

# Written Request under Clause 4.6 Exceptions to Development Standards of Campbelltown Local Environmental Plan 2015

**Lots 1 & 2 SP 41598, No 11 Queen Street,  
Campbelltown**

Prepared For:  
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Prepared By:



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# Contents

<b>1. INTRODUCTION .....</b>	<b>3</b>
1.1 BACKGROUND.....	3
FIGURE 1 – HEIGHT MAP .....	3
1.2 THE SUBJECT LAND .....	3
1.3 PROPOSED DEVELOPMENT.....	4
1.4 ZONING .....	4
<b>2 PROVISIONS OF CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS .....</b>	<b>4</b>
2.1 CLAUSE 4.6(1) - OBJECTIVES .....	4
2.2 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6 .....	5
2.3 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6 .....	5
2.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD? .....	6
<b>3 DETAILS OF DEVELOPMENT STANDARD TO HAVE EXCEPTION FROM.....</b>	<b>7</b>
3.1 CLAUSE 4.3 .....	7
FIGURE 2 – POTENTIAL HEIGHTS OF BUILDINGS UNDER LEP 2015 .....	9
FIGURE 3 – QUEEN STREET STREETSCAPE.....	9
FIGURE 4 – QUEEN STREET VIEW .....	10
<b>4 OBJECTIVES OF DEVELOPMENT STANDARDS .....</b>	<b>11</b>
4.1 CLAUSE 4.3 .....	11
FIGURE 5 – SHADOWS DIAGRAMS .....	12
<b>5 JUSTIFICATION FOR NON-COMPLIANCE WITH THE DEVELOPMENT STANDARDS .....</b>	<b>18</b>
5.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))? .....	18
5.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))? ....	19
<b>6 CONCLUSION .....</b>	<b>19</b>

## 1. Introduction

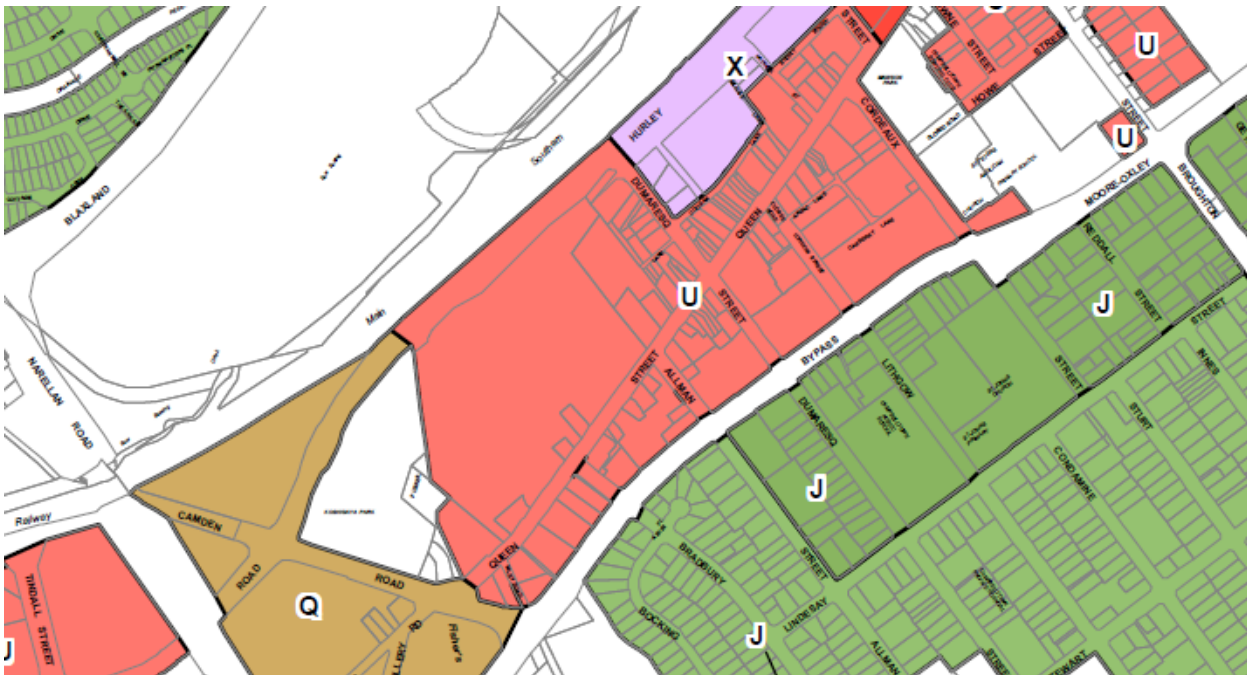
### 1.1 BACKGROUND

This document comprises a written request from the Applicant under clause 4.6 of Campbelltown Local Environmental Plan 2015 ("LEP 2015") that seeks to justify the contravention by the new building in the Proposed Development of the development standard for height of buildings in clause 4.3(2) of LEP 2015.

This report has been prepared to support a variation to the development standards of Clause 4.3(2) of *Campbelltown Local Environmental Plan 2015* (CLEP 2015), in respect of building height. The submission should be read in conjunction with the Statement of Environmental Effects (SoEE) prepared by this firm.

The maximum height shown for the Site on the Height of Buildings Map referred to in clause 4.3(2) of LEP 2015 is 32 metres as shown on the extract of Height of Buildings Map - Sheet HOB\_008 below in **Figure 1**.

