

Attachment B -
Clause 4.6 Request - Height of Buildings

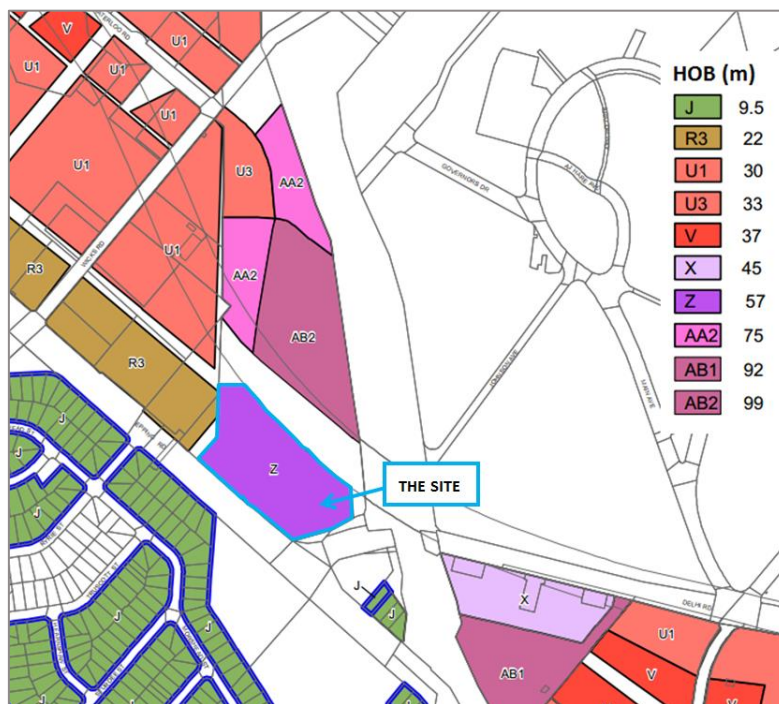
CLAUSE 4.6 – HEIGHT OF BUILDINGS STANDARD

INTRODUCTION

This written request has been prepared in accordance with the provisions of clause 4.6 “Exceptions to Development Standards”. The request seeks a variation to the Height of Building development standard adopted under clause 4.3 of the Ryde Local Environmental Plan 2014 (RLEP 2014).

As shown in the land the subject of this request is labelled “Z” coloured purple and is identified as being subject to a 57 metre maximum Height of Buildings (HoB) development standard under the provisions of RLEP 2014.

Figure 1 – Height of Building Map (RLEP 2014)



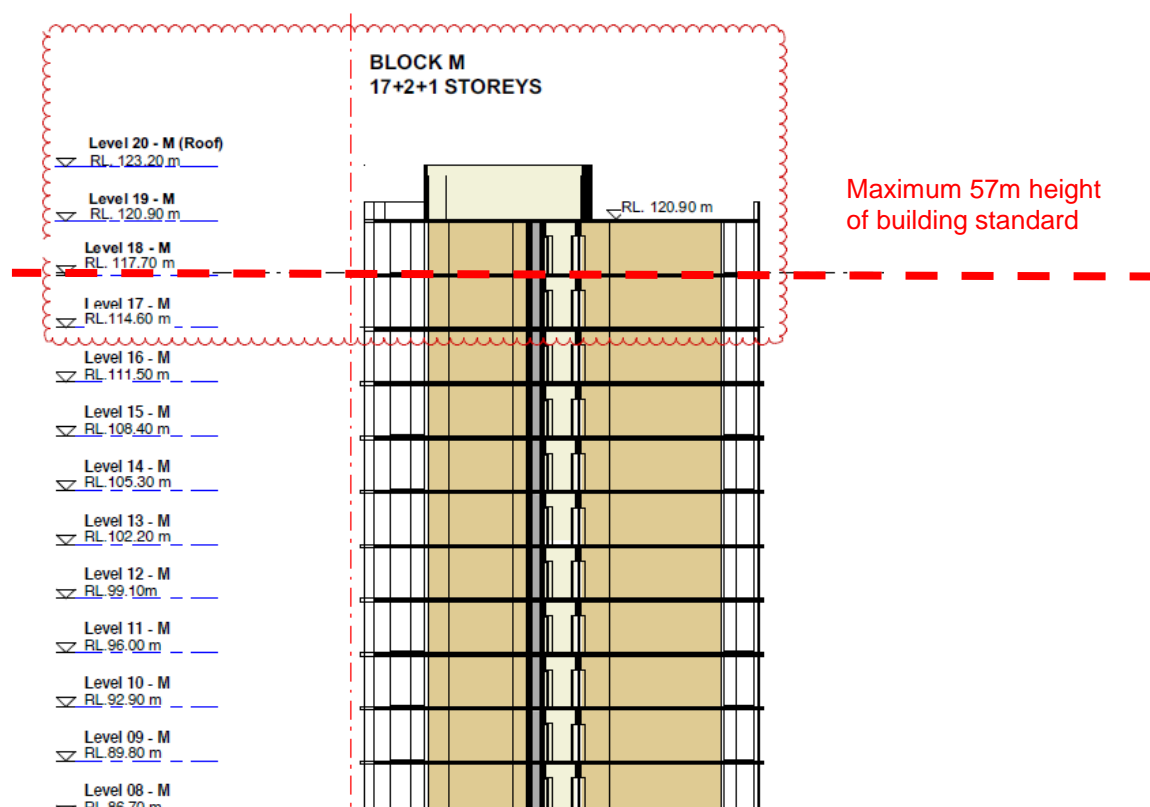
Building M has a height that exceeds the maximum permissible 57 metre height of buildings imposed by clause 4.3 of the RLEP 2014. The amended proposal proposes additional height of Building M on Lot 104 involves a non-compliance in the identified non-compliance occurs for 1 level and the lift over run with a maximum height of maximum of 63.2 metres.

