

Application to vary development standards under Clause 4.6, RLEP2014

1.0 Introduction

This is an application to vary a development standard under Clause 4.6 – Exceptions to Development Standards of the *Ryde Local Environmental Plan 2014* (RLEP 2014). The development standard to be varied is the maximum Height of Buildings applicable to the subject site under Clause 4.3 Height of buildings RLEP 2014.

The Development Application (DA) submitted to Council seeks consent for the construction of a 2 x 20 storey mixed use buildings with a shared podium containing 357 residential buildings and four levels of basement parking and associated site and landscaping works, including a publicly accessible shared pedestrian / cycle path along Shrimptons Creek which will be maintained in perpetuity by the land owners.

The subject site is located at 82-84 Waterloo Road, Macquarie Park and is a regular shaped allotment bound by Waterloo Road to the north, 80 Waterloo Road to the east, 5 Byfield Road to the south and Shrimptons Creek to the west.

The proposal will result in a Height of Buildings non-compliance with a maximum of 67.75. maximum Height of Buildings standard of 65m under the RLEP 2014.

In preparing this Clause 4.6 request, Architectus have taken into account the following decisions in the Land and Environment Court and the Court of Appeal: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248. It is considered that this request is consistent with the requirements of Clause 4.6 of the RLEP 2014 and the legal principles established by the above cases.

2.0 Planning instrument, development standard and proposed variation

The subject site is located within the City of Ryde LGA and is subject to the RLEP 2014 and is zoned B4 Mixed Use. Under the RLEP 2014 the objectives of the B4 Mixed Use Zone are:

- *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 ensure employment and educational activities within the Macquarie*

University campus are integrated with other businesses and activities.

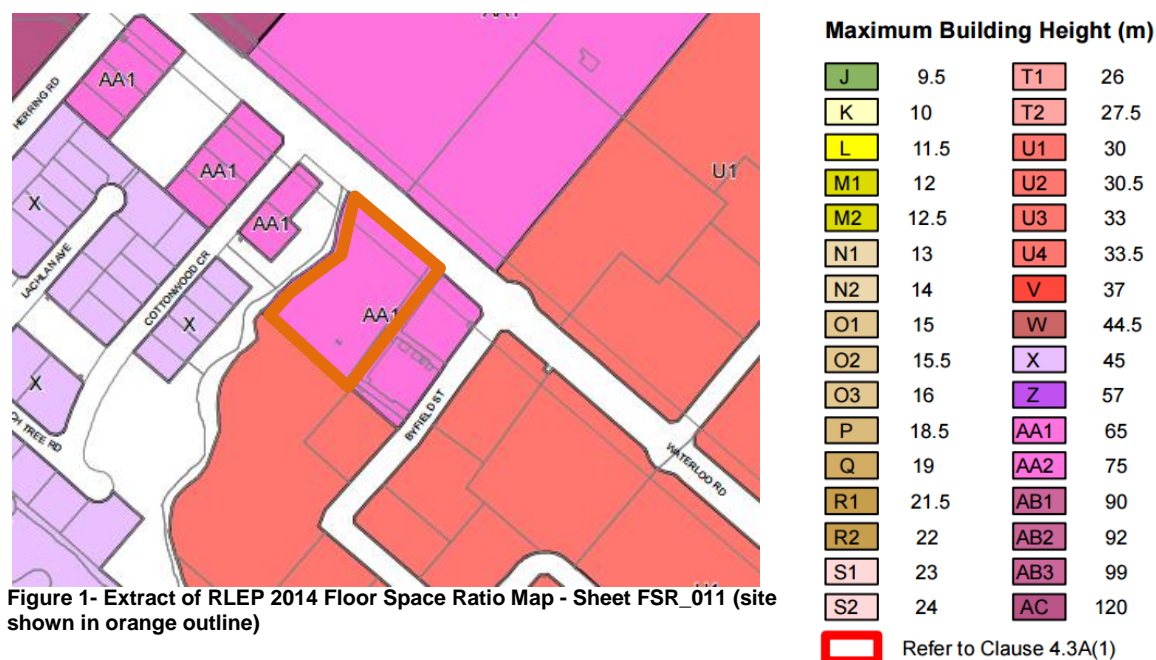
- To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.