**FIGURE 1 - HEIGHT MAP**



The proposed building proposes a height greater than that provided by Clause 4.3 (i.e. 71.15m to ridge level). As such a variation is sought under 'Clause 4.6 - Exceptions to development standards' under CLEP 2015. It would be noted that the subject property is heritage listed under the LEP and that the land is constrained by the location of the heritage item, being the former CBC Bank Building.

### 1.2 THE SUBJECT LAND

The land the subject of this objection is known as No 263, Lots 1 & 2 SP 41598 Queen Street, Campbelltown.

### 1.3 PROPOSED DEVELOPMENT

The proposal seeks consent for demolition of the existing commercial building at the rear of the site and the erection of a new mixed use building on the site, including basement carparking and landscaping of the land. Conservation of the heritage item is also proposed by this development.

The proposal seeks to construct 101 residential apartments and retail/commercial space over 20 storeys. The ground floor will contain the retail/commercial space, the first floor commercial space, with the residential component constructed over the next levels. Four levels of basement carparking are proposed, which contain 139 carparking spaces. The proposal also involves the removal of one pine tree. ("Proposed Development").

### 1.4 ZONING

The site falls within the B3 Commercial Core zone under Campbelltown Local Environmental Plan 2015.

## 2 Provisions of Clause 4.6 – Exceptions to Development Standards

In this regard clause 4.6 allows Council to use its discretion for buildings that do not comply with certain development standards contained with an LEP and is essentially the same as a SEPP 1 objection to the 'development standard'.

### 2.1 CLAUSE 4.6(1) - OBJECTIVES

The objectives of clause 4.6(1) are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Subclause 2 essentially provides for Council to grant development consent for a development that would contravene a development standard. Subclause 3 has the same requirements as a SEPP 1 objection in that a written request must be received objecting to the particular development standard.

The proposed variation to Clause 4.3 is considered to be consistent with the objectives of the exception clause. In this regard, given the specific circumstances of the site a better and more appropriate outcome for the proposed building is achieved by allowing flexibility to the development standard, in this particular circumstance having regard to the heritage requirements of Clause 5.10 of the LEP and the provisions of Clauses 5.6 (Architectural roof features) and 7.13 Design Excellence).

Clause 5.10(10) permits the Council to grant consent to a development that would not be permitted if the conservation of the heritage item is proposed. Indeed the adaptive reuse of the building will ensure that the heritage item, being the former CBC Bank Building will be conserved and preserved (refer to Conservation Management Strategy and Schedule of Works prepared by NRBS Partners that accompanies this report).

## 2.2 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6

Clause 4.6(2) & (3) of CLEP 2015 states:

- (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.*

This report seeks to demonstrate that compliance with Clause 4.3 of CLEP 2015 is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard in this instance having regard to the requirements of Clause 5.10(10) and Clauses 5.6 and 7.13.

## 2.3 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6

Clause 4.6(3), (4), (6) & (8) of CLEP 2015 states:

- (4) *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.*

It is considered that the public interest is better served as a consequence of the variation of the development standard of CLEP 2015 due to the constraints imposed by the heritage item on the property. Clearly the public interest is providing employment opportunities within the commercial component of the mixed use development and potentially in the hospitality industry for the growing population close to all amenities and services that are available in Campbelltown and more importantly conserving a significant state heritage item in the Campbelltown CBD and its adaptive reuse.

In the accompanying SoEE it is demonstrated that the proposal is consistent with the objectives of the B3 Commercial Core zone. Clause 4.6(8) states

- (8) *This clause does not allow 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,*
  - (ba) *clause 4.1D, 4.2A, 4.2B or 4.2C*

- (c) clause 5.4,
- (ca) clauses 6.1 and 6.2.

The proposed building will not contravene a development standard for complying development nor will it contravene any of the above clauses of CLEP 2015.

## 2.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The EP&A Act defines development standards as:

*"development standards" means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

We are of the opinion that the provisions of Clause 4.3 is a *development standard* as defined by the EP&A Act, being a standard fixed in respect of *the bulk, scale and height of a building, being standard (c)*.

### 3 Details of Development Standard to have exception from

#### 3.1 CLAUSE 4.3

Clause 4.3(2) Building Height is a development standard which may only be varied if a development application is accompanied by a written request that adequately addresses the required matters in Clause 4.6(2), in respect of building height.

Clause 4.3(2) Building Height states:

- (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 basis of this report is to demonstrate that the above height requirement is unreasonable considering the specific circumstances of this case. And therefore is not appropriate given the desired future character of the locality and the minimal adverse environmental impacts including amenity impacts on neighbouring commercial properties resulting from the proposed building. This Clause also needs to be considered in relation to Clauses 5.6 and 7.13, which refers to architectural roof features and design excellence, respectively and Clauses 5.10(10) (conservation of heritage items).

Clause 5.6 only applies where a building exceeds the height requirement of clause 4.3. It would be noted that the building exceeds the 32m height requirement and therefore the provisions of this clause applies.

- (1) The objectives of this clause are:
  - (a) to permit variations to the maximum building height standards only where roof features contribute to the building design and overall skyline.
  - (b) to ensure that the majority of the roof is contained within the maximum building height.
- (2) Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3 may be carried out, but only with development consent.
- (3) Development consent must not be granted to any such development unless the consent authority is satisfied that:
  - (a) the architectural roof feature:
    - (i) comprises a decorative element on the uppermost portion of a building, and
    - (ii) is not an advertising structure, and
    - (iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and
    - (iv) will cause minimal overshadowing, and
  - (b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.

