Annexure 1

Clause 4.6 Variation –
Height of Buildings

Clause 4.6 Variation Statement – Building Height (Clause 4.3)

1. Height of Buildings Standard

Clause 4.3 of HLEP 2012 relates to the maximum height requirements and refers to the *Height of Buildings Map.* The relevant map identifies the subject site as having a maximum height of 17.5m. Building height is defined as:

> ***building height*** *(or* ***height of building****) means—*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
>
> *including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The relevant map [sheet HOB_017] indicates that the maximum building height permitted at the subject site is 17.5m.

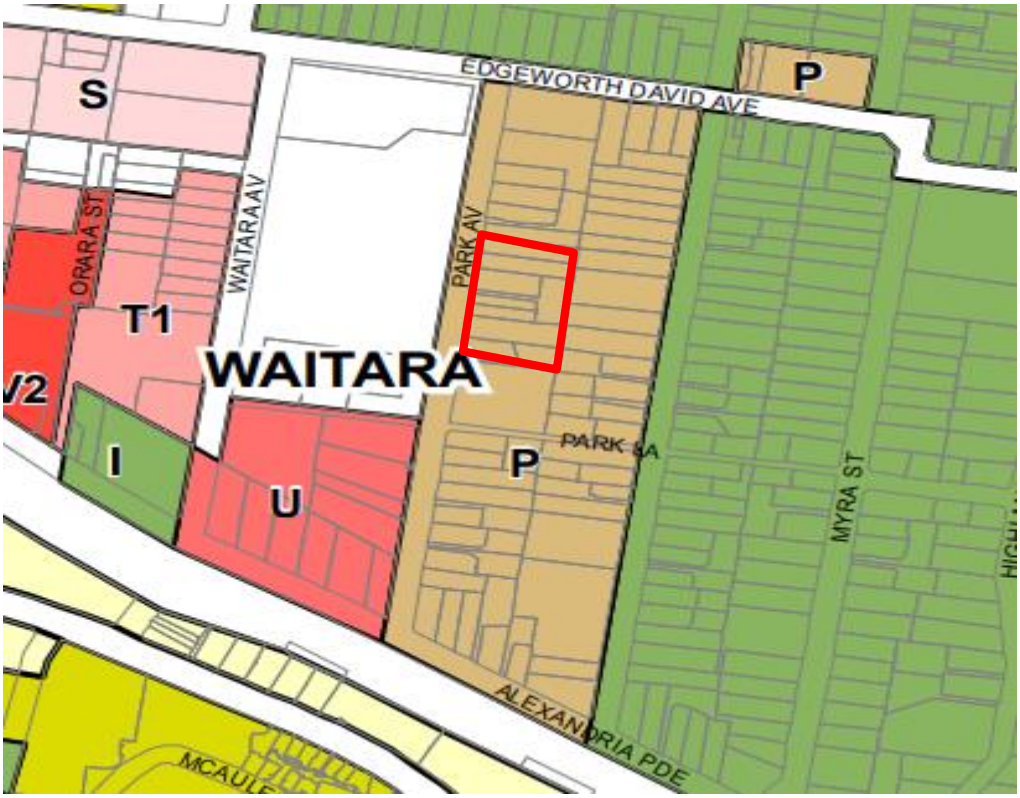

Figure 9 Extract from the Height of Buildings Map [P=17.5m]

2. Proposed variation to height of buildings development standard.

The revised architectural plans have reduced the height of the buildings by 0.15-0.25m and altered the external design and setbacks which results in a variation from the heights considered in the SNPP Assessment Report. The proposed development results in the following variations to the HOB standard for all five buildings are as follows:

- Building A would be 17.91m high and breaches the height standard by a maximum of 410mm or 2.3%,
- Building B would be 17.66m high breaches the height standard by a maximum of 160mm or 0.9%,
- Building C would be 18.45m high and breaches the height standard by a maximum of 955mm or 5.4%,
- Building D would be 18.59m high and breaches the height standard by a maximum of 1090mm or 6.2%,
- Building E would be 18.49m high and breaches the height standard by a maximum of 995mm or 5.6%.

A visual representation of the extent of variation is provided in the building height plane diagram below. It is noted that extent of the variation for the proposed development when compared to the extent of variation for the surrounding existing development at Nos. 16-20 Park Avenue and 35-39 Balmoral Street, Waitara.

