

20 July 2019

General Manager
City of Ryde Council
Locked Bay 2069
NORTH RYDE NSW 1670

Dear Sir/Madam,

RE: AMENDED DEVELOPMENT APPLICATION FOR PROPOSED DEVELOPMENT INVOLVING MULTI-LEVEL PUBLIC CAR PARK BUILDING TO ACCOMMODATE 146 CARS AT 53-71 ROWE STREET, EASTWOOD

UPDATED REQUEST UNDER CLAUSE 4.6 OF THE RYDE LOCAL ENVIRONMENTAL PLAN 2014 TO VARY THE DEVELOPMENT STANDARD FOR HEIGHT OF BUILDINGS UNDER CLAUSE 4.3 OF THE RYDE LOCAL ENVIRONMENTAL PLAN 2014

INTRODUCTION

1. This letter has been prepared on behalf of the applicant the City of Ryde Council (Council) to further assist with the consideration of the Amended Development Application (Amended DA) for the proposed multi-level public car park building and the variation sought to Clause 4.3 of the *Ryde Local Environmental Plan 2014* (RLEP).
2. As detailed in the Statement of Environmental Effects (SEE) report which accompanies this Amended DA, the amended design has had consideration of the Height of Building (HOB) standard contained in Clause 4.3 of the RLEP, the proposal will result in a variation to the HOB standards in Clause 4.3 of the RLEP Height of Building Mapping.
3. The permitted 15.5m HOB standard under Clause 4.3 of the RLEP applies as the land under the HOB Map, for the land at 53-71 Rowe Street, Eastwood.
4. Therefore, this request is to vary the RLEP HOB standards under the provisions of Clause 4.6 of the RLEP.
5. This Clause 4.6 variation request has been prepared having regard to:
 - The NSW Department of Planning & Environment's Guideline *Varying Development Standards: A Guide*, August 2011, and
 - has incorporated as relevant principles identified in the applicable Case law, (established tests) in the following judgements:
 - *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
 - *Wehbe v Pittwater Council* [2007] NSWLEC 827
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1')
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
 - *Moskovich v Waverley Council* [2016] NSWLEC 1015
 - *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191

▪ *Ex Gratia P/L v Dungog Council [2015] (NSWLEC 148)*

6. This letter explains how flexibility is justified in this case in accordance with the matters required to be considered and addressed under Clause 4.6 in a written request from the applicant. This letter also addresses where relevant other matters the consent authority is required to be satisfied when exercising the discretion of the assumed concurrence of the Secretary.

WHAT IS THE ENVIRONMENTAL PLANNING INSTRUMENT (EPI) APPLICABLE?

7. The Environmental Planning Instrument (EPI) to which this variation relates is the Ryde Local Environmental Plan 2014 (RLEP).

WHAT IS THE ZONING OF THE LAND?

8. In accordance with Clause 2.2 of the RLEP the site is zoned B4 Mixed Use.

WHAT ARE THE OBJECTIVES OF THE ZONE?

9. The land use table to Clause 2.2 of the RLEP provides the following objectives for the B4 Mixed Use zoning:

Zone B4 Mixed Use

1 Objectives of zone

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.
- To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.

WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

10. The development standard being varied is the "Height of Building" (HOB) standard shown in the RLEP HOB Map.

UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

11. The development standard being varied is prescribed under Clause 4.3 of the RLEP. Clause 4.3 is detailed below. The RLEP HOB Map identifies the subject site with the designation 'O2 = 15.5m', see Figure 1. The land is zoned B4 under the RLEP zoning map. Therefore, under Clause 4.3, the RLEP HOB Map and this clause apply.

4.3 Height of buildings

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

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

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

The RLEP Height of Buildings mapping designation 'O2 = 15.5m' is shown in extract from the Height of Building Mapping in **Figure 1** below.



