

Clause 4.6 Variation Request Building Height

COMMUNITY HALL

48 RIVER STREET, MACLEAN

2 MAY 2023



QUALITY ASSURANCE	
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ADDRESS:	48 River Street, Maclean
COUNCIL:	Clarence Valley Council
AUTHOR:	Think Planners Pty Ltd

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Prepared by:	Revision:	Date:
Ben Creighton	A	1 May 2023
Reviewed by:	Revision:	Date:
Jonathon Wood	B	2 May 2023

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1. OVERVIEW OF CLAUSE 4.6 DEPARTURE – HEIGHT

Think Planners have prepared this Clause 4.6 variation on behalf of Clarence Valley Council. The variation has been prepared in support of a development application for the construction of a Community Facility, at 48-50 River Street, Maclean.

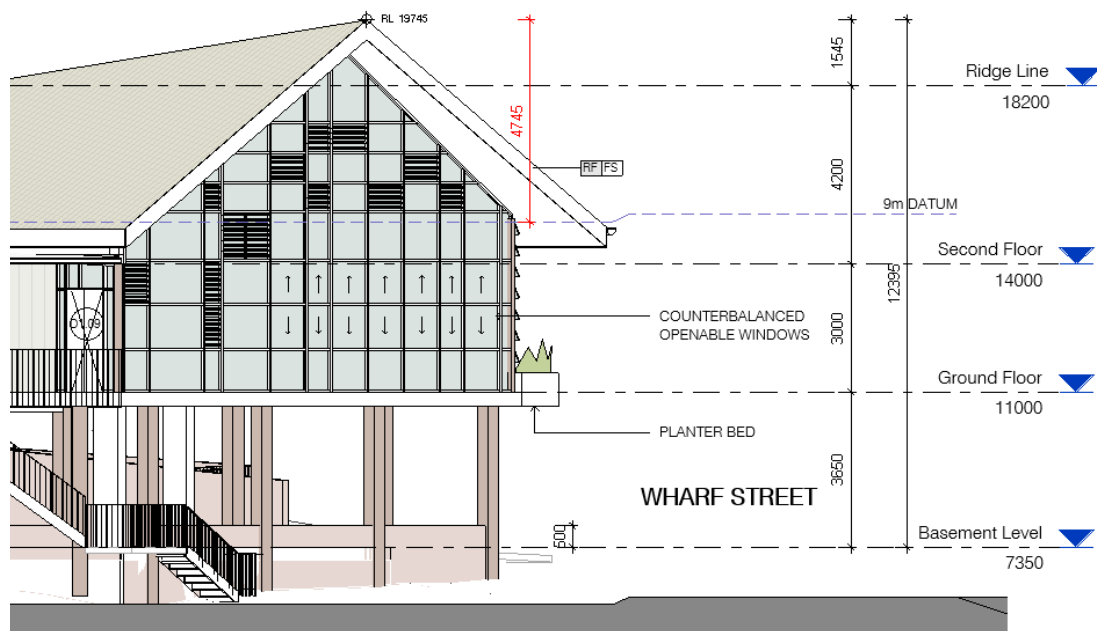
2. WHY DOES THE PROPOSAL VARY THE HEIGHT STANDARD?

The *Clarence Valley Local Environmental Plan 2011* (CLEP 2011) applies a maximum building height of 9 m to the subject site. At its highest point, the proposed building has a height of 13.745m.

The proposed variation to the height standard is 4.745m to the highest point of the building, representing an increase above the control of 41.72%.

The proposal achieves the objectives of the height standard, showing that there is no impact on the amenity of the surrounding area, the site itself and, importantly, the building fits into the area's existing character.

Figure 1: Height of Building Map (Source: Spatial Viewer)



Development standard to be varied

Clause 4.3 of the CLEP 2011 states:

4.3 Height of buildings

- 1) *The objectives of this clause are as follows—*
 - a) *to maintain the low scale character of towns and villages in the Clarence Valley,*
 - b) *to protect the amenity of neighbouring properties by minimising visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public land.*
- 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.*

Clause 4.3 of the CLEP 2011 prescribes a maximum building height of 9 m for the subject site and broader locality as demonstrated by Figure 1 overleaf.

Elevations showing the height relative to the 9 m height limit are presented in Figures 2, 3, 4 and 5. As can be seen, non-compliance is created due to the slope of the land.