A summary of the building heights, when measured from the variable existing ground level below, is outlined in

Table 1 – Height of Building M

Building	Permitted	Proposed height
M	57 metres	RL123.2 (max) (lift overrun) 63.2 metres RL120.90 metres (parapet) 60.9 metres

Figure 2 – Building M and HOB standard, Turner Studio



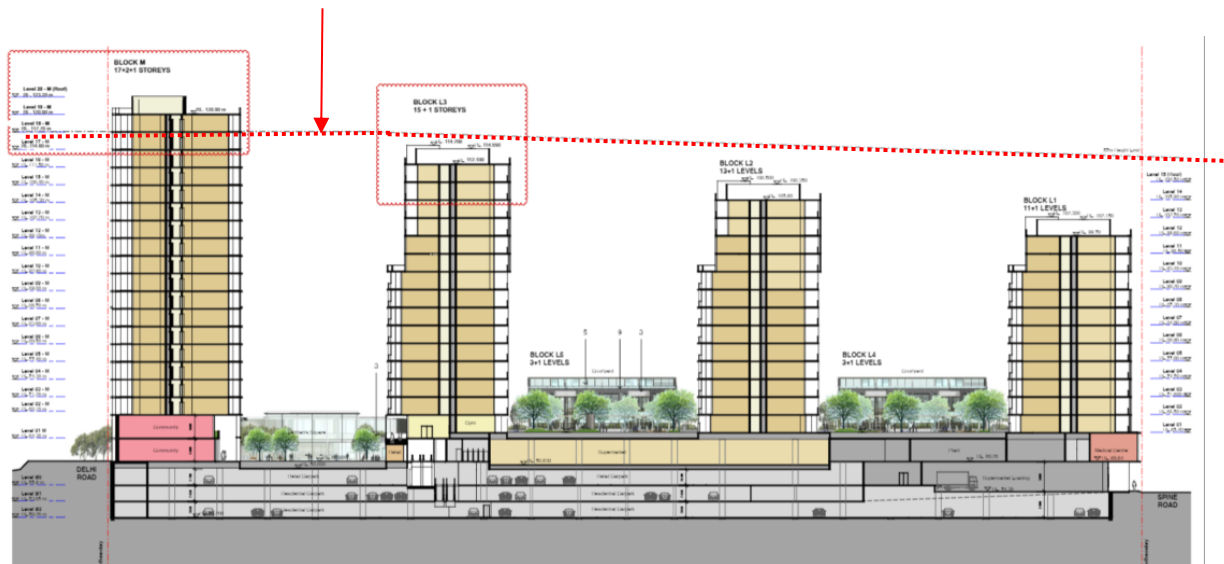
As such an exception to the development standard of 6.3 metres is requested.