As stated above, the site is a state listed heritage item. Clause 5.10(10) provides:

- (10) Conservation incentives The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:
  - (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and

- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.

As stated above, the proposed development will conserve the heritage building and therefore Council can also approve the development that exceeds the building height.

In terms of design excellence, Clause 7.13 states:

- (1) The objective of this clause is to ensure that development exhibits the highest standard of architectural and urban design as part of the built environment.
- (2) This clause applies to development involving the construction of a new building or external alterations to an existing building on land in the following zones:
  - (d) Zone B3 Commercial Core,**
- (3) Development consent must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence.
- (4) In considering whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters:
  - (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
  - (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
  - (c) whether the development detrimentally impacts on view corridors,
  - (d) how the development addresses the following matters:
    - (i) the suitability of the land for development,
    - (ii) existing and proposed uses,
    - (iii) heritage issues and streetscape constraints,
    - (iv) bulk, massing and modulation of buildings,
    - (v) street frontage heights,
    - (vi) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,
    - (vii) the achievement of the principles of ecologically sustainable development,
    - (viii) pedestrian, cycle, vehicular and service access, circulation and requirements,
    - (ix) the impact on, and any proposed improvements to, the public domain,
    - (x) the interface with the public domain,
    - (xi) the quality and integration of landscape design.

The following **Figures 2** and **3** provide the potential building heights proposed by LEP 2015 and the Queen Street streetscape, respectively. Whilst perspectives of the building viewed from Queen Street and from the adjoining Campbelltown Mall Shopping Centre are provided in **Figure 4**. As noted throughout the SoEE that accompanies this application, the visual character of the immediate area will alter over the years as development potential is realised as a result of the studies undertaken by Council and the Department of Planning and Environment.

There is no doubt that over the ensuing years, the skyline of Queen Street and the CBD will change dramatically as a result of the LEP and the position of the Department of Planning and Environment for the Corridor Strategy from Glenfield to Macarthur. This corridor proposes residential apartments within mixed use developments for the eastern side of the railway corridor and on the western side, mainly Campbelltown, a business park that will increase employment of older industrial sites. The business park will employ a considerable number of persons and such persons will wish to live close to employment. This does not include the growth that will occur in the retail and commercial sectors. The subject development is ideally located to provide housing for these workers, particularly having regard to the size of the proposed units.