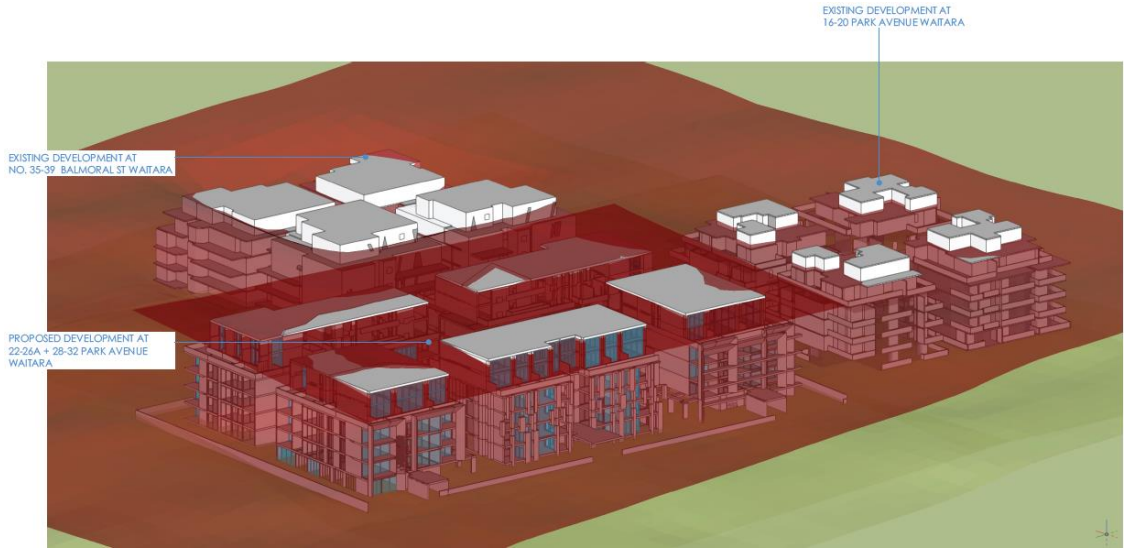

Figure 10 Height Blanket Diagram

3. Clause 4.6 to HLEP 2013

The objectives and provisions of clause 4.6 are as follows:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not include of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(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.

The development standards in clause 4.3 are not "expressly excluded" from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements

of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum building heights as detailed in Part 2 above.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in Wehbe V Pittwater Council (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

> *" An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

The judgement goes on to state that:

> *" The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

> *"…Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

5. Sufficient environmental planning grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

> *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* and *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum building height:

1. The height breach, in part, can be attributed to the requirement to site the development above the Flood Planning Level. The following table details the extent of the variation when excluding flooding:

	FPL (RL)	Plus 17.5m (RL)	Proposed RL	Height over FPL
Building A	172	189.5	189.95	450mm
Building B	172	189.5	189.95	250mm

Building C	171.1	188.6	189.05	450mm
Building D	171.7	189.2	189.45	450mm
Building E	172.2	189.7	190.15	450mm

Therefore, when excluding flooding the proposed development will be 250-450mm above the maximum height level. This variation occurs predominantly at the western end of each building given the cross fall of the site. In most instances, the extent of the height variation at the eastern end of the building is negligible or compliant (refer to Figure 3 below)

Figure 11 Short section detailing the fall of the site from east to west

Therefore, it is a combination of the flooding and topography that result in a variation to the height of buildings development standard. Both of these factors are site specific factors that are not contemplated by Clause 4.3 of HLEP 2013.

2. The greatest extent of the variation occurs on the western elevations of Buildings C, D & E. The non-compliant elements are setback 12.2-13.75m from the front (western) boundary and are 3-4.2m behind the base element as detailed in Figure 3 above. Given the height and scale of the base elements, the top elements will appear as visually recessive elements that are not visually jarring to the casual observer on Park Avenue when viewed in context of surrounding properties.

3. The topography of Park Avenue includes a fall from south to north with the following typical RL heights:

Address	**RL Height**
4-6a Park Avenue	RL 191.6
8-10 Park Avenue	RL 190.99
12-14 Park Avenue	RL 190.64
16-18 Park Avenue	RL 190.47
Building E	RL 190.15
Building D	RL 189.45
Building C	RL 189.05
34-38 Park Avenue	subject to future redevelopment

As detailed above there is a gradual fall in the topography which is followed by existing development on the eastern side of Park Avenue. Despite the height variation, the proposed development will step with the change in topography and transition to the currently underdeveloped site at Nos 34-28 Park Avenue. Insistence on compliance with the height control would put the development out of step with the gradual fall of building heights with the topography. Figure 4 has been prepared which provides a visual presentation of the built form and topogpray and how the proposed development, despite the variation will sit in its context and appear from pedestrian level on Park Avenue.