This Clause 4.6 Variation seeks to vary the applicable maximum Height of Buildings applicable under Clause 4.3 of the RLEP 2014 as identified on the Floor Space Ratio Map.

The objective to the development standard is contained in Clause 4.3(1) and is reproduced below:

- to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,
- to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,
- to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,
- to minimise the impact of development on the amenity of surrounding properties,
- to emphasise road frontages along road corridors..

Clause 4.3 establishes a maximum Height of Buildings of 65m as shown in **Figure 1** below.



The proposal results in several non-compliances with the maximum building height as detailed in **Table 1** and **Figure 2** to **Figure 5**.

Table 1 – Development data

	A	B	C
Area of non-compliance	4.375m ²	9.555m ²	18.895m ²
Maximum height	66.06m	67.75m	65.9m
Permissible height	65m	65m	65m
Exceedance height	1.06m	2.75m	0.9m
Variation	1.63%	4.23%	1.38%

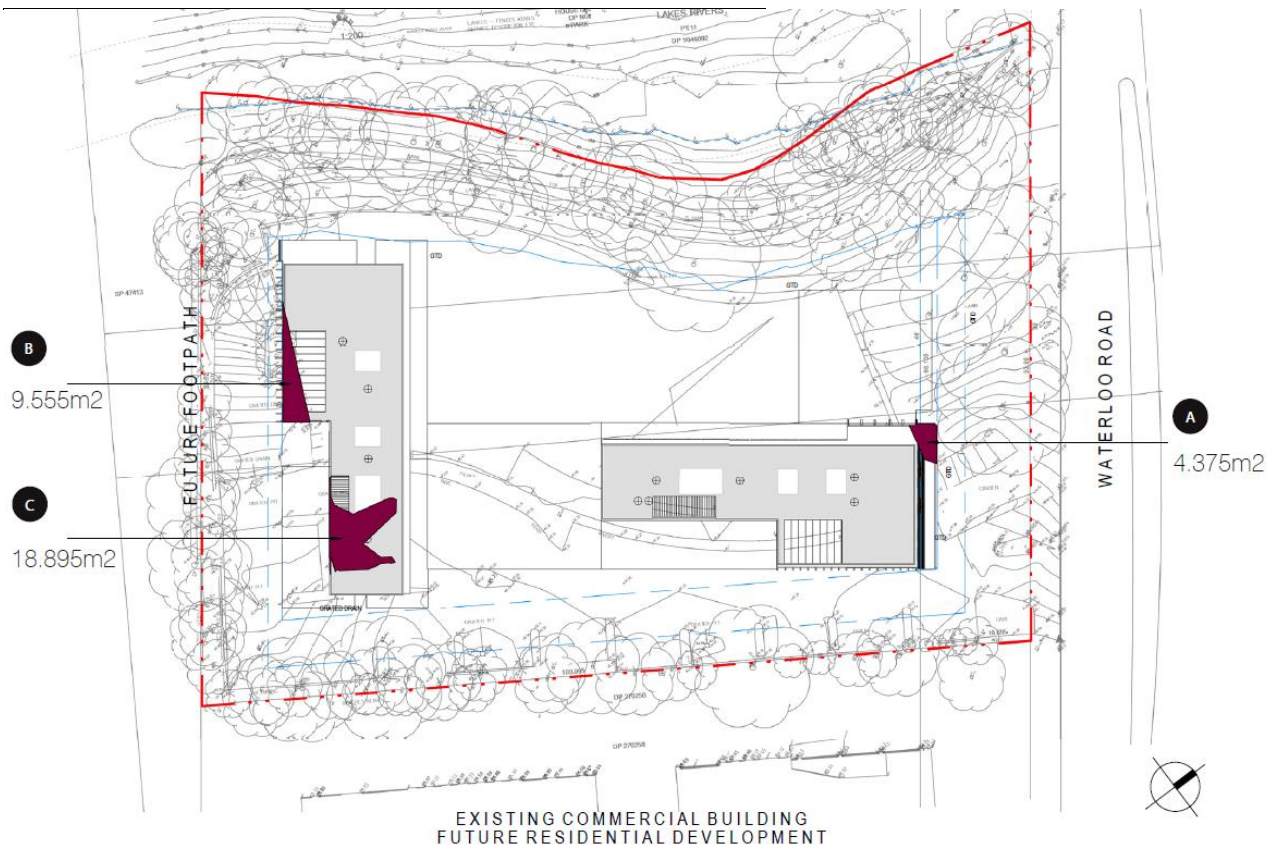


Figure 2 - Area of non-compliance

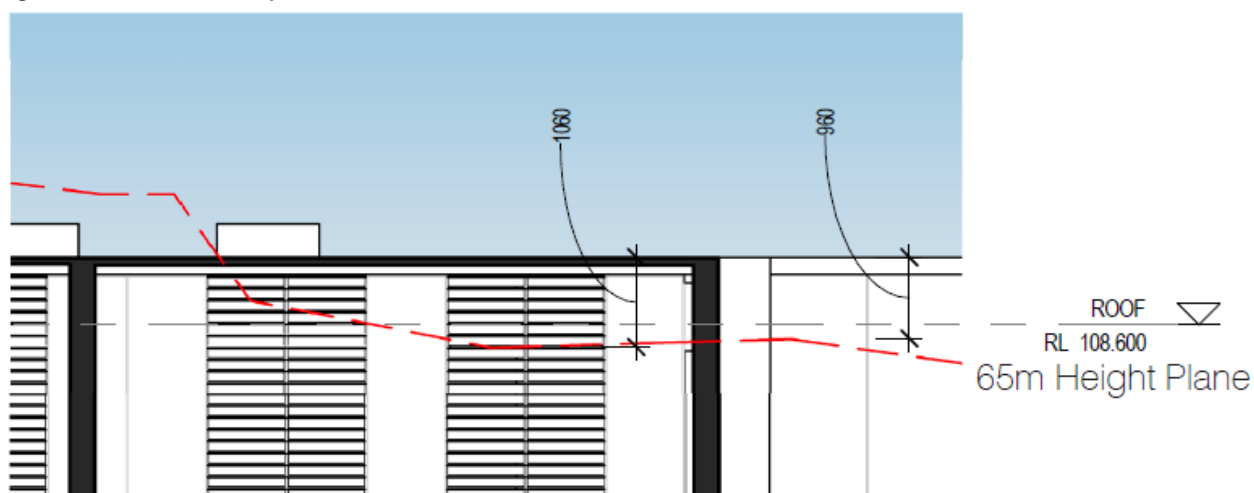


Figure 3 – Section A

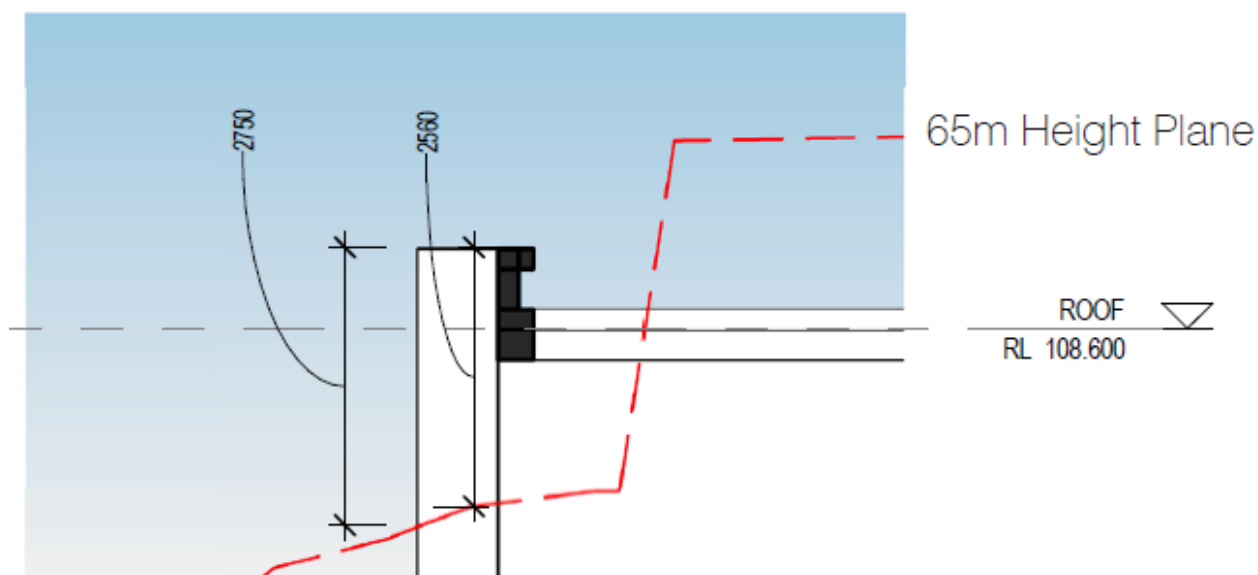


Figure 4 – Section B

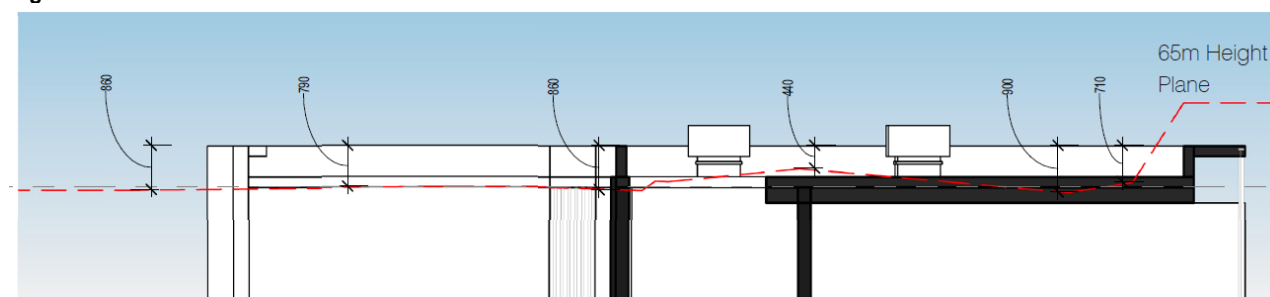
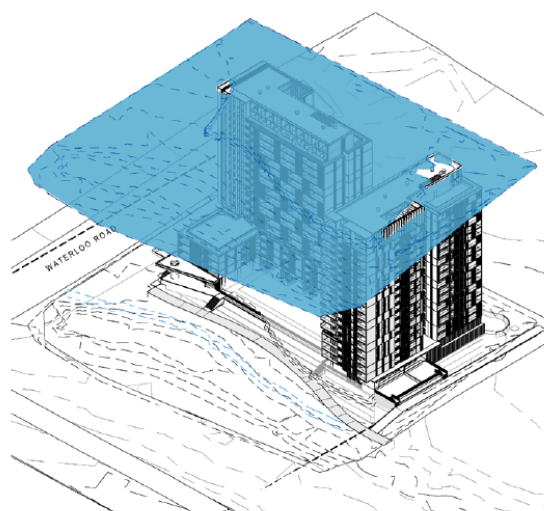