FIGURE 2 - POTENTIAL HEIGHTS OF BUILDINGS UNDER LEP 2015

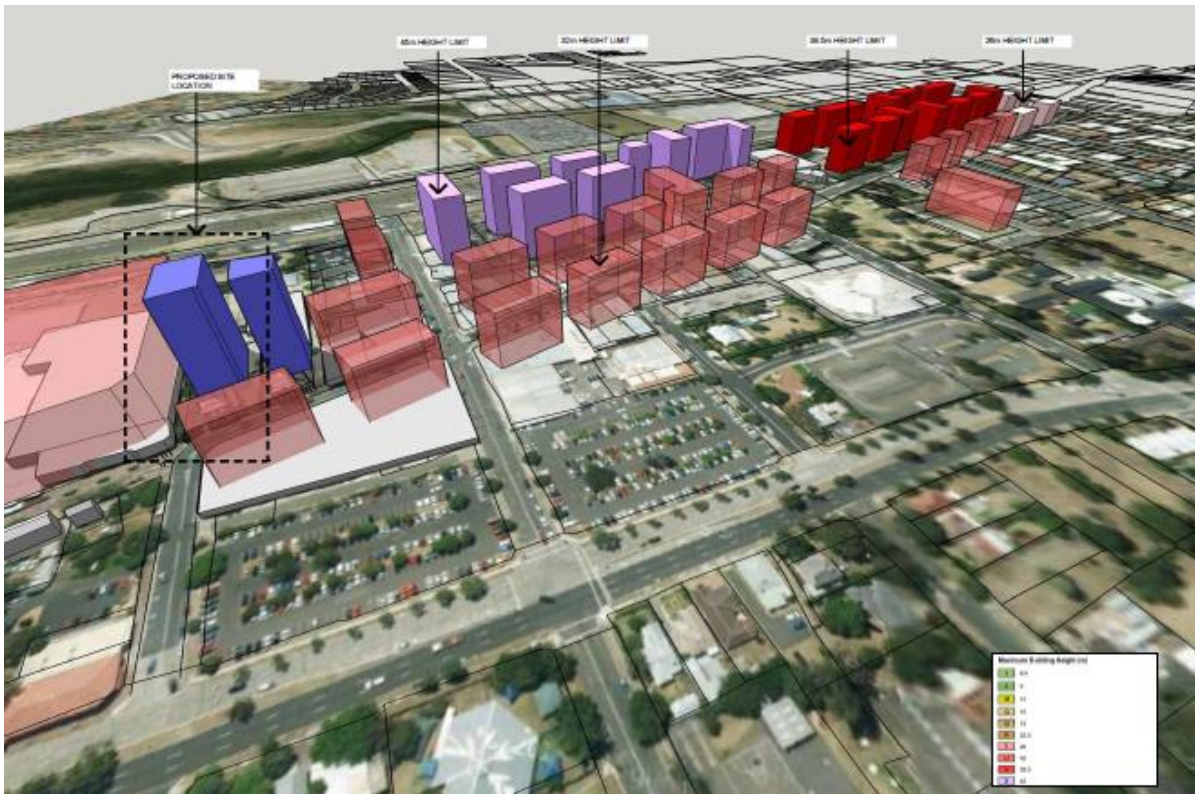


FIGURE 3 - QUEEN STREET STREETScape

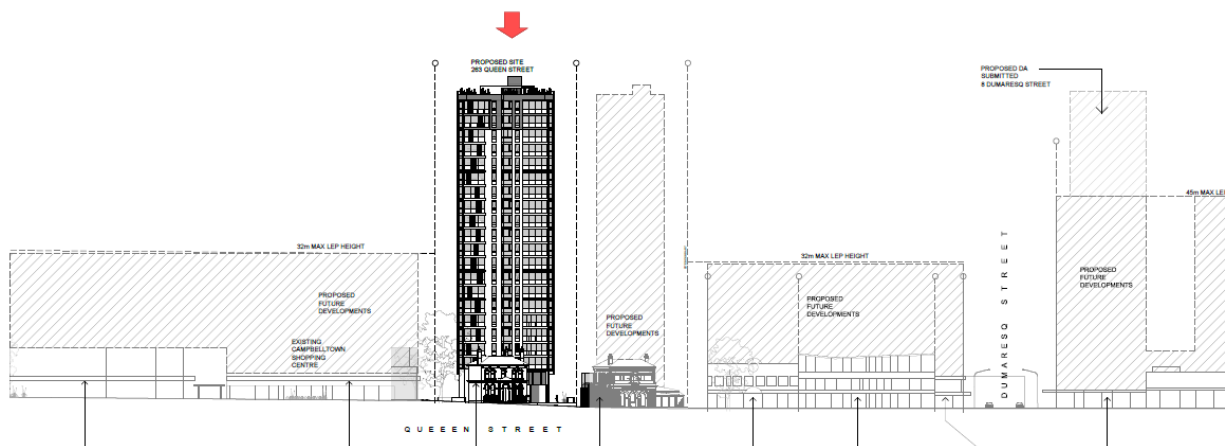
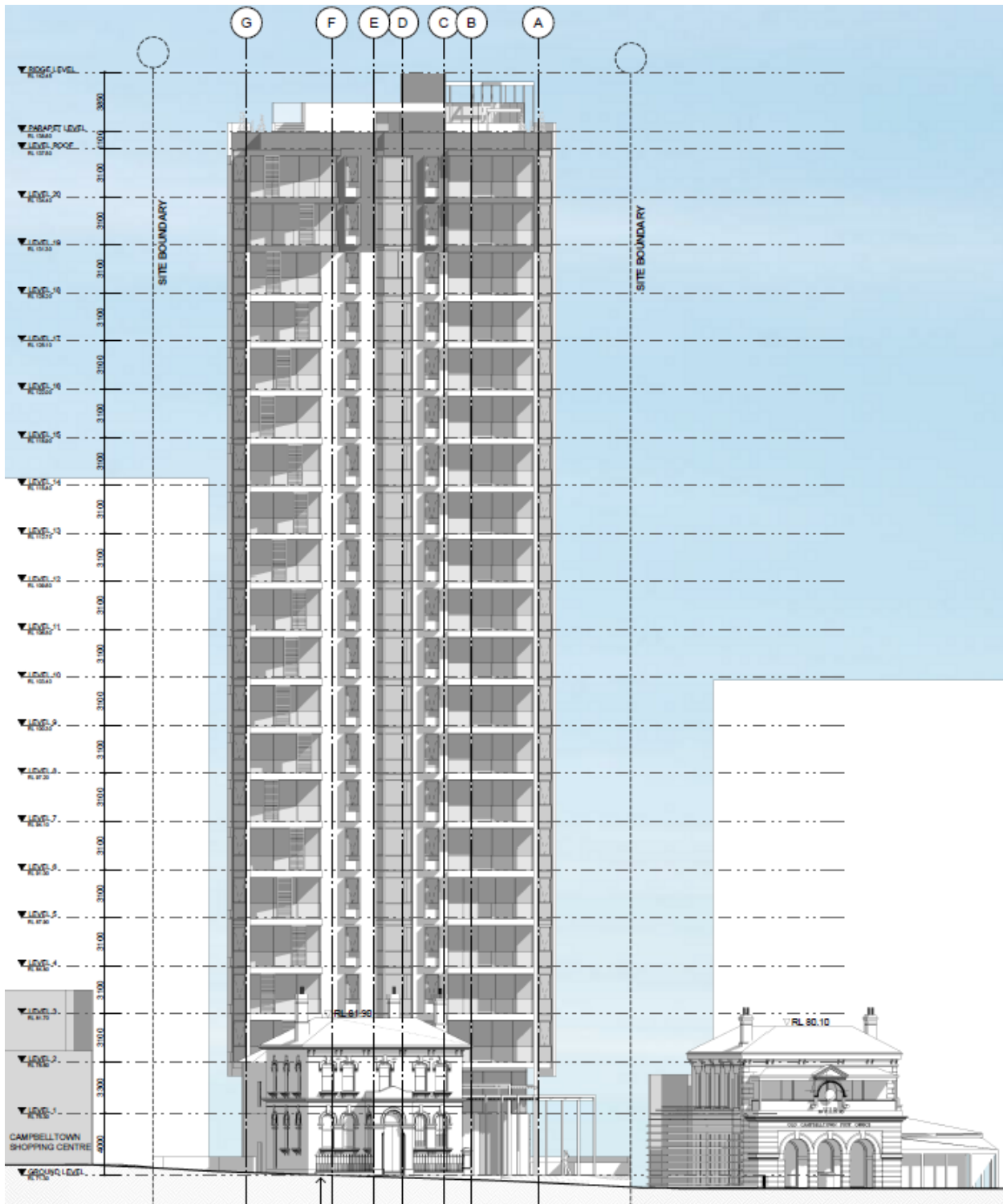