Figure 1: RLEP Height of Buildings Map extract (site outlined in red)

Source: NSW Legislation

This development standard relates to the maximum permitted height of a building, as Clause 4.3 of the RLEP falls within the scope of a “development standard” as defined under Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

12. The objectives in Clause 4.3 of the RLEP, are as follows:

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

WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE EPI?

13. An extract of the RLEP HOB map is shown in **Figure 1**. The map prescribes the site being within 'O2 = 15.5m' for the subject site.

WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION PROPOSED?

14. The Amended DA seeks a minor variation to the HOB mapping. This is shown with the “red line” in the extract from Amended architectural design in Appendix BB, as shown in **Figure 2** below.

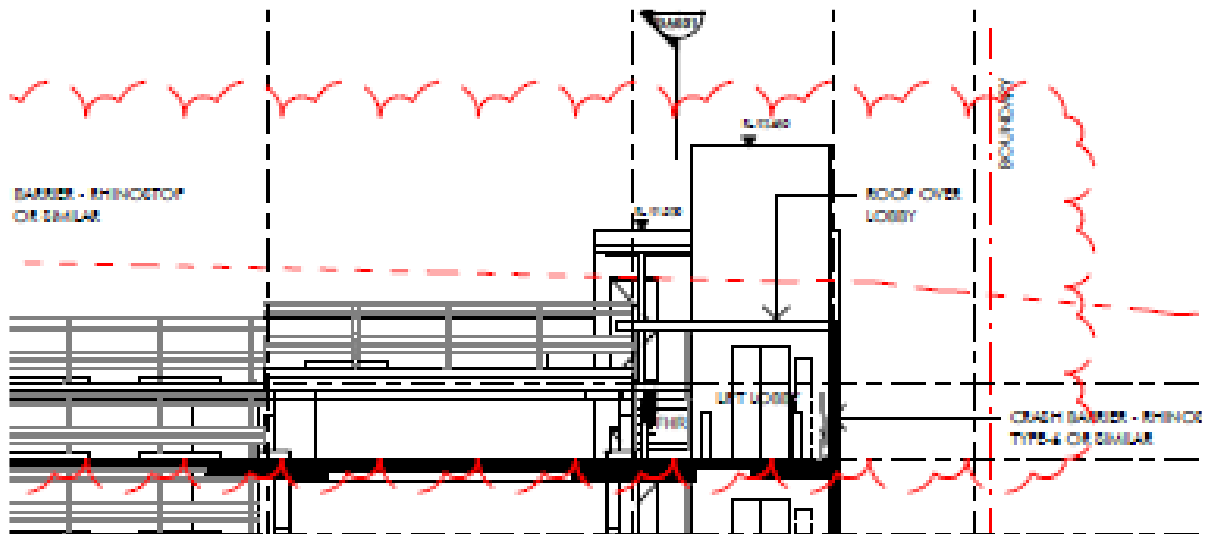


Figure 2: Amended DA Architectural drawing DA030 Rev 8 showing 15.5m as a “red dashed line” relative to existing ground levels through the proposed development

Source: Nettleton Tribe Architects

15. As can be seen in **Figure 2** above, the portions of the Amended DA of the car parking building which project through the 15.5m Height of Building control under Clause 4.3 of the RLEP can be described as involving:

- a) At the Rowe Street edge of the proposed building:
 - The perforated “art work” screen to be attached to the Rowe Street elevation façade, which projects “taller” than the parapet/balustrade surround of parking level L4A, as discussed in detail in the Architectural Façade Concept Strategy at pages 12 and 13 (**Appendix K** of SEE Report) the perforated “art work” screen is a “contemporary solution” for the upper levels of the building when viewed from Rowe Street;
 - The lift overrun to enable equitable lift access to parking level L4A and a portion of the roof immediately adjacent to the Rowe Street elevation which provides for all weather mitigation for persons using the lift door while at the same time also protecting the lift doors from weather elements; and
 - The roof over the lift lobby adjacent to the Rowe Street façade slightly protrudes through the maximum height development standard adjacent to parking level L4A;

16. **Figure 3** below also demonstrates the extent of the elements of the proposed building as described above, which protrudes through the 15.5m HOB control.