Park Avenue street elevation with height plane overlay

Figure 12 Visual representation of the proposal within in context

4. The height of the proposed development, including the variation, will be entirely compatible with the height and character of surrounding development. As demonstrated in Figure 2, Nos. 16-20 Park Avenue and 35-39 Balmoral Street do not comply with Clause 4.3 of HLEP 2013. Whilst these variations in themselves are not a sufficient reason to vary the development standard, it is Council's actions in approving height variations in the Balmoral Street, Waitara Precinct that sets a different context to one that is governed by the permissible planning controls. Whilst it cannot be said that the height standard has been thrown away, it is clear that the Balmoral Street, Waitara precinct does not demonstrate a high level of compliance with the height of buildings development standard and therefore height variations can be considered in the context of existing and approved buildings.

This is broadly consistent with Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115* found the following at Para 62-63:

> *Construction of the term "desired future character" that would confine its meaning to being defined and fixed by the development standards only would make forming the opinion of satisfaction under cl 4.4(4)(a)(ii) that the proposed development is consistent with these objectives difficult, if not impossible. On this construction, the height and FSR development standards define and fixed the desired future character. A development that contravenes the height and FSR development standards needs to demonstrate that it will be consistent with the desired future character. It cannot do this because, contravening the development standards, it is inconsistent with the desired future character that is defined and fixed by those development standards.*
>
> *This circularity is avoided if the term "desired future character" is construed as permitting regard to be had to matters other than only the development standard. On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.*

Whilst the facts and degree may vary, it is clear that the character of the locality, whilst defined in the HDCP, is not specifically defined in the HLEP 2013 and is therefore subjective and can be set by the existing, recently approved and proposed buildings within the neighbourhood. When considering the development in the context of the surrounding development, including existing non-compliant buildings, the proposal development, even with the height variation, will sit in harmony with surrounding development and is considered to be entirely compatible with the scale and character of surrounding development, noting that compatible does not mean sameness (*Project Venture Developments Pty Ltd v Pittwater Council [2005] NSWLEC 191*).

5. The proposed development will provide for a five storey development with a mezzanine style level that is entirely compatible with mezzanine style additions approved at Nos. 4-6a, 8-10, 12-14 and 16-18 Park Avenue, all of which are to the south of the site. The proposed top element with a fifth level and mezzanine style addition will only comprise of a bedroom and a bathroom for each apartment and represent a small proportion of the total area for each apartment.

6. It is considered that there is an absence of any significant material impacts attributed to the breach on the amenity or the environmental values of surrounding properties, the amenity of future building occupants and on the character of the locality. Specifically:

    a. The extent of the additional height creates no adverse additional overshadowing impacts to adjoining properties when compared to a compliant building envelope. This is detailed in the hourly shadow diagrams provided with this submission that detail the additional overshadowing as a result of the height variation. It is concluded the height breach will not result in any adverse loss of solar access to surrounding properties and continues to provide sufficient solar access. That is, the extent of additional overshadowing from the additional height would be insignificant and would not be noticeable to the owners of surrounding properties.

b. The height breach does not result in any adverse additional privacy impacts. The extent of privacy impacts caused by the height breach will have no greater impact on the privacy to the adjoining properties when compared to the approved built form. The extent of the variation is limited to the upper portion of the proposed development where windows that are complaint with the height limit will have a greater impact on privacy. As such, the loss of privacy caused by the non-compliant elements would be insignificant or nil; and

c. The height breach will not result in any significant view loss. No significant views have been identified in the locality and therefore the extent of view loss caused by the non-compliant element would be insignificant or nil.

7. The height breach facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development with the provision of mezzanine style additions. Insistence on compliance with the height control would result in the removal of the mezzanine style addition which would result in a disproportionate loss of amenity for the occupants with insignificant or nil benefits to the amenity of adjoining properties. Furthermore, insistence on compliance with the height development standard would reduce the height of Buildings C, D & E which would not facilitate the gradual stepping of buildings with the topography.

8. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone (as further detailed in Section 7 below);

9. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

    a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilise site for residential uses (1.3(c));

    b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

10. The variation to the height of buildings development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:

    a. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));

b. Approval of the proposed variation will allow for a variation of building height and scale across the locality which is commonly accepted urban design approach instead of buildings with consistent height; and

c. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the flood levels, the topography and character of the precinct. Insistence on compliance with the height control will result in the removal of the mezzanine style level which is a disproportionate response given the insignificant impacts of the proposal. The additional height does not significantly impact the amenity of the neighbouring properties (when compared to a compliant development) and has been designed in such a way to ensure the additional height is not visually jarring from the public domain.