The non-compliance represents a 11 per cent variation of the height of building standard.

Figure 3 – Section showing Building M non-compliance with 57 m HOB Standard

Building M (ROOF – RL123.20)

Maximum 57m height
of building standard



The exception to the development standard for Building M is a result of proposed amendments proposed to the development application specifically in response to the SNPP reasons for Deferral dated 27 September 2017, as follows:

- Reduction in the height of Building J by 2 full levels, with the deletion of Levels 13 and 15;
- Reduction in the height of Building K by 2 full levels, with the deletion of Levels 12 and 13;
- Increase in the height of Building M by 2 full levels; and
- Increase in the height of Building L3 by 2 full levels.

Figure 4 and Figure 5 illustrate elevations Building J and K effected by the above amendments.

Figure 4 – Original DA West Elevation showing Buildings J and K on Lot 105 (Jarvis Circuit)

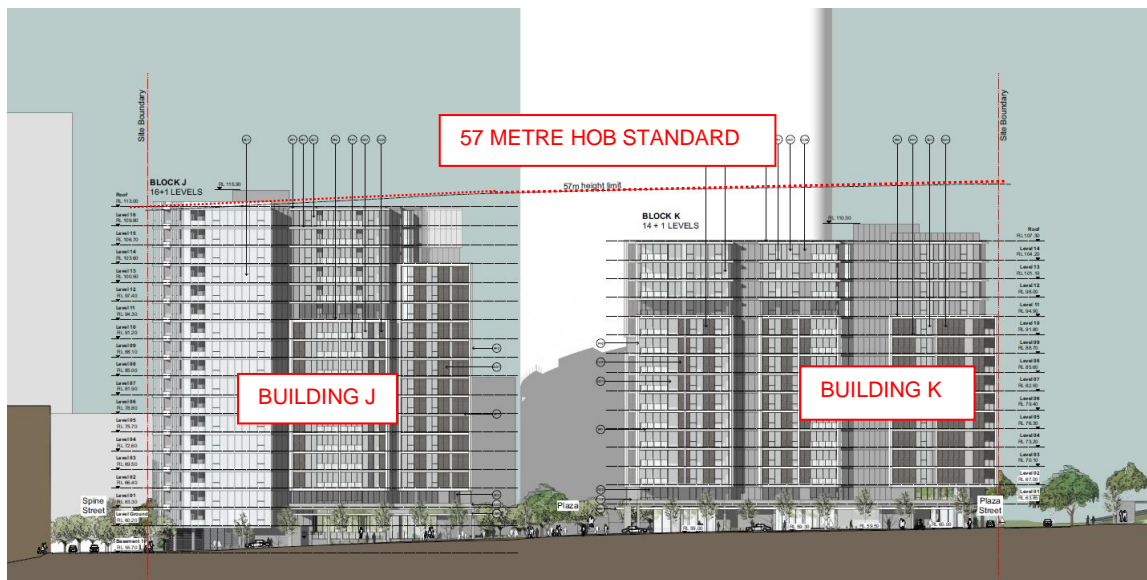


Figure 5 – Amended DA West Elevation with reduction in the heights of Buildings J and K on Lot 105 (Jarvis Circuit)