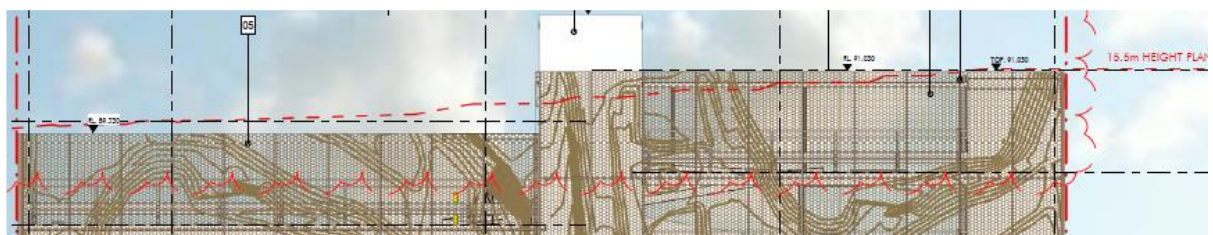


Figure 3: Image showing 15.5m in dashed red line through proposed development in Amended DA drawing DA020 Rev 8

Source: Nettleton Tribe Architects

17. The overall height of the building when measured from its tallest point of RL 92.68 at the top of the lift overrun at the Rowe Street frontage to ground level immediate below at RL74.711 is some 17.969m. The portion of building which encroaches the 15.5m HOB control has a maximum 2.469m variation or 15.9%.
18. There are a number of reasons for the non-compliance with Clause 4.3(2) of the RLEP and these factors when combined, have contributed to the design:
 - a) The site includes existing gradients/topographical considerations with cross falls in three directions within the site:
 - from the north-east corner of RL76.131 at its Rowe Lane frontage to the north-west corner (east-west) RL 75.05 which is some 1.08m;
 - along its Rowe Street frontage south-east corner RL75.5 to the south-west corner RL73.9 of some 1.6m; and
 - from the north-east corner of RL76.131 at its Rowe Lane frontage to the southwest corner (north-east to south-west diagonal) at the Rowe Street frontage RL73.9 of some 2.23m.
 - b) With the existing site topography in mind, the ground floor level of the proposed building seeks to strike a balance to maintain the existing footpath levels while enabling universal access into the property and achieve the required driveway gradients, thus the ground floor level has been “split” with upper ground level RL76.030 with access to the commercial premises from the existing footpath from Rowe Street and egress driveway to Rowe Lane, and lower ground floor level RL74.53 consistent with disabled access gradients from Rowe Street associated with the entry and exit to the lift lobby area;
 - c) The breach of the HOB control is because of the lift overrun at its upper most point, where the lift provides equitable access to each level of the public car park building, with the lift finishing at the upper most parking level L4A of the Amended design while at the same time seeking to balance the maximum possible number of additional short-stay public car spaces to be created;
 - d) The Amended DA has removed the original L5 parking at the rooftop and reorganised the ground floor level to now include 146 spaces (instead of 164 spaces). This is so as the Amended Design can still deliver a civic building with a direct public benefit using money collected from parking contributions by Council and respond to Council’s resolution which states:
 - (a) *That Council endorses the preparation of a preferred design for the provision of 150-200 public car parking spaces on the existing at-grade Rowe Street East car park to support the full and proper functioning of the eastern Town Centre, with the public car park to specifically provide parking for shoppers and not commuters.*
 - (b) *That a comprehensive consultation process be undertaken with the community when a concept design is available.*
 - (c) *That funding be made available from Council’s development contributions fund(s) in the amount of \$550,00 for expenditure during 2018/2019.*
 - (d) *That the General Manager determines an appropriate level of funding required for future construction of the preferred design solution during this initial design phase to then be considered in Council’s future budgetary process.*

