” and its relationship to its surrounds.

A variety of building scale and height provides interest and diversity to a city. The scale relationships, in some cases, are more abrupt, but these reflect the layering and evolution of building forms within a city.

The height and form of the development will establish a new context that to some extent alters the character and scale of the streetscape. The character and identity of the East End is tied closely to the quality and the intact nature of a range of heritage and contributory buildings, especially the former David Jones building. This character is being retained and enhanced.

From the perspective of the city skyline, the reduction in height of the building envelopes, at the edges of the view cone towards the Cathedral, means any resultant building will sit below the Cathedral, such that the Cathedral maintains its prominence. When considered in the context of an evolving city scale, the buildings envelopes and height proposed are considered appropriate.

A development that strictly complied with the standard would result in significantly more height at the corners of the site, potentially resulting in greater impacts on view corridors and potential overshadowing. It would also result in greater building mass to Hunter Street than currently proposed.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The proposed building height maintains the following planning outcomes:

- Facilitates the delivery of a finer pedestrian grain;
- Respects the heritage buildings and the heritage elements that need to be protected;
- Maintains key view corridors to and from the Cathedral and is subservient to the Cathedral, and does not dominate the views available from public places; and
- Delivers a mix of land uses.

The development has not sought to maximise the height available under the controls at the Wolfe Street, Hunter Street and the and south-western portions of the site in order to maximise views to and from the cathedral, and improve built form scale relationships, and comply with the current Planning Proposal (Amendment 26) applying to the site.

The proposed built form results in a more compatible scale relationship to the existing and emerging character of the Newcastle East End than a development that would strictly comply with the height control. The non-compliances on Block 1 results in a built form that better responds to the heritage fabric and streetscape context.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard has not been abandoned.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is appropriate for the site.

3.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

The particular circumstance of this site that distinguishes it from others is that there are a number of heritage items located on site and surrounding the site and the significant slope from King Street towards Hunter Street.

The site also sits within important view corridors to and from the Cathedral. In order to minimise the impact of any proposal on these corridors, permitted heights across the site are proposed to be redistributed in order to mitigate potential impacts.

The proposed variations in height are in direct response to these particular circumstances and the design excellence process undertaken and provide for a better urban outcome.

The siting and protection of the heritage items, slope of the site, and the protection of view corridors requires a site specific response to ensure appropriate scale relationships for resultant built form.

In the circumstances of the case, there are sufficient planning grounds particular to the site to justify contravening the development standard being:

- The increased height ensures the allowable FSR is contained within reduced building envelopes on other portions of the site in order to protect important public views to and from the Cathedral.
- The proposal satisfies the objectives of the B4 Mixed Use zone and the objectives of the building height standards.
- Non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss.
- The scale of the proposed development is consistent with the desired scale of the surrounding development and streetscape.
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Newcastle Development Control Plan 2006.
- The built form outcome responds to the heritage fabric and streetscape context and has varied height to provide an improved building separation and to minimise intervention of the significant heritage fabric of the former David Jones building. The location of the plant for Building B has been accommodated within the plant on Building C – thereby resulting in some breach to the height. This results in a better heritage and streetscape outcome for the site.

3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?

3.4.1 Objectives of the Height of Building standard

The proposal remains consistent with the relevant objectives of the height of building standard despite the noncompliance as demonstrated below:

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

The site is within the Newcastle City Centre and is an appropriate location for increased height. The heights proposed remain consistent with the desired built form and are compatible with the scale and form of development in the Newcastle East End. The overall development will result in a positive contribution towards the built form as it provides a mechanism to reuse important heritage buildings and introduce appropriate scaled buildings to the centre.

The protection of views to and from the Cathedral, and maintaining the Cathedrals prominence in the city skyline, also represents a positive contribution to the built form.

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

The proposed variation in height does not result in unreasonable shadow impacts to the important public domain of the proposed Market Street, Hunter Street Mall, or Cathedral Park. The built form locations have been carefully considered to maximise daylight access. Solar access to future development has been demonstrated as capable of complying with SEPP 65.

The proposed siting of Building C has provided potential for improved separation between built forms.

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the B4 Mixed Use zone, despite the non-compliance with the height of building control as demonstrated in the assessment of the objectives below:

To provide a mixture of compatible land uses.

The proposed development provides a mix and range 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.

The proposal provides for retail and residential uses in an integrated way in a highly accessible location. The proximity of residential uses to employment will assist in maximising walking and cycling opportunities.

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

The mix of land use will support the vitality of the centre by providing opportunities for the centre to grow. The scale of offering is not of a magnitude that would impact upon the viability of other centres.

3.5 Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?

The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to a specific suite of controls applied across an area that supports a variety of built forms. The proposal seeks to redistribute some height to less sensitive locations in response to site specific conditions, and respond to a specific heritage and streetscape context.

3.6 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

“to encourage

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

A strictly complying development would result in a poorer urban design response to the overall site and the area generally and in that sense it may be said that compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act.

The development as proposed is consistent with the provisions of orderly and economic development and would not hinder the objects of the Act in Section 5(a)(i) and (ii).

3.7 Is there public benefit in maintaining the development standard?

Generally speaking, there is public benefit in maintaining standards. However, there is public benefit in maintaining a degree of flexibility in specific circumstances. In the current case, strict compliance with the height would result in a poorer urban design outcome.

The redistribution of height across the site has provided an opportunity to minimise impacts on public views to and from the Cathedral, and accommodate an appropriate built form that responds to the slope of the land and its heritage context, and resulted in buildings and building envelopes that respond to the heritage fabric of the retained building and maximises amenity.

There is, in the specific circumstances of this case, no public benefit in maintaining the development standard, as the proposed development results in a better planning outcome for the site.

3.8 Is the objection well founded?

For the reasons outlined in previous sections, it is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

The development does not hinder the attainment of the objects specified within clause 5(a)(i) and (ii) of the Act.

4.0 Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the height of building standard.

Development standards are a means of implementing planning purposes for a development or area.

The Stage 1 Development Application results in a ten (10) to 11 storey built form, at the street frontages and at the interface with adjoining development. The buildings result in a height and scale relationship compatible with the existing and emerging character of the area.

In the circumstances of the case, the land:

- i. includes a number of heritage items and is in the vicinity of many more;
- ii. Is located within important view corridors to and from the Cathedral; and
- iii. Is steeply sloping.

The resultant built form configurations are a result of a design excellence process that has carefully considered the buildings' height and scale and the space between buildings, and the need to retain significant heritage buildings and building facades.

The development will not result in unacceptable impacts with regard to the amenity of adjoining properties. A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses and would not result in a better urban design response to the site. In the context of the locality it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the LGA given the particular site circumstances, heritage context and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the height control to be enforced. It is concluded that the variation to the height of building development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.