FIGURE 4 – QUEEN STREET VIEW



## 4 Objectives of Development Standards

### 4.1 CLAUSE 4.3

- (a) *to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,*
- (b) *to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,*
- (c) *to provide for built form that is compatible with the hierarchy and role of centres.*
- (d) *To assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.*

It is not considered that the development unreasonably impacts on the visual plane along Queen Street, nor from distant views. From Queen Street the building is partially screened by existing buildings. The massing of the building has been carefully considered in the context of 'fitting in' with the character of the area and more importantly the heritage listing of the subject property and the conservation area in general. The heritage officer stated that a building between 15 storeys and 20 storeys was an acceptable outcome. Given the fact that the Heritage Council requires the building to be setback 19m from the heritage item, the building has risen in height to 21 storeys.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting an increase in height is a streetscape that has various architectural elements. There will also be a variety of building materials used on the proposed building to complement the future streetscape and to provide active street fronts along Queen Street, which has been seen to be the end of the centre rather than forming an integral component.

In our opinion, the best planning practice should recognise this significance and respond to the opportunity to value add to the visual significance of the location by going beyond basic numerical compliance checking, and consider broader structural and urban design frameworks. On this basis, the opportunity is available to highlight that visual significance through the proposed building's siting and the general high quality building design, and as stated above, to comply with clause 4.3.

This opportunity is better served, in our view, by the proposed height of the building, which supports its location and yet at the same time does not unreasonably interfere with existing view corridors than one constructing a building of lesser height.

In terms of overshadowing, the shadow diagrams at **Figure 5** show that during the morning, shadow is cast on the roof of the adjoining shopping centre. At 12noon, the heritage buildings in the Queen Street Precinct are slightly affected and at 3pm the CBC Building and commercial development opposite are affected. This would occur for a 10 storey building, although to a lesser extent.

FIGURE 5 – SHADOWS DIAGRAMS



Having regard to the above, we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land. The population in the LGA is growing rapidly and access to employment opportunities should be at the forefront of decision making and planning outcomes for development sites zoned for that purpose. Planning decisions should take both of these factors into consideration.

The heritage aspects of the subject property have been addressed in the reports that accompany the application.

It has been demonstrated that the proposed building has been designed to take into consideration its surroundings and "fit in" with the commercial zoning of the land and the development scenarios that will occur in the CBD. Therefore restricting the building to 32m high is unreasonable and unnecessary. In respect of the height control, the following is provided. In standard instrument LEPs one of the fundamental controls is maximum height. The standard provision reads:

*"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 definition of the expression "building height (or height of building)" in the Dictionary of the Standard Instrument is:

*"**building height (or height of building)** means the vertical distance between **ground level (existing)** and 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."*

The difficulty with applying the definition of building height in the context of a particular building arises because of the vague and imprecise definition of the expression "ground level (existing)" in the Dictionary of the Standard Instrument. The definition states:

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

If a site is vacant there will usually be no difficulty in determining the existing level of the site at particular points. However, even in the case of a vacant site it is possible that the site may have been excavated or filled in the past which means that the topography is different to the topography of adjoining lots.

Difficulties also arise in the case of sites that are covered by an existing building where there is no "ground" or the floor levels of the building are either elevated above or sunken below the footpath or road level. How do you determine the existing level of the site in those cases?

In the case of *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (17 April 2014) the Court was dealing with a development Application for a four and five storey residential flat building and the retention of existing townhouses on a site at Boundary Street, Alexandria. One of the contentions of the Council in the case was that the proposed building exceeded the 15m height limit as stipulated in clause 4.3 of Sydney Local Environment Plan 2012 (LEP 2012).

The following provides excerpts from the judgement of Commissioner O'Neil, which has relevance to the proposed development. Commissioner O'Neill did not agree with the Applicant's expert but said:

*"This definition of existing ground level is sufficiently vague that both expert planners' reasoning can be argued, because the particular difficulty in applying this definition to this site is that the existing building occupies the whole of the site area and so there is no 'ground' (as in soil/garden/paving) around the building and on the site, from which the existing ground level can be determined by a site survey."*

*It is relevant to consider the objectives of the building height development standard in considering how best to determine the maximum height of the building using the dictionary definitions in LEP 2012. The objectives include, at cl 4.3(a) of LEP 2012, to ensure the height of development is appropriate to the condition of the site and its context.*

*As one of the purposes of the development standard is to relate the proposal to its context, it follows that the determination of the existing ground level should bear some relationship to the overall topography that includes the site.*

*Mr Betros' approach focuses entirely on the existing building on the site. Once the existing building is demolished, the point at which the height of the building was measured from will no longer be discernible or relevant. Importantly, this approach does not relate the building height development standard to the context of the site, it only relates it to the building to be demolished. Using this method, it is conceivable that on one property, the existing ground level will be taken as two storeys below ground level where there is a basement (as in the example raised by Mr Betros) and on the adjoining property, the existing ground level will be taken as being well above ground level where a building occupies the entire site and the finished floor level is higher than the footpath, resulting in adjoining sites with starkly different height limits arising from the same development standard.*