- e) The resolution of Council and the Amended DA responds to the community consultation survey undertaken by Council in September 2018 which indicated there is a deficiency of short-stay car parking for shoppers and businesses in Eastwood. Council commissioned Cardno in 2017, who completed the *Draft Eastwood Traffic and Parking Study* in December 2018, and this study confirmed there is a deficiency of short-stay car parking on the eastern side of Eastwood, and the current shortage of short-stay car parking has resulted in shoppers seeking access to on-street parking in nearby residential areas due to the lack of available off-street public car parking. This study considered a scenario to increase public car parking by an additional 100 spaces in this location with the modelling indicating this would not result in unacceptable local traffic impacts but rather improvements for local users:

The traffic models were used to evaluate the immediate impacts of the road network associated with this proposal, based on the following assumptions:

- Introducing 100 additional parking spaces;
- Consolidating the access and egress at Rowe Lane to a single exit;
- Retaining the current configuration for the access and egress at Rowe Street.

The assessment focused on the intersections in the vicinity of the Rowe Street Car Park. The results of the evaluation indicated that the proposed Rowe Street car park upgrade would have minimal impacts on the intersections across the Eastern Town Centre (when compared to current intersection operation). No noticeable differences were found in the intersections' level of service and congestion patterns across the Town Centre.

- f) The project managers for Council have advised creating a basement level will result in additional costs being born by the project such that the additional costs are not reasonable particularly using limited Council public funds for a public infrastructure where a minor variation to a height control does not result in unacceptable environmental impacts.

MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

19. Clause 4.6 of the RLEP states:

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 Director-General has been obtained.
- (5) In deciding whether to grant concurrence, the Director-General must consider:
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.
- (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 all 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,
 - (ca) clause 4.3, to the extent that it applies to the land identified as "Town Core" on the Ryde Town Centre Precincts Map,
 - (cb) clause 4.1A, to the extent that it applies to the Torrens title subdivision of a dual occupancy (attached),
 - (cc) clause 6.9.

20. Each of the matters for consideration under Clause 4.6 of the RLEP and response to each consideration as detailed below:

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.

The objectives of this clause expressly indicate a degree of flexibility should be applied “in particular circumstances”. This is such a circumstance to enable a flexible approach to the outcome sought by this DA.

- (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.*

The Height of Building (HOB) standard is not excluded from 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.*

The Statement of Environmental Effects submitted with the DA indicates a specific request is included with the application to seek a variation of the HOB development standard. This letter is the applicant’s formal written request.

Refer to **table 1** below for an assessment under Clause 4.6(3)(a) and (b).

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*

This written request addresses all requirements of subclause (3).

As set out in **table 1** of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the HOB standard (refer to **table 1**) and the objectives for the zone (refer to **table 2**).

Concurrence may be assumed but is a matter to be determined by the Consent Authority.

- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Potential matters of significance for State or regional environmental planning is addressed in paragraphs 39 and 40 and **table 3**.

The minor non-compliances with the development standard does not raise any matters of significance for State or regional planning as the development meets the stated objectives of the development standard.

Consideration of whether there is any public benefit in maintaining the development standard is considered in paragraphs 42, 43 and 44.

As the development is consistent with the stated objectives of the development standard, and as such requiring strict compliance with the development standard is unreasonable and unnecessary. There is no public benefit of maintaining the development standard in this instance.

All matters required to be considered by the Secretary (formerly Director-General) before granting concurrence have been addressed as part of this Clause 4.6 variation request.

(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 all of these zones.

The provisions of Clause 4.6(6) do not apply to the subject site and proposed development in this DA.

(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).

The Consent Authority must keep a record after determining this DA

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
- (ca) clause 4.3, to the extent that it applies to the land identified as "Town Core" on the Ryde Town Centre Precincts Map,*
- (cb) clause 4.1A, to the extent that it applies to the Torrens title subdivision of a dual occupancy (attached),*
- (cc) clause 6.9.*

This subclause does not affect the site.

