

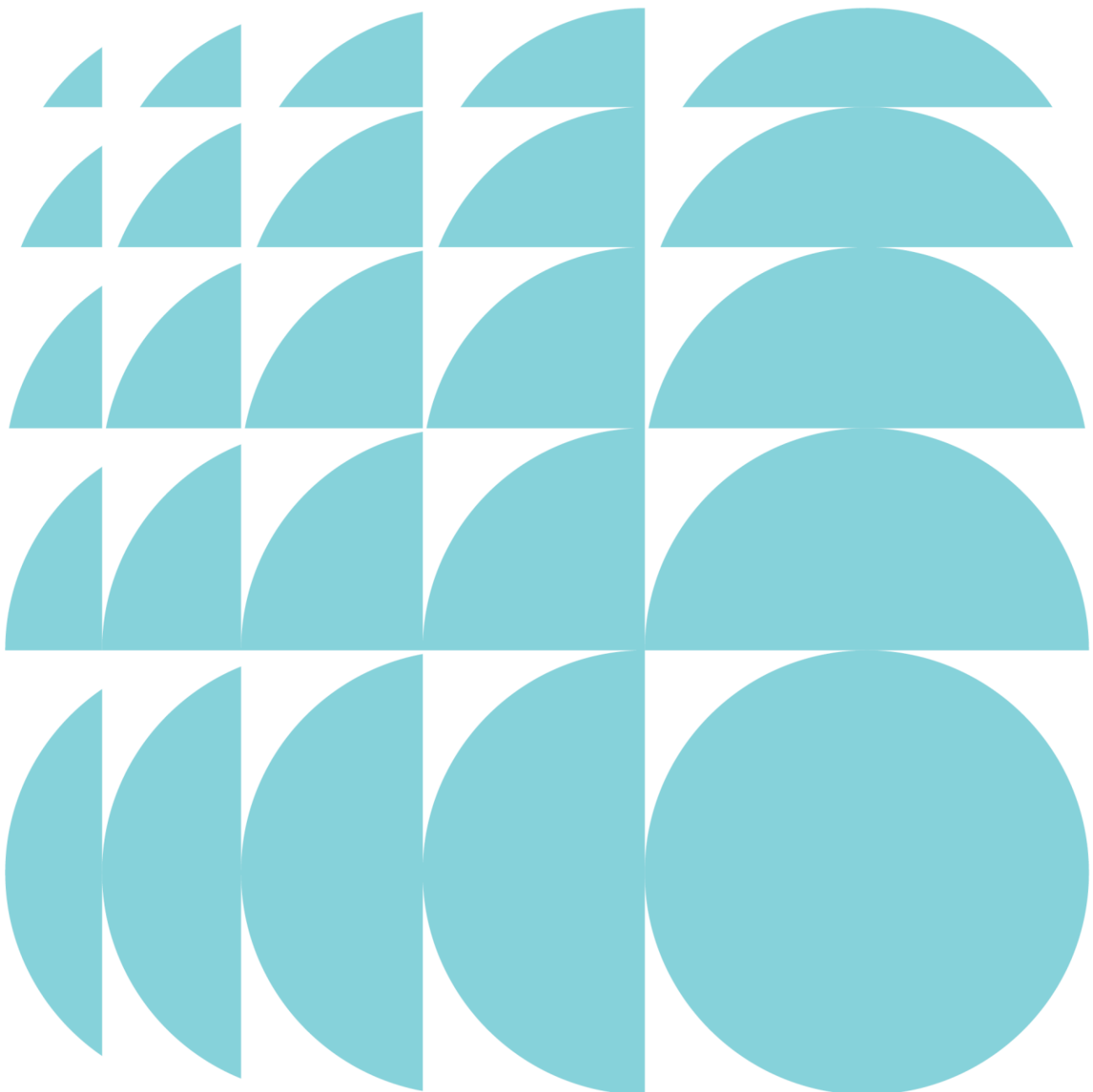
## Clause 4.6 Variation Request

Maximum Height of Buildings Development  
Standard

1A and 1B Queen Street, Auburn  
Residential Development

Submitted to Cumberland Council  
On behalf of EG Funds Management

3 May 2018 | 16271



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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of EG Funds Management. It is submitted to Cumberland Council (Council) in support of a Development Application (DA) for the redevelopment a former light industrial site, to accommodate a Residential Flat Buildings (RFB) development containing a total of 595 dwellings. This application relates to land at 1A and 1B Queen Street, Auburn (the site).