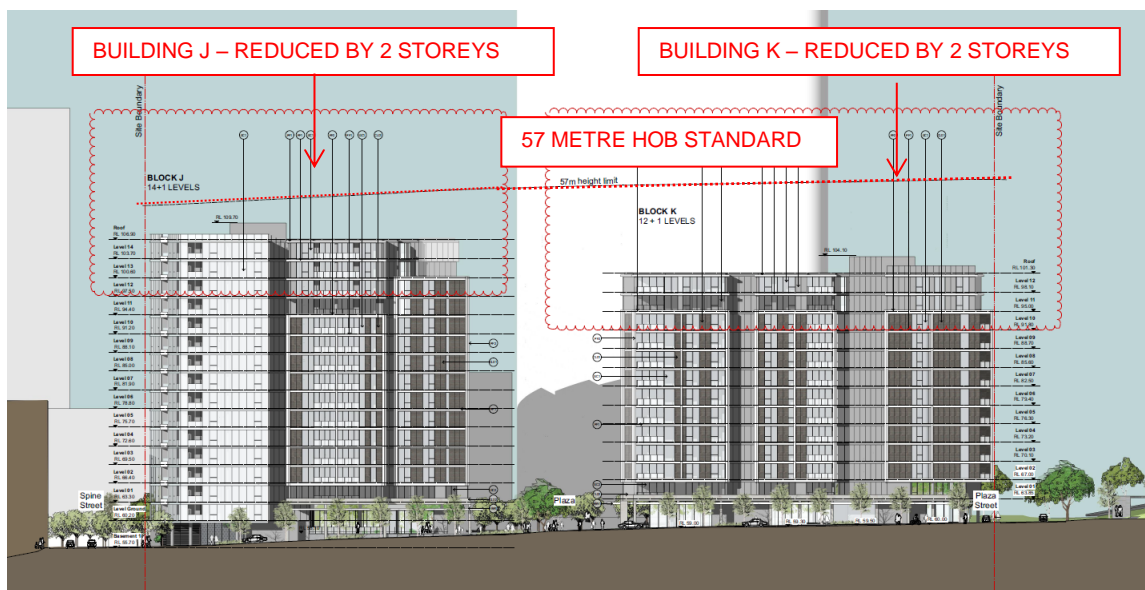


Figure 6 and 7 illustrates elevations Building M and K effected by the above amendments.

Figure 6 – Original DA East Elevation showing Buildings M, L1, L2, L3, L4 and L5 (Jarvis Circuit)

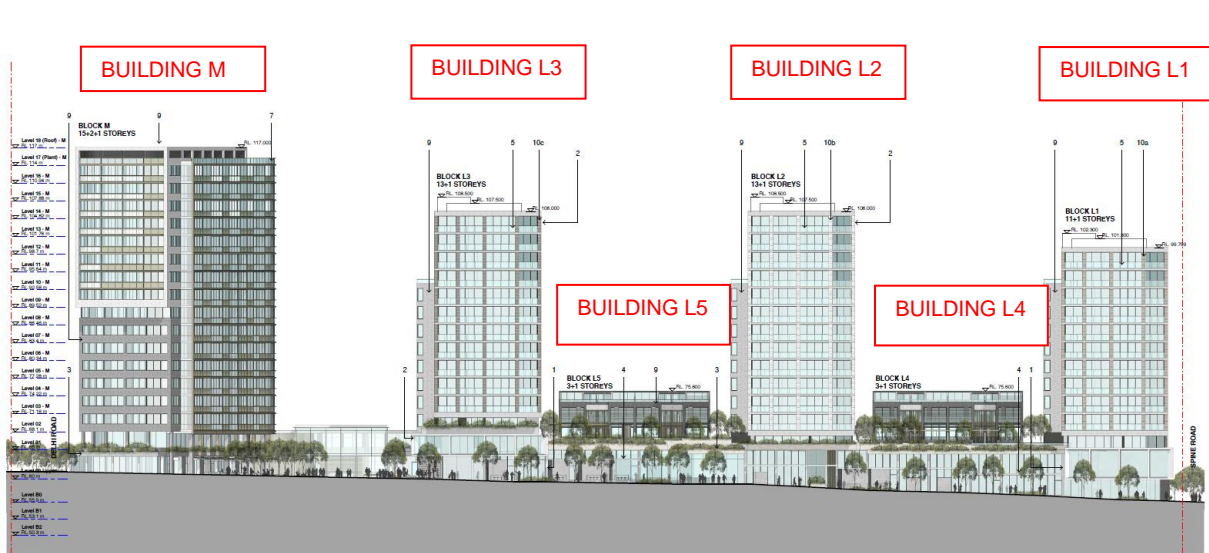
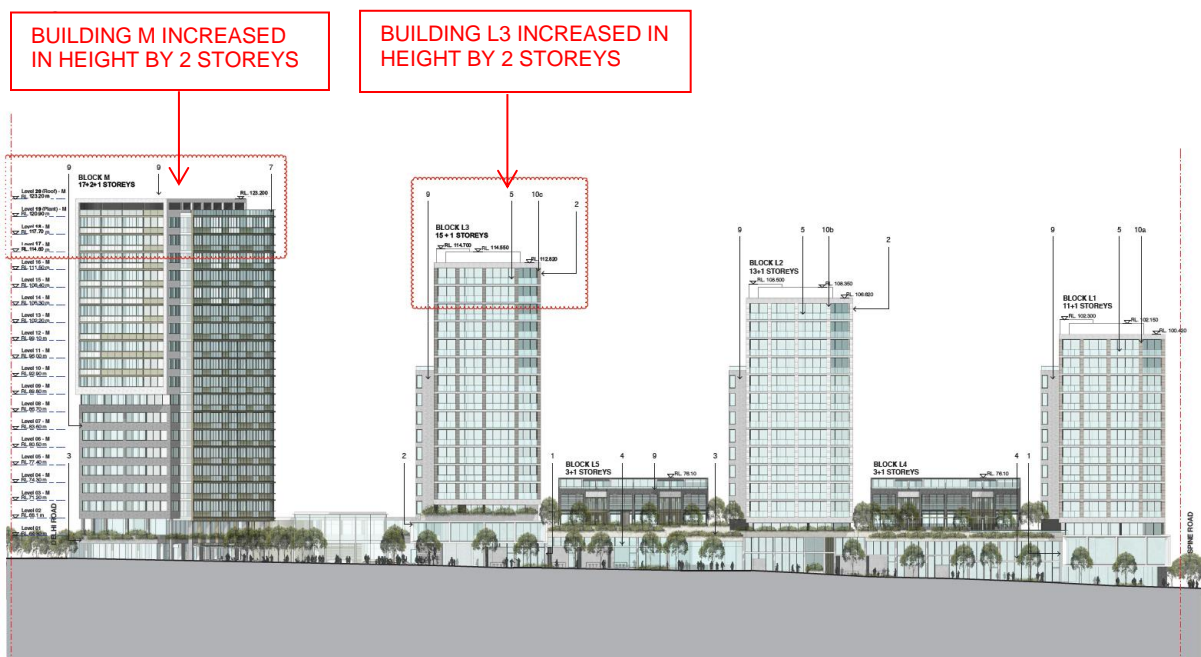