21. **Table 1** below provides an assessment against Clause 4.6(3):

Table 1: Clause 4.6(3) assessment

Objective	Comment
(a) that compliance with the development standard is unreasonable or unnecessary in the	<p>Strict application of the development standard is considered to be unreasonable and unnecessary as the proposed development will be consistent with the stated objectives of Clause 4.3 of the RLEP:</p> <p><i>(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,</i></p> <p><i>(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,</i></p>

Objective	Comment
<i>circumstances of the case</i>	<p>(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,</p> <p>(d) to minimise the impact of development on the amenity of surrounding properties,</p> <p>(e) to emphasise road frontages along road corridors.</p> <ul style="list-style-type: none"> In light of the objectives above which encourage a flexible approach to compliance with design principles where the design of the development responds to the site and its form, strict compliance with the standard under Clause 4.3 is unnecessary because: The Amended design of the building results in a better urban design outcome particularly as the building allows for disabled access throughout without resulting in unacceptable streetscape presentations and does not propose to unacceptably alter the existing site topography while creating a sense of address to each frontage, appropriate proportion and access to the proposed commercial premises to create an active street frontage to Rowe Street in character with the existing and desired streetscape character, which is considered to be consistent with objective (a); The Amended DA is accompanied by an extensive series of diagrams prepared by Nettleton Tribe Architects included in the architectural drawings at Appendix BB of the Amended DA package, which demonstrate the proposed design and the solar access to adjoining properties. <p>The shadow diagrams delineate at hourly intervals between 9am to 3pm on 21 June (winter solstice) the shadow line of a complying DA, compared to that of the portion of the building which exceeds the HOB control, on the approved development to the south. These diagrams indicate that the Amended DA design will cast a minor amount of additional shadowing.</p> <p>As is further demonstrated in the elevation shadow diagrams on the buildings to the south, it is considered that at least 3 hours solar access between 9am and 3pm on 21 June and the degree of shadow impact from the portion of the building which seeks a breach of the height of building control is minor and not considered to generate an unacceptable shadow impact.</p> <p>Therefore, based on these diagrams in the architectural drawings, the shadow analysis demonstrates that the minor breaches of the building height control will not result in an unacceptable impact on the amount of solar access available to the building to the south.</p> <p>The amended design includes balustrade heights of 1.3m so as to mitigate headlight glare being distributed beyond the site while at the same time mitigating overlooking from the building onto and into other nearby buildings and enabling natural ventilation to be maintained.</p> <p>Therefore, the amended design will adequately maintain privacy for residents of existing and future dwellings and promotes privacy for the existing and future residents which is consistent with the objective of the building height control in Clause 4.3.</p> <p>Therefore, it is considered that the proposed public car park building is of an appropriate bulk and scale and includes features to promote the existing and desired future streetscape character envisaged in this area, being consistent with objective (b) of Clause 4.3.</p> <ul style="list-style-type: none"> The proposed development will not result in an unacceptable adverse impact in terms of loss of solar access, loss of privacy or loss of views to or from adjoining properties. The proposed development is of a compatible design with its context and is of a scale and density as envisaged with the future character of the area. Therefore, strict compliance with the development standard is unnecessary as the development will still achieve the environmental and planning objective of Clause 4.3, as discussed above. <p>For reasons outlined above a development which is made to comply with the planning control is</p>