Clause 4.6 of the *Auburn Local Environment Plan 2010* (Auburn LEP) enables Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that 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 development is proposed to be carried out.

Assistance on the approach to justifying the contravention to a development standard is taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSWLEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
4. *Moskovich v Waverley Council* [2016] NSWLEC 1015.

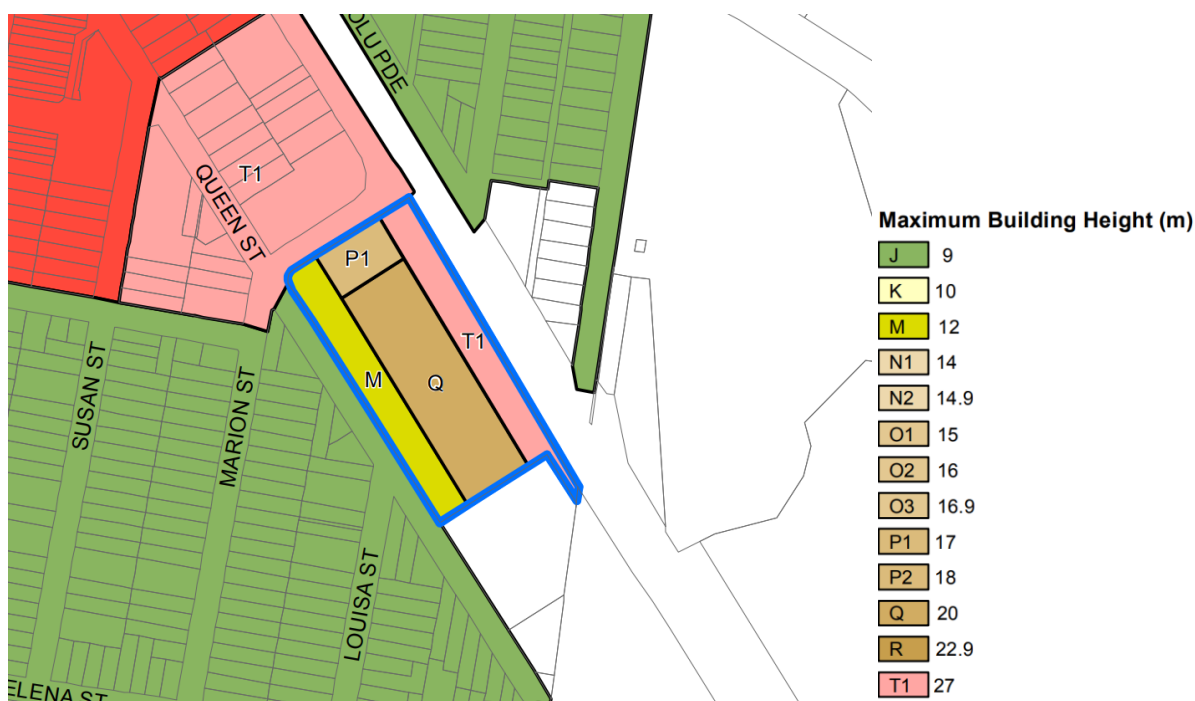
In accordance with the above requirements, this written Clause 4.6 request identifies the variation sought to the maximum building height and establishes that compliance with the development standard is unreasonable and unnecessary in the circumstances. It also demonstrates that there are sufficient environmental planning grounds to justify the contravention and provides an assessment of the matters the Secretary is required to consider before granting concurrence. The height variation will have a negligible impact upon surrounding residential amenity.