Figure 7 – Amended DA East Elevation showing increases in the heights of Buildings M, and L3 (Jarvis Circuit)



PRINCIPLES OF EXCEPTIONS TO DEVELOPMENT STANDARDS

ENVIRONMENTAL PLANNING INSTRUMENT PROVISIONS - CLAUSE 4.6

Clause 4.6 of the RLEP 2014 provides flexibility in the application of planning controls by allowing Council to approve a development application that does not comply with a development standard where it can be demonstrated that flexibility in the particular circumstances achieve a better outcome for and from development. Subclauses (3), (4), (5) and (8) from clause 4.6 of RLEP 2014 are extracted below:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*
- (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 4.3, to the extent it applies to Precinct 2 (Town Core) shown on the Ryde Town Centre Precincts Map.*

NSW Land and Environment Court: case Law (tests)

Several key Land and Environment Court (NSW LEC) planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The key findings and directions of each of these matters is outlined in the following discussion.

Winten v North Sydney Council

The decision of Justice Lloyd in *Winten v North Sydney Council* established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the *Standard Instrument templates*.

These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard;
- What is the underlying object or purpose of the standard;
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act;
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
- Is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case; and
- Is the objection well founded.

Wehbe V Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* expanded on the findings in *Winten v North Sydney Council* and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives;
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or

- Is the “*zoning of particular land*” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable.

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

More recently in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

- Compliance with the particular requirements of clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP; and
- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs.

The following section addresses the local provisions of clause 4.6 of RLEP 2014 together with principles of *Winten v North Sydney Council* as expanded by the five (5) part test established by *Wehbe V Pittwater [2007] NSW LEC 827* and refined by the judgement of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*.

IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The planning control in question is clause 4.3 of the RLEP 2014. Clause 4.3 nominates a maximum Height of Buildings of 57 metres for the site. The planning control as a numerical control is a development standard capable of being varied under the provisions of clause 4.6 of the RLEP 2014.