Objective	Comment
	<p>unreasonable in the circumstances.</p> <p>A development that strictly complies with the 15.5m height standard is unreasonable or unnecessary in the circumstance for the following reasons:</p> <ul style="list-style-type: none"> • The non-compliance with the height limit does not result in a building that will be out of scale with surrounding future development. It allows for a public infrastructure building with the non-compliance generally attributed to the lift overrun providing access to the rooftop Level L4A. Removing the non-compliance would not significantly alter the perceived height of the building as viewed from the public domain or from other surrounding development but rather would reduce the stated Councillor public purpose of the building in achieving the objective of providing between 150 and 200 public short stay car parking spaces. • There is no discernible difference in the environmental impacts between a building that strictly complies with the height control in terms of: <ul style="list-style-type: none"> – <u>Visual and acoustic privacy impacts</u> <p>The non-compliant levels of the building do not generate any privacy impacts over or above those that exist with a fully compliant building height. This is the same for acoustic privacy;</p> – <u>Visual impacts</u> <p>There is a nominal difference in visual impacts between the proposed building and a complying building. When viewed from Rowe Street as demonstrated in the perspective views; and</p> – <u>Overshadowing impacts</u> <p>There is a negligible difference in shadow impacts of a compliant building and the proposed building.</p> • Strict compliance with the development standard is unnecessary as the amended DA will still achieve the environmental and planning objectives of Clause 4.3, as discussed above. • Strict compliance is unreasonable as no environmental or planning purpose would be served by enforcing the development standard and would not bring about a good planning outcome, on the following grounds: <ol style="list-style-type: none"> I. An assessment of the proposal demonstrates it is consistent with the desired future character of the B4 zone; II. The amended design is considered to be compatible with the streetscape along Rowe Street; III. The amended design will not create any unreasonable overshadowing, result in loss of privacy or create an adverse visual impact upon the streetscape or the environment given the areas of non-compliance is in a portion of the site which does not dominate the streetscape; and IV. The scale of the desired future surrounding development has been considered carefully and the amended design is considered to be compatible. <p>In summary the design in its current form with the breach of the HOB control can be supported because:</p> <ol style="list-style-type: none"> a. the majority of the building complies with the HOB mapping control except the portion of the building which breaches the control being the lift shaft overrun to L5 which affords universal and equitable lift access to each level of the public car park building; b. the proposal involves a public purpose by Council as a public body, on public land

Objective	Comment
	<p>currently used as a public car parking area and identified by Council as needing to expand its public car parking space supply (refer to Council resolution, Council community survey and Cardno study), where no other development in this section of Rowe Street, Eastwood can provide for such an outcome;</p> <p>c. to lower the building will involve more excavation and alteration of the existing site terrain. This process will involve adding to the cost of the project which is using Council public funds in order to deliver Council infrastructure, where those public funds are required to be carefully and well managed in order to deliver the project. The Council has repeated stated that in this location the objective is to provide for at least 150 car parking spaces to satisfy current demand. As such, the ground floor level seeks to strike the right balance between enabling disabled access into the lift foyer from Rowe Street and disabled access from Rowe Lane to the two-sided opening lift without excessive removal of soil or creating a basement level. To include a basement level or to lower the building will add unreasonably to the cost to deliver the public building which is not a feasible use of limited financial resources of the Council where the breach of the height of building control occurs generally due to the lift overrun/Level 4A lift foyer area and the inclusion of a metal perforated screen to the Rowe Street facade;</p> <p>d. if forced to comply with the height standard, this will result in the loss of car parking spaces below that required by the project which undermines the public purpose of the project and stated community engagement information issued on the project (see Appendix H);</p> <p>e. the portion of the Amended design which exceeds the Height of Building control will not create any unreasonable overshadowing;</p> <p>f. the portion of the Amended design which exceeds the Height of Building control will not result in loss of privacy;</p> <p>g. the portion of the Amended design which exceeds the Height of Building control will not result in an unacceptable adverse visual impact upon the streetscape;</p> <p>h. the portion of the Amended design which exceeds the Height of Building control will not result in an unacceptable amenity impact; and</p> <p>i. the proposal is considered to be consistent with the objectives of the control.</p> <p>For these reasons it is considered that strict application of the HOB control in Clause 4.3 is unreasonable and unnecessary in this circumstance, particularly given that the non-compliance is minimal and there are no unacceptable impacts flowing from the non-compliance.</p>
<i>(b) that there are sufficient environmental planning grounds to justify contravening the development standard</i>	<p>The exceedance of the development standard for the lift is a very minor part of the proposed built form, as the Amended design seeks the inclusion of lift access to allow accessibility throughout the existing building and land. The minor non-compliance with the development standard is far outweighed by the Amended design achieving the aims in Clause 4.3 in promoting the principles outlined in the Greater Sydney Region Plan – A Metropolis of Three Cities. For example, the development promotes a use in an urban area which supports:</p> <ul style="list-style-type: none"> • Public use and development of public land for improved public infrastructure; and • Increasing jobs and better utilising land already zoned B4 Mixed Use which permits this form of development under the RLEP. <p>In this regard, the Amended DA is consistent with the State and regional objectives.</p>