## 2.0 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of the Auburn LEP, which sets the maximum height of buildings applicable to the subject development proposal. Clause 4.3 of the Auburn LEP is reproduced below in its entirety, and an extract of the Height of Buildings Map, to which this clause applies, is reproduced in Figure 1.

### 4.3 Height of buildings

1. The objectives of this clause are as follows:
    - a. to establish a maximum height of buildings to enable appropriate development density to be achieved, and
    - b. to ensure that the height of buildings is compatible with the character of the locality.
  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.
- 2A. Despite subclause (2), the maximum height of office premises and hotel or motel accommodation is:
- a. if it is within the Parramatta Road Precinct, as shown edged orange on the Height of Buildings Map—27 metres,
  - b. if it is on land within Zone B6 Enterprise Corridor within the Silverwater Road Precinct, as shown edged light purple on the Height of Buildings Map—14 metres.



**Figure 1 – Extract of the height of buildings map (site outlined in blue)**

Source: Auburn LEP + Ethos Urban

## 2.1 Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site is located on the eastern edge of the Auburn Town Centre, approximately 550m south of Auburn Railway Station, adjoining the Western Rail Line corridor. It is in an ideal location to accommodate residential development, that integrates with and extends the Auburn centre, and can capitalise on the sites desirable connections to a wide range of employment, transport, services and amenities. The site itself is currently occupied by six light industrial buildings that are incompatible with the predominant residential character of the area and therefore invites urban renewal.

The site setting can be characterised as a transition area, graduating from high density development surrounding the train station to low density development on the outer periphery of the Centre. The site's development standards and building envelopes have been developed to respond to this setting and support the stepping of building heights from the Western Rail Line corridor in the north east, down to the general residential area in the south west.

## 2.2 Nature of the Variation

The proposed building envelopes are largely compliant with the maximum building height development standards applying to the site, which range from 27m to 12m, except for lift overruns, shade structures and minor portions of the roof slab, and architectural roof features<sup>1</sup>. The maximum extent of these localised exceedances of the building height are detailed in Table 1 and illustrated in Figure 2 to 8 below. It is emphasised that the table shows only the maximum exceedance to height of each building which in most case is the result of the architectural roof feature/lift overrun. These exceedances are minor and relate to the site's cross fall, visually interesting architectural design, and the need to maintain access to rooftop communal open space areas.

**Table 1 – Proposed variation to the maximum building height**

| Building | LEP Maximum Height | Maximum Proposed Height Exceedance | Variation |
|----------|--------------------|------------------------------------|-----------|
| A1       | 27-17m             | 0.46m (lift overrun)               | 1.7%      |
| A2       | 20m                | 4.2m (lift overrun)                | 20.09%    |
| A3       | 12m                | 0.6m (lift overrun)                | 4.9%      |
| A4       | 17m                | 0.95m (lift overrun)               | 0.5%      |
| B1       | 27-20m             | 0.2m (lift overrun)                | 0.04%     |
| B2       | 20m                | 3.96m (lift overrun)               | 19.8%     |
| B3       | 12m                | Nil                                | Nil       |
| B4       | 20m                | 0.75m (lift overrun)               | 3.75%     |

<sup>1</sup> Architectural roof features have been included in this Cl. 4.6 variation request for completeness. Consent may also be granted under Cl. 5.6 of the Auburn LEP for these particular design elements which by virtue of this clause are allowed to exceed the height of building map under certain circumstances.

| Building | LEP Maximum Height | Maximum Proposed Height Exceedance | Variation |
|----------|--------------------|------------------------------------|-----------|
| C1       | 27-20m             | Nil                                | Nil       |
| C2       | 20m                | 4.31m (lift overrun)               | 21.5%     |
| C3       | 12m                | Nil                                | Nil       |
| C4       | 20m                | 0.82m (lift overrun)               | 4.1%      |

## 2.3 Is the Planning Control in Question a Development Standard?

'Development Standards' are defined under Section 4(1) of the EP&A Act as follows:

*“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: ...*

*(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”*

The maximum building height control prescribed under Clause 4.3 of the Auburn LEP is clearly and unambiguously a development standard and has continually been applied in this manner by the consent authority.