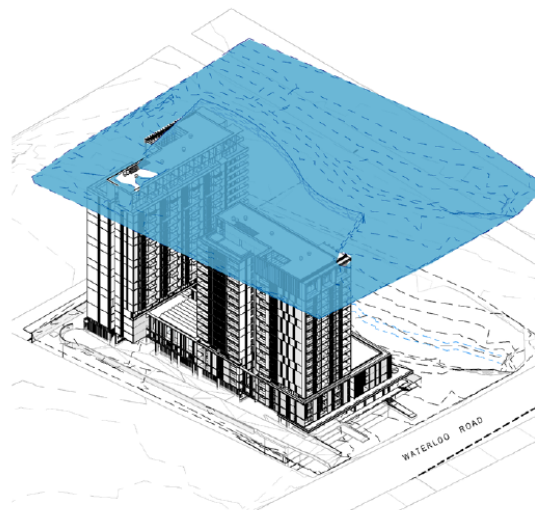
Figure 5 – Section C



Height Plane Study_NorthWest View

2

SCALE: NTS



Height Plane Study_SouthEast View

3

SCALE: NTS

Figure 6 – Height Plane Study

In considering building heights for the subject site, careful consideration of maximum building height and existing ground levels must be given. there are several key matters which influence and impact the maximum heights. Existing ground level as defined by the RLEP 2014, and maximum Height of Buildings as defined by the RLEP 2014.

The RLEP 2014 defines the maximum Height of Buildings as:

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.

Of particular importance to the above definition is ground level (existing), which is defined by the RLEP 2014 as:

ground level (existing) *means the existing level of a site at any point.*

An existing commercial building currently occupies the subject site. Significant cross fall has been addressed through retaining walls and basement excavation. A copy of the survey has been provided at **Attachment E**.

3.0 Application of Clause 4.6, SLEP2012

Clause 4.6 of the SLEP 2012 provides a mechanism whereby development standards may be varied. The relevant provisions of clause 4.6 are as follows:

- (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 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) – (8)...’

Under Clause 4.6, it is considered that there are five crucial requirements which need to be addressed:

1. There must be a **written request** from the applicant that seeks to justify the contravention of the standard.
2. That written request must justify contravention of the standard by demonstrating, as required by clause 4.3, that:
 - a. **Compliance with the development standard is unreasonable or unnecessary in the particular circumstances of the case;** and
 - b. **That there are sufficient environmental planning grounds to justify contravening the development standard.**
3. The **consent authority must consider** the written request.
4. The consent authority must be satisfied that:
 - a. the **written request has adequately addressed the matters that are required to be demonstrated by clause 4.6(3)**, i.e. compliance is unreasonable and unnecessary and sufficient environmental planning grounds; and
 - b. the **development is 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.**
5. **Concurrence to the variation** must have been obtained **from the Director-General.**

It is noted that *Planning Circular no PS08–003 Variations to development standards* (dated 9 May 2008) provides that the concurrence of the Secretary of the Department of Planning and Environment can be assumed where Councils have adopted Clause 4.6 of the standard instrument. As such, the final requirement identified above can be assumed to be satisfied.

Of relevance in considering Clause 4.6 are the following judgements of the Land and Environment Court:

- *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')
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386
- *Moskovich v Waverley Council* [2016] NSWLEC 1015

Consideration of these judgements provides the following key principles which assist in the application and assessment of variations to development standards under Clause 4.6:

- a) Where the objectives are expressly and clearly stated in the controls, those are the relevant objectives for the purposes of clause 4.6 (paragraph [57] in *Four2Five No. 1*);
- b) For the purposes of clause 4.6(3)(b), the 'sufficient environmental planning grounds' have to be particular to the circumstances of the proposed development on the site (paragraph [60] in *Four2Five No. 1*); and
- c) Although the five methods of establishing that compliance with a standard is unreasonable or unnecessary as identified by Preston J in *Wehbe v Pittwater Council* [2007] NSWLEC 827 remain relevant, something more than demonstrating that the objectives of the standard can be achieved (referred to as

Method 1 in *Wehbe*) is required in order to satisfy clause 4.6(3)(a). This is because the test of achievement of objectives is now separately addressed in clause 4.6(4)(a)(ii).