*Furthermore, the definition of basement in LEP 2012 is the space of a building where the floor level of that space is predominantly below existing ground level and where the floor level of the storey immediately above is less than 1 metre above existing ground level [italics added].*

*From this definition, it does not follow that existing ground level becomes the level of the basement floor or the soil beneath the basement following the construction of a basement. A basement is, by definition, below ground level and so the level of the basement floor cannot be taken to be existing ground level.*

*For these reasons, I do not accept Mr Betros' approach of defining existing ground level as the ground floor level of the existing building and then dropping it down to the basement level in the north-eastern corner of the site where the existing basement is located. This results in an absurd height plane with a large and distinct full storey dip in it as it moves across the site and crosses the basement of the existing building, which relates only to a building that is to be demolished and has no relationship to the context of the site. This is not a criticism of Mr Betros' reasoning, however, as I understand he has adopted the approach taken by Council in previous assessments, which is reasonable.*

*I prefer Mr Chamie's approach to determining the existing ground level because the level of the footpath at the boundary bears a relationship to the context and the overall topography that includes the site and remains relevant once the existing building is demolished."*

A judge of the Court has given some preliminary consideration to the meaning of the expression "ground level (existing)" as used in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (which is the same as the definition in the Standard Instrument) in the case of *McCullagh v Autore* [2014] NSWLEC 46 (11 April 2014).

In that case the McCullaghs, who were seeking an interlocutory injunction to stop a development on the adjoining property owned by the Autores' submitted that properly construed, the term "ground level (existing)" meant the ground level prior to any development having occurred on the Autores' property, including the construction of the original dwelling located on the site. Justice Pain said:

*"It is a nonsense, in my view, to construe the definition given to the term "ground level (existing)" as reaching back in time to immediately before the first consent was granted to develop the land the subject of the Autores' property. This is so if for no other reason than it would have the effect of giving the SEPP retrospective effect. Moreover, the practical effect of this construction would be that any land owner wishing to construct a wall would be required to trawl back through all of the development approvals granted in respect of a parcel of land in order to determine the precise existing ground level as at the date of the first development consent.*

*It is unlikely that such a construction gives effect to the objective intention of Parliament in drafting the definition.*

*The alternative interpretation suggested by the McCullaghs was that the term "ground level (existing)" meant the ground level prior to the construction of the dwelling that the Autores presently occupy. No evidence was, however, presented to the Court to demonstrate that the ground levels had changed. Rather, the only evidence before the Court was the survey plan adduced by Mr Boyce as at August 2015, that clearly showed that the present ground level and the ground level as at that date, were the same.*

The most recent case in the Land & Environment Court in respect heights of building is the matter of *Four2Five Pty Ltd v Ashfield Council* (2015) NSWLEC 1009 heard by Pearson C. There were two aspects of the appeal. Those being the height of building and floor space ratio; which related to the overarching contention of overdevelopment of the site. In respect of the height issue, a submission was made under Clause 4.6 to vary the control.

The Ashfield Local Environmental Plan at Clause 4.3(1) has the following objectives:

- (a) to achieve high quality built form for all buildings,
- (b) to maintain satisfactory sky exposure and daylight to existing buildings, to the sides and rear of taller buildings and to public areas, including parks, streets and lanes,
- (c) to provide a transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings,
- (d) to maintain satisfactory solar access to existing buildings and public areas.

It was agreed by the planners in this matter that “cl 4.3(2A) is poorly worded and that the objectives of cl 4.3(2A) set out in cl 4.3(1) of the LEP do not explain the planning purpose, intent or desired outcome sought by the control in cl 4.3(2A). They agreed that one apparent purpose of cl 4.3(2A) is in part an attempt to avoid “rooms in the roof” architectural styles similar to those in developments at 393-399 Liverpool Road and 415 Liverpool Road”.

Further at 58, it was stated that:

*“The planners agreed that the proposed development is consistent with objective (a) to achieve high quality built form. Mr North was of the opinion that the issue is consistency with the Council’s strategic planning vision, however objective (a) refers simply to the built form, rather than the planning vision. On that aspect, both planners were agreed that it is satisfactory. In relation to objective (b) to maintain satisfactory sky exposure and daylight to existing buildings surrounding the site, both agreed that sun and daylight for the buildings to the north is not affected, while for the building to the east, there was agreement that the setbacks are compliant. Mr North was of the opinion that the proposed use of the top floor of the building would reduce daylight exposure to the streets, and that there would be a diminishing of sky exposure when viewing the development from Frederick Street and Liverpool Road. The restriction imposed by cl 4.3(2A) relates to “gross floor area” which, as defined, includes and excludes a range of specified uses (or lack thereof) of space within external walls. Applying that definition,*

*I prefer the evidence of Mr Fletcher which was that what is provided in the upper 3m of the building, rather than some structure of similar dimensions which might fall within the exceptions to “gross floor area”, would not of itself have an adverse impact on daylight and sunlight exposure. There are no public areas including parks for which sky exposure or daylight is affected. In my view the proposed development is consistent with objective (b). In relation to objective (c), there are no heritage items in the locality.*

*Mr North considered that the “different areas” referred to in that objective are the different land use zones.*