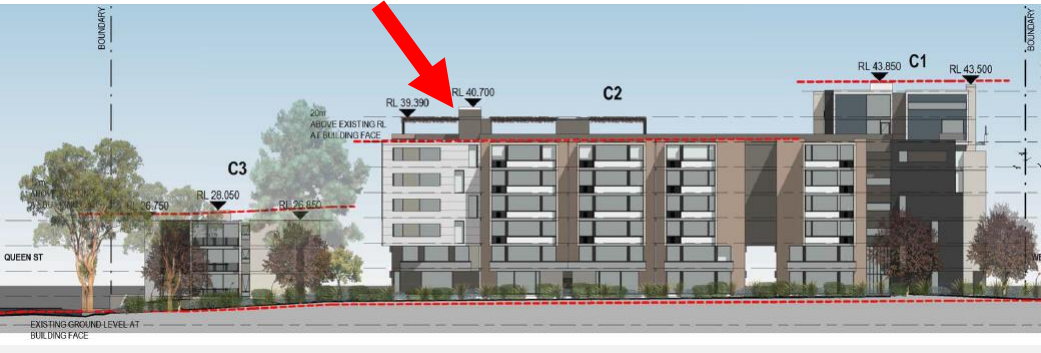


Figure 2 – Eastern elevation of Buildings C1, C2, and C3

Source: AU+C



Figure 3 – Eastern elevation of Buildings B1, B3, and B4

Source: AU+C



Figure 4 – Eastern elevation of Buildings A1, A2, and A3

Source: AU+C



Figure 5 – Western elevation of Buildings A1, A2, and A4

Source: AU+C



Figure 6 – Northern elevation of Buildings A3, B3, and C3

Source: AJ+C

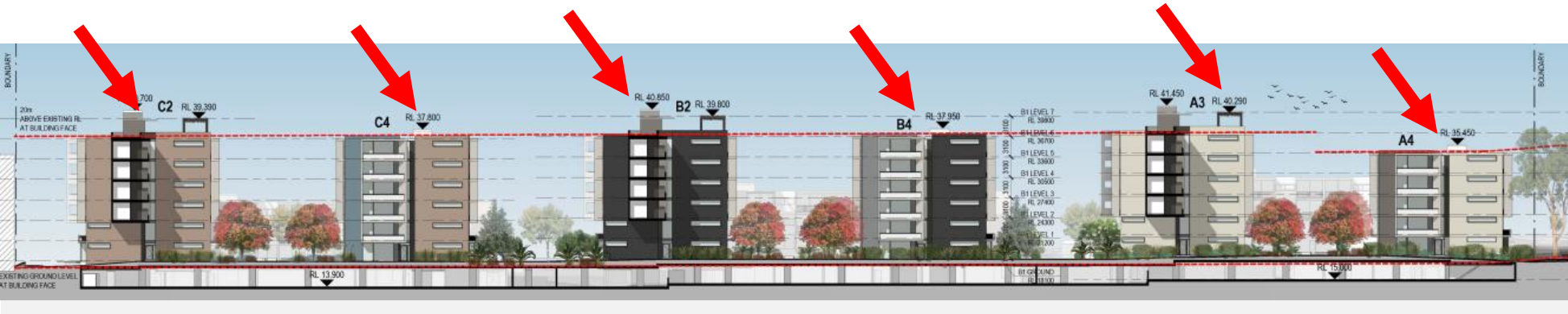


Figure 7 – Northern elevation of Buildings A2, A4, B2, B4, C2, C4

Source: AJ+C

Source: AJ+C

## 3.0 Justification for Contravention of the Development Standard

### 3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ of the Land and Environment Court identified five ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary. Nor does the development need to demonstrate satisfaction of more than one of five ways outlined.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

The five ways outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
4. 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 (**Fourth Way**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Way**).

This Clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height control pursuant to the First Way outlined in *Wehbe*.

In the recent judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (*our emphasis*) the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

Sections 3.1 and 3.2 of this document address the matters in clause 4.6(3)(a), and in particular how the objectives of the development standard are achieved notwithstanding the non-compliance with the numerical control.

### 3.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way)

The objectives of the maximum height of buildings development standard (under clause 4.3 of the Auburn LEP), and an explanation of how these objectives are met notwithstanding the minor non-compliance with the standard is provided in Table 2.

**Table 2 – Assessment against the maximum building height objectives, Cl. 4.3 of the LEP**

| Objective   | Comment   |
|---|---|
| (1) The objectives of this clause are as follows:<br>(a) to establish a maximum height of buildings to enable appropriate development density to be achieved, and | The proposed minor variations to the maximum height of building development standard does not reasonably change the permissible density that would otherwise be achieved on the site. The proposed variations are not attributed to habitable floor area, and as such will not intensify the use of the site. Instead, the variations relate to lift overruns, shade structures, and parapets that facilitate access to, and contribute to the amenity of, rooftop communal open space areas.<br>The minor, localised variations will not result in additional dwellings, rather they contribute to the quality of life of residents and the integrity of architectural design on the site. The proposal also remains consistent with the FSR provisions for the site also used to measure the desirable density of development.  |
| (b) to ensure that the height of buildings is compatible with the character of the locality.  | The rooftop lift overruns and shade structures have been designed to be recessive and compatible with the overall pallet of materials and finishes, to ensure they integrate into the building form. These roof additions are minor or have been set-in from the building edge, to safeguard the overall transition in height across the site and to minimise the visual impact of the development.<br>The proposed architectural roof features are not inconsistent with the character of the area. Whilst there is no definitive architectural style in the area to respond to, the development will continue to read as three storeys when viewed from Queen Street, and as such is compatible with the scale of development on the south western edge of the site. The proposed architectural roof features will assist in articulating the built form and creating an interesting streetscape. |

Further to the above, the site is subject to a site-specific provision under the Auburn LEP. This provision contains specific objectives that must be considered prior to granting consent for development on the site, and whilst these objectives are not strictly the objectives of the standard, they speak to the suitability of development on site. Accordingly, an explanation of how these objectives are met notwithstanding the minor non-compliance with the standard is provided in Table 3 below.



**Table 3 – Assessment against the site-specific objectives of Cl. 6.11 (Development of certain land at 1A and 1B Queen Street)**

| Objective   | Comment   |
|---|---|
| (2) The consent authority must, before granting consent to development on land to which this clause applies, take into consideration whether or not:<br><br>(a) the height of any proposed building is compatible with the existing and likely future scale of development in the immediate vicinity, and | The proposed exceedances are minor in nature and do not affect the overall density or bulk of development on the site. They will not impact the ability of the development to integrate with and extend from the Auburn Town Centre and provide an appropriate interface to lower density areas in the south west.  |
| (b) the height of any proposed building adequately transitions to any adjoining residential accommodation, and  | The proposed development will continue to appropriately transition in height from the site to the surrounding residential areas, the railway line, and town centre. As illustrated in the building elevations included above, the proposed exceedances are limited to minor structures on the roof which do not change the overall bulk and scale of the development. This is assisted by the fact that the components of the buildings exceeding the height limit are set in from the main façade. The proposed development will still read as three storeys when viewed from Queen Street.                        |
| (c) the development provides an appropriate level of solar access to common open spaces, and  | The proposed height exceedances directly respond to this objective. The proposed lift overruns, parapets and shade structures on the roof of select apartment buildings facilitate access to, and contribute to the amenity of, rooftop communal open space areas. These communal open space areas will benefit from excellent amenity in terms of solar access and views. By virtue of the fact the site specific DCP places ground level communal spaces on the southern parts of building locations, it becomes even more imperative that roof top communal open spaces are provided with enhanced solar access. |
| (d) the development results in a visually interesting and varied built form.  | <p>Whilst the architectural roof features will partly exceed the maximum building height, their primary purpose is to create a visually interesting and articulated built form that contributes to the surrounding streetscapes and view from the railway line.</p> <p>The proposed lift overruns and shade structures have been designed to be recessive and compatible with the overall pallet of materials and finishes, rather than celebrated. These elements have been designed to integrate with the built form, and not comprise the delivery of a high-quality design outcome on the site.</p>             |