22. The requirement for consideration and justification of a Clause 4.6 variation necessitates an assessment of the criteria. It is recognised that it is not merely sufficient to demonstrate a minimisation of environmental harm to justify a Clause 4.6 variation, although in the circumstance of this case, the absence of any environmental impact, the request is of considerable merit.

23. The proposed variation from the development standard is assessed below against the accepted "5 Ways" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46. Whilst the principle applied to SEPP 1, it has been generally applied in the consideration of a request under Clause 4.6 of the RLEP, as confirmed in *Four2Five*.

HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

24. The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6(3)(a) (see below).
25. The five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

26. Clause 4.3 does have stated objectives, and it is considered that the variation still achieves the stated objectives of the development standard as detailed previously in Table 1 above:

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

27. The Amended DA achieves the above stated objectives for the reasons stated in Table 1, notwithstanding the minor increase in the non-compliances with the HOB standard.
28. The breach of the HOB standard does not cause inconsistency with these objectives, and therefore the intents of clause 4.3 of the RLEP is also achieved.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

29. There are stated objectives of the standard in Clause 4.3 and as discussed above, the objectives of Clause 4.3 are relevant to the Amended DA and can be maintained by the amended architectural design.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

30. As the stated previously the objectives of the standard can still be maintained, and therefore the purpose will not be defeated or thwarted by the variation requested and strict 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;

31. It is noted that Council has varied the HOB standard from time to time based on the merits of each case.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

32. Not applicable.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

33. The Updated Statement of Environmental Effects (Updated SEE) prepared for this Amended DA provides a comprehensive environmental planning assessment of the amended architectural design and concludes that subject to adopting a range of reasonable mitigation measures, there are sufficient environmental planning grounds to support the Amended DA.

34. There are robust justifications throughout the Updated SEE accompanying documentation to support the proposed public car parking building given the overall bulk and scale of the development will be essentially the same as that of a building which may well have contained residential apartments at the upper levels fronting Rowe Street and therefore the proposed building is consistent with the desired future outcome and is appropriate on environmental planning grounds.

35. The particular circumstances of this case distinguish it from others as detailed in Table 2 above.

IS THE VARIATION IN THE PUBLIC INTEREST?

36. Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.

37. The objectives of the standard have been addressed in **table 1** and are demonstrated to be satisfied. The proposal is consistent with the zone objectives and permissible in the zone. Each of the objectives of the zone are addressed in **Table 2** below.

Table 2: Assessment of the Amended DA against the zone objectives – B4 Mixed Use under the RLEP

B4 Mixed Use zone - objectives	Comment
<ul style="list-style-type: none"> <i>To provide a mixture of compatible land uses.</i> 	The Amended DA involves a purpose designed public building for short stay public car parking facilities over multiple levels, in an attempt to provide for the demand for local shoppers in Eastwood. This building is unique and will provide a distinct public building which is compatible in the mixture of land uses in this section of Rowe Street.
<ul style="list-style-type: none"> <i>To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.</i> 	The Amended DA has been designed to include multiple levels of short stay public car parking in an accessible location with ease of access to existing public transport services and is integrated with ground floor level and first floor level facilities for

B4 Mixed Use zone - objectives	Comment
	bicycle parking for access to public transport and to will encourage walking and cycling.
<ul style="list-style-type: none"> <i>To ensure employment and educational activities within the Macquarie University campus are integrated with other businesses and activities.</i> 	The site is remote from Macquarie University, but bus services on Railway Parade, some 150m to the west of the site, are available for site users to access Macquarie University and associated employment and education activities.
<ul style="list-style-type: none"> <i>To promote strong links between Macquarie University and research institutions and businesses within the Macquarie Park corridor.</i> 	The site is remote from Macquarie University and the Macquarie Park corridor, but bus services on Railway Parade, some 150m to the west of the site, are available for site users to access Macquarie University and associated employment and education activities.