*There is a zone boundary at the northern boundary to the site, with adjoining properties fronting Beatrice Street zoned R3, so that the relevant “transition” in built form and land use intensity would be that from the northern section of the development. Mr North accepted that cl 4.3(2A) does not apply to development in the R3 zone and that as a consequence a development in that zone to the maximum height limit of 12.5m could have four storeys: in that context, and applying cl 4.3(2A) to the subject site, there could be a transition from 6 storeys up to 23m on the southern part of the site to 3 storeys up to 12.5m on the northern part of the site to 4 storeys up to 12.5m in the adjoining R3 zone. However, Mr North noted that cl 5.9(b) of the IDAP would require that a fourth storey in the R3 zone be in an attic configuration within a roof pitch of 30 degrees. Assuming that any redevelopment of the properties on Beatrice Street in the R3 zone were to the 12.5m height limit, and that any fourth storey complied with cl 5.9(b), there would be a transition in built form from the subject site with a complete, albeit recessed, habitable storey, to an attic configuration at a similar height; the same could be said, however, for a development of the subject site that complied with cl 4.3(2A).*

The FSR controls would themselves impose a transition in land use intensity as the maximum FSR permitted under the LEP for the properties fronting Beatrice Street is 0.7:1, and 2.0:1 for the subject site. The proposed development is not inconsistent with the objective of providing a transition as expressed in objective (c). The planners agreed that the proposed development maintains satisfactory solar access to existing buildings and public areas, consistent with objective (d), and I accept that evidence”.

Pearson C further stated that:

56. I am satisfied that the proposed development satisfies cl 4.6(4)(a)(ii). Clause 4.6(4)(a)(i) requires that the Court is satisfied that the written request has adequately addressed the matters required to be demonstrated by cl 4.6(3), namely that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.
57. The environmental planning grounds identified in the written request are the public benefits arising from the additional housing and employment opportunities that would be delivered by the development, noting (at p 5) the close proximity to Ashfield railway station, major regional road networks and the Ashfield town centre; access to areas of employment, educational facilities, entertainment and open space; provision of increased employment opportunities through the ground floor retail/business space; and an increase in the available housing stock. I accept that the proposed development would provide those public benefits, however any development for a mixed use development on this site would provide those benefits, as would any similar development on any of the sites on Liverpool Road in the vicinity of the subject site that are also in the B4 zone. These grounds are not particular to the circumstances of this proposed development on this site. To accept a departure from the development standard in that context would not promote the proper and orderly development of land as contemplated by the controls applicable to the B4 zoned land, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the “environmental planning grounds” referred to in cl 4.6(4)(a)(i) of the LEP.
58. The written request argues that compliance is unnecessary in the circumstances of the case because the proposed development meets the objectives of the standard and the zone objectives, and that insistence on strict compliance would be unreasonable. Achieving the objectives of the development standard notwithstanding non-compliance with the standard was the most commonly invoked way of establishing that compliance with a development standard was “unreasonable or unnecessary in the circumstances of the case” under cl 6 of SEPP 1:  
  
*Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] per Preston CJ. In *Wehbe* at [44]-[48] Preston CJ identified other ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that the underlying objective or purpose is not relevant to the development; that the objective would be defeated or thwarted if compliance was required; that the development standard has been virtually abandoned or destroyed by the Council’s own actions in departing from the standard; or that the zoning of the land is unreasonable or inappropriate.
59. I agree with the submission of Four2Five that the wording of cl 4.6, being different to that in SEPP 1, requires the decision-maker to be faithful to the language of the clause rather than any stated principles developed in the application of SEPP 1, and that, subject to that caution, the case law developed in relation to the application of SEPP1 may be of assistance in applying cl 4.6. While *Wehbe* concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under cl 4.6 where cl 4.6(3)(a) uses the same language as cl 6 of SEPP1. Consistency with the objectives of the development standard and the zone objectives is now addressed specifically in cl 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary, using the same expression as that in cl 6 of

SEPP 1, in cl 4.6(3)(a) and 4.6(4)(a)(i) of the LEP. The written request does not identify any of the additional ways of establishing that compliance is unreasonable or unnecessary in the circumstances of the case.

60. In submissions Four2Five relied on the approval of a seventh storey for 380 Liverpool Road in breach of the development standard, to a height of 23m. That development is on the opposite corner to the subject site, described in the initial assessment report as “an important road intersection” (exhibit A, p 74). While the approval of that development at seven storeys with gross floor area in the top 3m did not comply with the development standard in cl 4.3(2A), in my view it does not represent a complete abandonment of the standard. The initial assessment report for 380 Liverpool Road noted that the elements that occupied the top 3m of the building were located on the corner of the site “where they assist in providing a better urban design outcome by articulating the corner of the road intersection” (exhibit A, p 73). The plans as modified in July 2014 (exhibit A p115S) support the evidence of Mr North that the seventh storey built form does not extend to the side boundaries: bedrooms in units 6.02 and 6.03, which are located at the corner, extend to the frontage, while units 6.04, 6.05 and 6.01 which are further away from that central point are set back from both the street frontage and the side of the site by extensive balconies, and wintergardens. However, the proposed development on the subject site includes in the northern section unit 3.08, built to the Frederick Street frontage and with a balcony 3.750m deep on its northern side, while the southern section includes unit 6.01 which extends to the side boundary with 421-423 Liverpool Road. Mr North conceded in oral evidence that if the approval of 7 storeys at 380 Liverpool Road is to be taken into account, it would support there being one unit located on the corner of the subject site. In my view, accepting that it is appropriate to regard the subject site as a “gateway” site analogous to that at 380 Liverpool Road, at its highest the approval of a seventh storey of habitable space for 380 Liverpool Road might support an argument that compliance with cl 4.3(2A) for that part of the proposed development confined to the corner of Liverpool Road and Frederick Street would be unreasonable or unnecessary. However, it is not necessary to express a concluded view, as that is not the basis on which the written request seeks to justify the contravention of the development standard, nor does it reflect the development as proposed.
61. I am not satisfied that the written request has demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard, or that compliance with the height standard is unreasonable or unnecessary in the circumstances of the case, as required by cl 4.6(4)(a)(i), and accordingly the requirements of cl 4.6(4) of the LEP are not met.