### 3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it applies to the site.

## Residential Amenity and Access

The current height and built form controls were established under a recent Planning Proposal and accompanying Development Control Plan (DCP). This confirmed the desirable features for future development on the site, and specifically identified and supported the provision of rooftop communal open space. It is noted however, that whilst the maximum height limits established by the rezoning envisioned development of a scale similar to that proposed, the height limits imposed did not provide for the provision of roof top open space (despite the DCP stating that this feature is desirable). This clause 4.6 variation therefore seeks to rectify the disparity between the maximum LEP height limit of the development and the DCP objective of providing high quality rooftop open space and an articulated built form.

Providing rooftop open space as part of the redevelopment of the site will take advantage of excellent amenity in terms of solar access and views; the potential to create greater opportunities for passive surveillance; and the potential to improve the overall environmental performance of the development. Accordingly, three rooftop communal open spaces are proposed for the site as per Figure 9 below, to benefit future occupants of the site and to respond to the DCP.

To maintain equitable access to these rooftop communal open space areas, lift overruns and rooftop shade structures will breach the maximum building height in specific localised areas within the site. These areas will not impact significant views to or from the site and will not generate any additional overshadowing on surrounding properties (refer to the architectural plans prepared by AJ+C and Section 5.5 of the Statement of Environmental Effects). The lift overruns and shade structure are integrated into the architectural form of the building and all roof top shade structures are included within this DA.



**Figure 9 – Rooftop communal open space on the site**

Source: Oculus

If the development standard was to be maintained, the lift overruns would need to be deleted and the communal open space areas would not be possible or an entire floor would need to be artificially taken off the development, which would result in the site being significantly below the allowable FSR and development capacity deemed appropriate for the site. Maintaining this development standard would therefore result in a sub-optimal outcome for all residents, resulting in a reduction in the amount, type, and amenity of communal open spaces provided in the development or an undue reduction in residential FSR and housing supply.

On balance, maintaining the development standard would result in a poorer amenity outcome for future residents and visitors to the site. Given the proposal will not result in any adverse impacts to surrounding residents, is consistent with the envisaged built form for the site and locality, and will provide a higher standard of amenity to future residents; the proposal is considered to have sufficient planning grounds to justify the contravening of the maximum building height development standard.

### **Site Cross Fall**

Through site preparation works, the proposal will create a more level site specific to the development scheme, which better utilises the existing cross fall for overland flow and is complementary of the topography. As the building envelopes no longer fall in accordance with the natural ground levels, small portions of the roof slabs will extrude above the maximum height limit at one elevation. Accordingly, the desire to create a level site ensures the natural ground level cuts through a small portion of the roof structures.

### **Place Making Opportunity**

The site is presently occupied by a light industrial complex that is out of character with the area and the strategic merit of the site, and therefore invites urban renewal. The redevelopment of the site presents a unique opportunity to create a new, and highly accessible, community on the edge of the Auburn Centre. It is therefore imperative that development on the site is both visually interesting, achieves excellent amenity, and appropriately interfaces with the surrounding area and the desired future character of the area.