WHAT IS THE UNDERLYING OBJECTIVE OF THE STANDARD?

The objectives for Height of Buildings development standard provided at subclause 4.3(1) of RLEP 2014 state the following:

- (1) *The objectives of this clause 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.*

- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The general underlying intent of the clause is to control the bulk of development and to ensure compatibility of the building form, define the street edge, preserve amenity and encourage land consolidation around public transport nodes.

The proposed development, as proposed is considered consistent with the relevant objectives of the control for the following reasons:

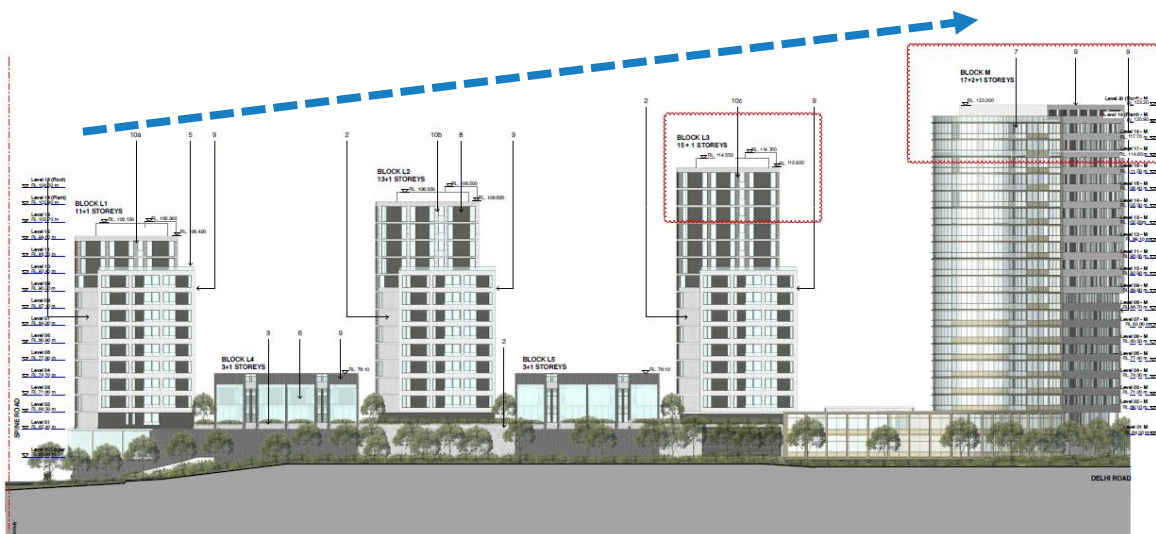
- The proposal will be compatible with the height and scale of adjacent development. Good separation is afforded the nearest neighbouring properties;
- The proposed development and in particular the additional height does not contribute unreasonably to additional overshadowing impacts of neighbouring residential properties of public open spaces or diminish the amenity of adjacent land, as demonstrates in the body of the Statement of Environmental Effects.

The additional height to Building M, enhances the variety of the built form and massing along Epping Road with a more even graduation in the heights of buildings rising along Epping Road from Building L1 to M (

- Figure 8).
- The additional height on Building further assists to define the major intersection of Epping Road and Delhi Road
- The reduction in heights on Lot 105, by two levels on each of Buildings J and K prepared the amenity of apartments and major communal open spaces on Lot 104, as demonstrated in the solar access study prepared by independent specialist consultant Steve King.

The development despite the minor non-compliance with the development standard is consistent with the planning and environmental objectives of the control.

Figure 8 – Increase tower heights along Epping Road frontage on Lot 104



IS COMPLIANCE WITH THE DEVELOPMENT STANDARD CONSISTENT WITH THE AIMS OF THE POLICY, AND IN PARTICULAR DOES COMPLIANCE WITH THE DEVELOPMENT STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE EP&A ACT?

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

- “(a) 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 co-ordination of the orderly and economic use and development of land...”

The development is generally consistent with the objects of the Act, in respect to the following:

- The site is located within an urban environment undergoing significant transformation for high density and mixed use development. The redevelopment of the site for mixed use development contributes to urban consolidation and may contribute to reducing demand to develop more environmentally sensitive lands.
- The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.
- The height variation, as requested, will enable construction of an approved project.