*This conclusion makes it unnecessary to express a concluded view on the application of cl 4.6(5) of the LEP, having regard to the discussion of the equivalent cl 8 of SEPP 1 in Wehbe at [40]-[41], in circumstances where the concurrence of the Director-General is to be assumed (Planning Circular PS 08-003, 9 May 2008, exhibit D).*

As such we are of the opinion that the use of Clause 4.6 of the LEP can be considered by Council having regard to the above decisions.

It is also considered that the subject development will not unreasonably impact on privacy, overshadowing or visual intrusion on adjoining developments (objective 1(d)).

In respect of the heritage impacts, this has been addressed in the Conservation Management Strategy and Schedule of Works that accompanies this application.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

## 5 Justification for Non-Compliance with the Development Standards

### 5.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))?

As discussed by Justice Preston in the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827, there are a variety of ways to establish that compliance with a development standard is unreasonable or unnecessary to achieve the objectives of the development standard, with four ‘tests’ to be satisfied, being:

- the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
- 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
- the zoning of particular land is 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.

These ‘tests’ were addressed above in Section 4.1.

Compliance with the development standard under Clause 4.3 is both unreasonable and unnecessary in this case given that the characteristics of the site and the circumstances of the proposed building allow for the proposed height. The potential site development is in keeping with the future character and the form of development that has occurred in parts of Queen Street having regard to the B3 Commercial Core zone applicable to the site and the adjoining sites.

The proposed development is considered reasonable for the following reasons:

- The proposed building has been carefully designed to minimise adverse amenity impacts on adjoining properties. Careful site responsive design has ensured that the technical non-compliance with the height proposed does not give rise to significant amenity impacts for the immediate adjoining commercial development or the heritage significance of the property;
- As discussed above, the proposed building is consistent with the objectives of Clause 4.3 of CLEP 2015; and
- The site is highly constrained by existing heritage building that restricts the building to a portion of the property. A building could be constructed on the property at 32m, but it would result in the heritage building being removed. As the building is of state significance, this has required the building to be more vertical, rather than horizontal (wider and longer) or indeed two towers over ground floor commercial development. As such a different built form outcome could have been achieved.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting the proposed development is a streetscape that has various architectural elements. There will also be a variety of building materials used on the proposed building to complement the future streetscape and to provide active street fronts along Queen Street, which forms an integral component of the Campbelltown Town Centre.

In our opinion, the best planning practice should recognise the constraints and respond to the opportunity to value add to this infill development by going beyond basic numerical compliance checking, and consider broader structural and urban design frameworks. On this basis, the opportunity is available to consider variations through the proposed building's siting and the general high quality building design, and as stated above, to comply with clause 4.3.

This opportunity is better served, in our view, by the proposed height of the building, which supports its location and yet at the same time does not unreasonably interfere with existing view corridors than one constructing a building of lesser height.

## **5.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))?**

There are considered to be sufficient environmental planning grounds to justify contravening the building height standard. These are as follows:

- The design of the proposed building is generally consistent with applicable planning controls contained CLEP 2015 and CDCP 2015.
- The height, boundary setbacks, depth and length of levels, deep soil landscaping, car parking, and solar access are generally compliant with development standards and controls in CLEP 2015 and CDCP 2015 that are applicable to the site.
- The proposed building has been designed to minimise amenity impacts such as overshadowing, visual privacy and bulk and scale on the adjoining commercial property.
- The articulated contemporary design makes use of attractive vertical and horizontal building elements while also varying the material, finishes and colours of the building's facade. This provides visual interest when viewing the development from the public domain and ensures that the proposed building will make a positive contribution to the redevelopment of the locality and the Campbelltown Town Centre generally.

## **6 Conclusion**

It has been demonstrated above, that the development is one that satisfies the objectives of clause 4.3 and in particular subclauses 1(a), (b), (c) & (d) and that Council can use its discretion under clause 4.6 to vary the height requirements.

Given that the constraints of the land were carefully considered during the preparation of the proposal, including discussions with the Heritage Council, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standards.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for the development, will conversely act to preserve the character of the area, having regard to the heritage significance of the existing building.

Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards.

It is considered that the variation to the development standard contained in Clause 4.3 of CLEP 2015 should be supported, because it is consistent with Clause 4.6, the objects of the EPA Act, the relevant aims and objectives of CLEP 2015 and the B3 Commercial Core zone and would appear to create a negligible impact on the natural environment and the heritage nature of the precinct.

Michael Brown

A handwritten signature in dark ink, appearing to read 'M Brown', with a stylized, flowing script.

Director Michael Brown Planning Strategies Pty Ltd