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. There are particular circumstances that affect the site and for the variation proposed which warrant variation from strict compliance with the height standard. Specifically:

- The variations relate to the provision of communal roof top open in accordance with the DCP;
- The site is subject to a site-specific DCP and rezoning which envisioned development to a scale and style of that proposed but the imposed height limit did not provide for the provision of roof top open space or vertical articulation (both of which are desired by the DCP);
- The variations include roof features which contribute to the articulation of the building and enhances visual interest; and
- The building envelopes no longer fall in accordance with the naturally sloping ground levels which causes exceedance of the height limit at some locations.



### Conclusion on Cl. 4.6(3)(b)

In light of the above, there are no environmental planning grounds that warrant maintaining and/or enforcing the numerical height standard in this instance. Rather, there are clear and justifiable environmental planning merits that validate the flexible application of the height control allowed by Clause 4.6 of the Auburn LEP.

## 3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

### 3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the maximum building height development standard, for the reasons discussed in Section 3.1 of this report.

### 3.3.2 Consistency with objectives of the zone

The proposed development exceeds the maximum height standard in the R4 High Density Residential zone and as such, the objectives of the zone are required to be considered in determining whether the variation is supportable. A summary of the proposals consistency with the land use zone is provided in Table 4 below.

**Table 4 – Assessment against the R4 zone objectives**

| Objective   | Comment   |
|---|---|
| <ul style="list-style-type: none"> <li>To provide for the housing needs of the community within a high density residential environment.</li> </ul>                | <p>The proposed height exceedances do not relate to habitable floor areas, and as such do not directly contribute to housing on the site. The proposed height does not result in development to a height in storeys above what was envisaged for the site and does not exceed the maximum FSR. As previously noted, the exceedances are predominantly to allow for the provision of rooftop communal open spaces that are consistent with the high-density nature of the site, and the vision for the redevelopment of the site established under the DCP. The minor exceedances support the urban renewal of the site for residential uses, which will encompass a mix of apartments and terrace-like dwellings, and supporting private and communal open space areas with sunlight access to service the day to day needs of residents.</p> |
| <ul style="list-style-type: none"> <li>To provide a variety of housing types within a high density residential environment.</li> </ul>                            |   |
| <ul style="list-style-type: none"> <li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li> </ul>        |   |
| <ul style="list-style-type: none"> <li>To encourage high density residential development in close proximity to bus service nodes and railway stations.</li> </ul> | <p>The proposal will redevelop a light industrial site to provide new homes within 550m of Auburn Railway Station and established bus routes within the Auburn Town Centre.</p>   |

Despite variation to the numerical maximum building height control, it is considered, and has been demonstrated, that the proposed building height is consistent with the objectives of the R4 zone of the Auburn LEP.

### 3.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (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.*

These matters are addressed in detail below.

#### 3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the maximum height of buildings development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, *A Metropolis of Three Cities* in that it:

- provides accommodation and services to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- is well located to public transport connections, in support of the '30-minute city' model, and embodying transit orientated design;
- does not affect any strategic employment areas or industrial zoned land since the site was determined suitable for residential uses through its recent rezoning; and
- Maintains the density and FSR recently gazetted for the site

#### 3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As demonstrated above, there is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height proposed is minor and is internal to the site, and the proposed variation would not give rise to any adverse environmental impacts. The proposed variation allows for the development of rooftop communal open space, and high quality architectural design, and is consistent with the desirable features for future development on the site established under the site-specific DCP. The reduction in high quality communal open space or the deletion of residential floors (and architectural design elements) to strictly comply with the building height development standard would be contrary to the public interest.

### **3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.**

In addition to the matters already mentioned, it is worth noting that the height variation sought applies only to some very limited parts of select buildings in locations that will have no detrimental impact on the amenity of surrounding properties or future users of the site.

## **4.0 Conclusion**

The assessment above demonstrates that compliance with the maximum height of buildings development standard contained in Clause 4.3 of the Auburn LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner. It also allows for a better urban design and planning outcome for the site by allowing for the provision of rooftop gardens, and the delivery of visually interesting and high quality architectural design. Further, the variation will not result in any adverse impacts on surrounding residential amenity.