With regards to the above, Method 1 in *Wehbe v Pittwater Council [2007] NSWLEC 827* requires a demonstration that the objectives of the relevant development standard are achieved notwithstanding the proposed non-compliance with the numerical standard. However, it is also noted that the recent *Moskovich v Waverley Council [2016] NSWLEC 1015*, identifies that cl4.6(4)(a)(ii) identifies a need to achieve consistency with the objectives of the particular standard. This decision identifies that the term consistency is less onerous than achievement, has been interpreted to mean “compatible” or “capable of existing together in harmony” or “not being antipathetic”.

4.0 Assessment of the proposed variation

An assessment of the proposed variation is provided below against the above identified requirements of Clause 4.6 of the RLEP 2014.

A written request must be provided

This document is provided on the behalf of the applicant as a written request which seeks to justify contravention of the standard.

Compliance with the standard is unreasonable or unnecessary in the circumstances of the case

It is considered that compliance with the standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:

- The areas of height non-compliance are relatively minimal and will not result in additional environmental impacts upon adjoining and adjacent properties or the wider streetscape.
- The majority of the proposal achieves compliance with the maximum height control, and to require the deletion of the upper floor area to simply achieve compliance with this control will result in a worse built form outcome.
- There are limited opportunities to lower the ground floor of the building due to flood level constraints.
- The proposal, inclusive of the minor building height non-compliance FSR variations, is a superior planning outcome to what would be achieved by a strictly complying development.
- The proposed height non-compliances are a direct result of the existing ground levels which have been developed over the years and are limited to the following key areas which are reduced in level for the following reasons:
 - Area A – Level drop outside of existing pedestrian pathway on the site.
 - Area B – Reduced levels as a result of basement car park access
 - Area C – Location of substation and other plant which is set below surrounding levels.

Complying development provides an inferior design and planning outcome

A development could be designed to achieve compliance with the maximum Height of Buildings, however, this would need to be achieved through the deletion of the areas of non-compliance as the ground floor level cannot be lowered further due to flooding constraints.

The deletion of the areas of non-compliance would result in an unresolved roof form with a stepped roof form. The possible relocation of this Gross Floor Area elsewhere on site is limited as the subject site is constrained due to the location of the Epping-

Chatswood Rail Line, riparian setbacks, and minimum building separation requirements.

There are sufficient environmental planning grounds to justify contravening the development standard

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard. This is because the proposal does not result in significant adverse impact such as:

- Significant overshadowing of adjoining properties as evidenced by the submitted shadow diagrams; and
- Inappropriate scale and massing in the context of the wider streetscape, existing built environment and emerging built environment.

As identified above, if the development was made to comply with the Height of Buildings standard, it would result in an inferior design and planning outcome for the site.

The consent authority must consider the written request

This written request is to be provided by the applicant to the City of Ryde Council, satisfying the requirements of this part.

Consent authority is satisfied that the written request has adequately addressed the matters that are required to be demonstrated

It is considered that sufficient detail has been provided within this document which adequately addresses the matters which are required to be demonstrated.

Consent authority is satisfied that development is 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.

Objectives of B4 Mixed Use zone and Building Height standard

B4 Mixed Use zone objectives

The objectives of the B4 Mixed Use Zone are provided below:

- *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 ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.*
- *To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.*

The proposal supports these objectives by:

- a) Providing a mixture of land uses on the site including retail and residential.
- b) Providing a mixed use development, including car share, bicycle parking in close proximity to the Macquarie University Station. Importantly, the proposal also delivers a pedestrian / cycle path way which will encourage active forms of transport once connected with the wider access network.

Building Height Objectives

The objectives of the Height of Buildings development standard are provided in Clause 4.3(1) of the RLEP 2014 and are as follows:

- a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*
- b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*
- c) *to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*
- d) *to minimise the impact of development on the amenity of surrounding properties,*
- e) *to emphasise road frontages along road corridors to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*

The proposal is considered to satisfy the above as:

- a) *to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*

The majority of the street frontage height achieves compliance with the maximum Height of Buildings with the exception of Area C which achieves a total non-compliance of 1.06m. This height non-compliance is considered to be so minor that it would not be noticeable from street level. Importantly, this area is equal to only 4.375m² resulting in minimal impact.