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

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The development, as proposed be modified, is consistent with the objectives of the development standard as provided in clause 4.3 (1) of the RLEP 2014.
- The variation to the HOB standard does not:
 - Result in Gross Floor Area exceeding the combined maximum total permitted for Lots 104 and 105 by Consent SSD_0593; or
 - Contribute unreasonably to amenity impacts, including privacy loss or overshadowing as documents in the body of the Statement of Environmental Effects; or
 - Significantly alter parking or traffic impacts associated with the development.
- Strict compliance would result in buildings of similar heights, which would not result in satisfactory variety in the modulation of building heights. Increasing the height on Building B adds to the variety of building heights across the two blocks, and has been the result of a redistribution of building bulk form Buildings J and K on Lot 105 to Buildings L3 (below the 57 height standard) and

Building M. A strong vertical expression for Building M is a desirable urban design response to this specific location.

- The potential environmental impacts of the variation have been documented and detailed in the body of the Statement of Environmental Effects. It is our view that compliance in this instance would not contravene the environment planning objectives of the height control, in particular the proposed increase in the height does not contribute to significant or unreasonable overshadowing impacts of adjacent residential land or public open spaces.

Taking into account the above, the particular circumstances of this application warrant a variation of the development standard to facilitate an appropriate urban design and architectural response to Building M at the intersection of Epping Road and Delhi Road. A reduction in height would not improve the development but rather would result in a more homogenous heights of buildings across the mixed use precinct in the Lachlan's Line site.

In this instance, numerical compliance would not contribute to an improved outcome. As such it is considered that a complying development is neither, reasonable or necessary in circumstances of the case.

IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?

No. The development standard is not a performance based control.

ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

Yes, there are sufficient environmental planning grounds to justify the contravening development. These include:

- A reduction in the heights of buildings by 2 levels on each of Building J and K (Lot 105) results in improvement to the solar access to apartments and major open space on Lot 104, as demonstrated in the solar access analysis prepared by Steve King.
- There are no reasonable alternatives to achieve compliance with the standard whilst maintaining the same overall density proposed across both Lots 104 and 105 without further overshadowing adversely impacting residential properties and public open space outside of the precinct;
- The variation does not result in unreasonable adverse amenity impacts on adjacent land;
- The variation does not diminish the development potential of adjacent land;
- The development provides all necessary supporting facilities and infrastructure within the site; and
- Despite the additional height of Building M, the scale of development along Epping Road and Delhi Road will be comparable.

IS THE OBJECTION WELL FOUNDED?

The proposed exception to the HOB development standard will, in part, facilitate the delivery of additional housing located within an area undergoing significant transformation within proximity to public transport connections.

The development does not result in any unreasonable or significant adverse environmental (social, economic or biophysical) impacts. In particular, the variation does not diminish the redevelopment potential or amenity of any adjoining land.

Compliance in this circumstance would not improve the outcome. Rather it would unreasonably impact on the building quality of the development. It is the opinion of the author of this report that to force compliance in the circumstance would be antipathetic to the inherent flexibility provided by clause 4.6, thereby hindering the attainment of its objectives.

WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The non-compliance will not raise any matter of State or Regional Significance.

IS THERE A PUBLIC BENEFIT OF MAINTAINING THE PLANNING CONTROL STANDARD?

The approved development, as proposed to be modified, is not contrary to the public interest accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

CONCLUSION

Building M exceeds the permissible HOB standard by a maximum of 6.3 metres equal to a variation of 11 per cent of the adopted development standard. Taking into account the particular circumstances of this development, strict compliance with the numerical standard in this instance be both unreasonable and unnecessary.

Reductions in the height of buildings J and K on Lot 105, will improve the amenity of apartments and communal open space on Lot 105, as demonstrated by the solar access analysis by Steve King.

The assessment of the additional overshadowing impacts as a result of the non-compliant additional height on Building M, demonstrated that these impacts will not have a significant detrimental impact on the amenity of residents or public open space.

Based on the reasons outlined above, it is concluded that the request is well founded and that the particular circumstances of the case warrant flexibility in the application of the development standard.