38. The objectives of the zone, as demonstrated above, as well as the objectives for the standard have been adequately satisfied, where relevant. Therefore, the variation to the HOB standard is in the public interest.

MATTERS OF STATE OR REGIONAL SIGNIFICANCE (CL.4.6(5)(A))

39. Clause 4.6(5) of the RLEP states:

(5) *In deciding whether to grant concurrence, the Director-General must consider:*

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

40. The matters for consideration in Clause 4.6(5) have been addressed in **Table 3** below.

Table 3: Clause 4.6(5) assessment

Matter of Consideration	Comment
<i>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning</i>	The minor non-compliance with the development standard does not raise any matters of significance for State or regional planning as the development meets the underlying objectives of the development standard.
<i>(b) the public benefit of maintaining the development standard</i>	As the Amended DA substantially complies with the stated objectives of the development standards, there is little utility in requiring strict compliance with the development standard for an otherwise compliant development. There is no public benefit of maintaining the development standard in this circumstance.
<i>(c) any other matters required to be taken into consideration by the Director-General before granting concurrence</i>	It is considered that all matters required to be taken into account by the Director-General before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request.

41. There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

THE PUBLIC BENEFIT OF MAINTAINING THE STANDARD (CL.4.6(5)(B))

42. Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.
43. There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the maximum height of buildings standards, whilst better planning outcomes are achieved.
44. We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will be in the public interest.

IS THE VARIATION WELL FOUNDED?

45. This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.3 of the RLEP, that:
- a) Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
 - b) There are sufficient environmental planning grounds to justify the contravention, which results in a better planning outcome than a strictly compliant development in the circumstances of this case;
 - c) The Amended DA meets the objectives of the development standard and where relevant, the objectives of the B4 zone, notwithstanding the variation;
 - d) The Amended DA is in the public interest and there is no public benefit in maintaining the standard;
 - e) The Amended DA will result in a better planning outcome and public benefit when compared to a compliant scheme, because:
 - a. the Amended DA can provide for improved access to public car parking spaces, which if complaint would be a diminished;
 - b. if the design were made to be compliant by reducing the breach of the lift overrun and perforated artwork screen, this would not create a measurable improvement in the amenity of nearby properties in terms of improved solar access as the current impact is minor;
 - c. if the Amended DA were made to comply this would be inconsistent with the Council resolution, the community survey preferred outcome and the Cardno study seeking to maximise public car parking on this site;
 - d. if the design were made to comply this would result in a diminished improvement in public car parking spaces in Eastwood and not be the most efficient use of public funding to solve the existing problem;
 - f) The non-compliance with the HOB does not result in any unreasonable environmental impact or unacceptable adverse impacts on adjoining owners/occupiers;

- g) It is considered the proposed height is appropriate for the orderly and economic use of the land and is consistent with character of this location; and
- h) The contravention does not raise any matter of State or Regional significance.

CONCLUSIONS

- 46. This Updated Clause 4.6 variation request to Clause 4.3 of RLEP should be supported on the basis that the strict application of the development standard to the Amended DA is both unreasonable and unnecessary given the variation is well founded and detailed in paragraphs 45(a) to (h) above and Table 1, and will provide for a public infrastructure building with improved access to short-stay parking which is in the public interest.
- 47. For the reasons set out above, the development should be approved with the minor exception to the numerical HOB standard in Clause 4.3. Importantly, the development as proposed achieves the stated objectives of the standard and zone despite the minor numerical non-compliance with the development standard.

Should you have any queries or require clarification on any matters please do not hesitate to contact the undersigned on (02) 9929 4044.

Yours faithfully,



Marian Higgins
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