It is noted that the SNPP Assessment Report makes many assertions that the original Clause 4.6 variation request was not well founded and raised a number of issues such as the 3.1m floor to floor height, the desired future character requiring 5 storeys under HDCP, the planning proposal to reduce the height to 16.5m and various non-compliances with the HDCP and ADG separation, landscaped area and other notable controls. With the greatest of respect to Council staff, none of these issues are relevant matters when considering a variation to the height of buildings development standard under Clause 4.6 of HLEP 2013.

It is noted that *in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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 (Clause 4.6(4)(a)(ii))

Height of Buildings Objectives

The sole objective of clause 4.3 of HLEP 2013 is as follows:

> *(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The construction of Clause 4.3(a) of HLEP 2013 requires a consideration of the site constraints, development potential and infrastructure capacity of the locality to establish a height that is "*appropriate*". The difficulty in addressing this objective is heightened by the fact that the terms "site constraints", "development potential" and "infrastructure capacity" are not defined in HLEP 2013. However, the fact that heights of buildings are only required to be "*appropriate*" when considering the site constraints, development potential and infrastructure capacity sets a lower bar when considering the Clause 4.6 variation against the objectives of the height of building control. Contrary to Council considerations in the SNPP Assessment Report, the above objective does not necessitate an assessment of HDCP and ADG requirements.

As discussed in Part 5 (above), the proposed development has site specific constraints with regard to flooding and topography that necessitate a built form that does not "nestle" into the site like surrounding buildings. In any event, the resultant building height is demonstrated to step with the gradual fall of the topography along Park Avenue and comprise of a height that is entirely "*appropriate*" when considered in the context of the height of surrounding developments (refer to Reason 3 and Figure 4 above).

In terms of the development potential, it is noted that HLEP 2013 does not contain a maximum FSR for the site but relies on the DCP envelope controls to establish development potential. However, if the development potential is limited to application that strictly comply with the development standard for height then Clause 4.6 of HLEP 2013 would have no work to do. A similar situation exists regarding compliance with the HDCP envelope and setbacks where Clause 4.15(3A) of EPA Act would have no work to do. These requirements provide flexibility from strict application of the controls and in this instance, the proposed variation to the height standard will permit additional accommodation in the form of mezzanine levels that is entirely compatible with the mezzanines and height of surrounding properties. The additional development potential will achieve a planning purpose by providing high quality residential accommodation in a suitable location in close proximity to services and transport. These benefits are in the absence of any significant additional adverse streetscape or amenity impacts on neighbouring properties and the variation is considered "*appropriate*" or not antipathetic to this objective.

In terms of infrastructure capacity, insisting on compliance with the height of buildings development standard will not alter the number of apartments provided in the proposed development but simply reduce the amount of habitable floor space (bedroom and bathroom). Therefore, the impacts on the local road network, essential services such as electricity and water, access to shops, public transport and local facilities and other similar services will not be significantly different if the height variation is permitted. It is therefore considered that the variation to the height limit is considered "*appropriate*" or not antipathetic to this objective.

The burden of insisting on strict compliance would result in the effective removal of the mezzanines which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with other high density developments in the vicinity and the planning controls, subject to flexibility available under Clause 4.6, permit a development of this general scale.

The proposal is therefore consistent with objective (a), despite the technical height variation.

Objectives of the Zone

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R3 are as follows:

- *To provide for the housing needs of the community within a high density residential environment.*

The proposed development will provide for the housing needs of the community. The height variation will assist in providing additional accommodation when compared to the compliant parts of the building to assist in providing for the housing needs of the community within a high density environment.

- *To provide a variety of housing types within a high density residential environment.*

The height variation will assist in providing additional and varied accommodation when compared to the compliant parts of the building. That is, the proposed mezzanine apartments that will add and diversify the housing stock within a high density environment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

This objective is not relevant to the proposal.

The proposed development, including those parts of the building that breach the height of buildings development standard, is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b)

The issue of the concurrence of the Secretary of the Department of Planning and Environment is dealt with by Planning Circular PS 20-002 'Variations to development standards', dated 5 May 2020. This circular is a notice under 64(1) of

the Environmental Planning and Assessment Regulation 2000. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The circular provides for assumed concurrence.

Concurrence cannot be assumed for a request for a variation to a numerical standard by more than 10 per cent if the function is to be exercised by a delegate of the consent authority. This restriction does not apply to decisions made by local planning panels, who exercise consent authority functions on behalf of councils but are not legally delegates of the council. As such, it is anticipated that the development application will be determined by the local planning panel.

The Secretary can be assumed to have given concurrence to the variation.

9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed building height exceeds the maximum permitted on the site by up to 935mm or 5.3%, the proposed development is consistent with the objective of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. Conclusion

This written request has been prepared in relation to the proposed variation to the 17.5m height of buildings development standard contained in Clause 4.3 of HLEP 2013.

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.

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