- b) *to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*

The proposal is mostly compliant with the maximum Height of Buildings with the proposed area of non-compliance not resulting in any significant additional areas of overshadowing. Importantly, it is noted that the properties to the south of the subject site are largely commercial / hotel in nature.

The areas of non-compliance are limited in area and do not result in a perception of a larger building than a fully compliant scheme. Whilst the proposal will be one of the first new buildings in this area up to the current maximum height limit, over time the wider area will be further developed in accordance with the requirements of the RLEP 2014, and the vision established by the Herring Road Priority Precinct.

As such, the proposal is considered to satisfy this objective.

- c) *to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*

The proposal achieves compliance with requirements of this objective due to its close proximity to Macquarie University Station.

- d) *to minimise the impact of development on the amenity of surrounding properties,*

Due to the minor nature of the proposed non-compliances, the proposal will not have a significant adverse impact upon the amenity of adjoining properties. In particular the following is noted:

- The proposed height non-compliances will not result in significant additional overshadowing of adjoining properties; and
- The proposed areas of non-compliance will not be distinct or easily discernible from surrounding properties and public domain areas with regards to bulk and scale. This is as they are generally inset and where on the external façade, not readily distinct from adjoining height compliant areas of the building.
- e) *to emphasise road frontages along road corridors to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*

The proposal responds positively to the frontage of Waterloo Road through the

provision of a defined podium with tower above. As a result, the road frontage is emphasised, supporting the future development of Waterloo Road as the main 'spine' road within Macquarie Park.

Public interest

For all of the forgoing reasons, Council would be satisfied that, as a consequence of consistency with zone objectives and a superior planning outcome, it is in the public interest to vary the standard.

5.0 Conclusion

This application sets out all of the material required by the Council to allow it to be satisfied that the variation request pursuant to clause 4.6 should be upheld.

In summary, those requirements are:

1. *There must be a **written request** from the applicant that seeks to justify the contravention of the standard.*

This application satisfies this requirement.

2. *That written request must justify contravention of the standard by demonstrating, as required by clause 4.6, that:*

- a. **Compliance with the development standard is unreasonable or unnecessary in the particular circumstances of the case; and**

- The proposed areas of non-compliance a primarily the result of recessed ground levels in key areas in response to basement entries, location of plant and substations and level changes resulting from raised pedestrian access points;
- A proposal which is compliant with the Height of Buildings standard would bring about an inferior built form and planning outcome for the subject site;

- b. **That there are sufficient environmental planning grounds to justify contravening the development standard.**

- There are sufficient environment planning grounds to support the proposed variation to the Height of Buildings standard because the proposed development which varies the Height of Buildings standard will be about a better environmental outcome that a development which complies with the standard;
- The development would result in the orderly and economic use of the land through the provision of high-quality residential development which creates opportunities to maximise potential use of existing and proposed infrastructure on a well-located, relatively unique site consistently with the existing and emerging character of the immediate area.

3. *The consent authority must consider the written request.*

Having considered this written request Council would be satisfied that the requirements of clause 4.6 have been satisfied.

4. *The consent authority must be satisfied that:*

- a. **the written request has adequately addressed the matters that are required to be demonstrated by clause 4.6(3), i.e. compliance is unreasonable and unnecessary and sufficient environmental planning grounds; and**

For the reasons set out above, the Council would be so satisfied.

b. the development is 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.

- The proposal positively achieves the objectives of both the Height of Buildings and B4 Mixed Use zoning of the site;
- There are no adverse impacts which would arise from the variation;
- The development is consistent with the existing and emerging character of the area;
- The development results in a better planning outcome than a complying development.

In light of the above, Council can be satisfied that the proposal will achieve each of the relevant objectives in a manner which is better than a development which strictly complied with the standard.

It follows that compliance with the applicable Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the subject site and all components of Clause 4.6 are satisfied. The applicant requests that the Council concludes that the variation to the development standard is well-founded and should be approved in the particular circumstances of this proposal.