Figure 1: Height of Building Map (Source: Spatial Viewer)



Figure 2: Northern Elevation

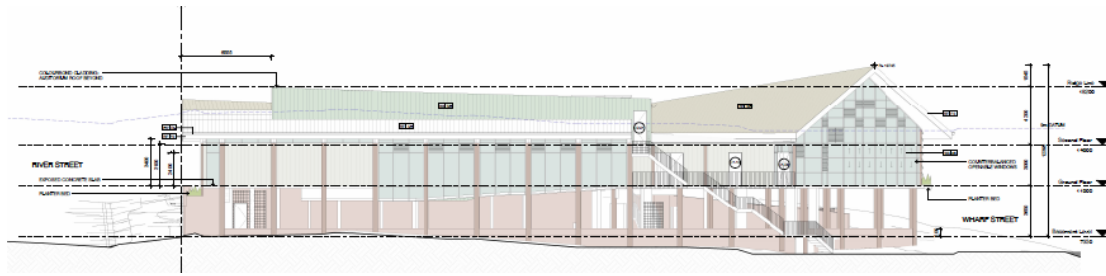


Figure 3: Eastern Elevation

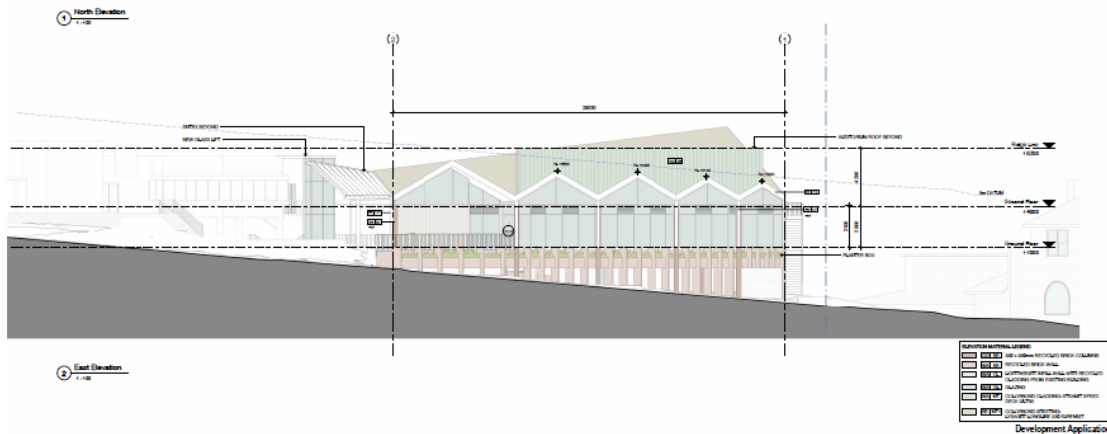


Figure 4: Southern Elevation

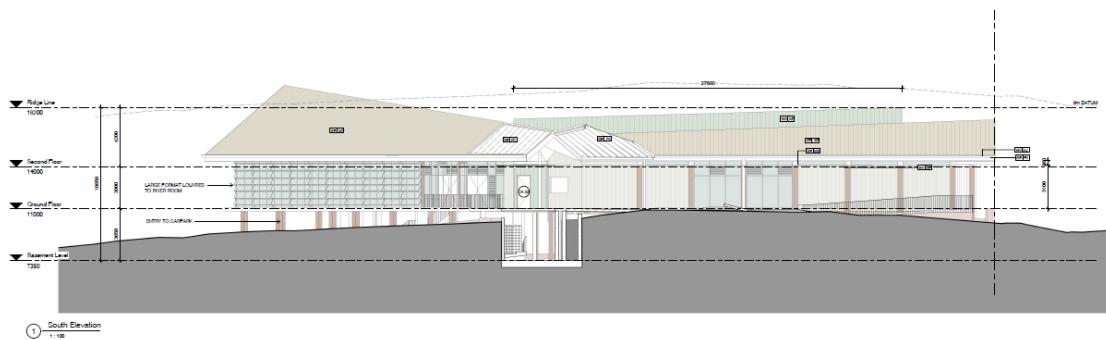
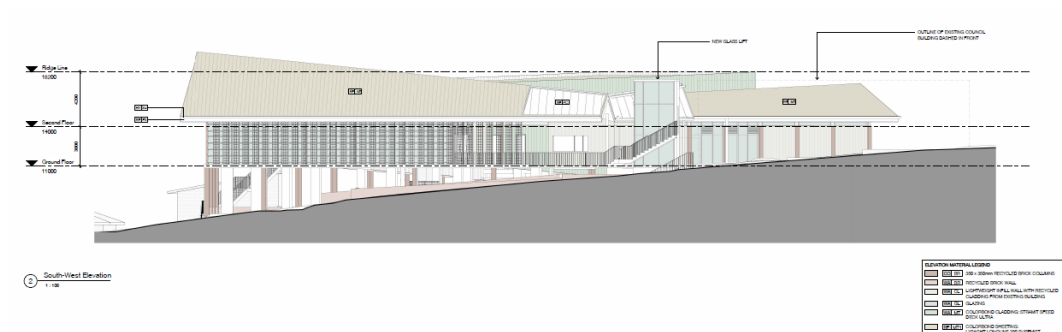


Figure 5: South West Elevation



3. RELEVANT CASE LAW

There are a number of relevant Land and Environmental cases that assist with preparing a clause 4.6 objection including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*.

In addition, a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the building height departure.

In particular a judgement in *Ricola Pty v Woollahra Municipal Council [2021] NSWLEC 1047* emphasised whether the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance, which in this case is against the height standards. This is closely linked to the establishment of sufficient environmental planning grounds to justify the contravention.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

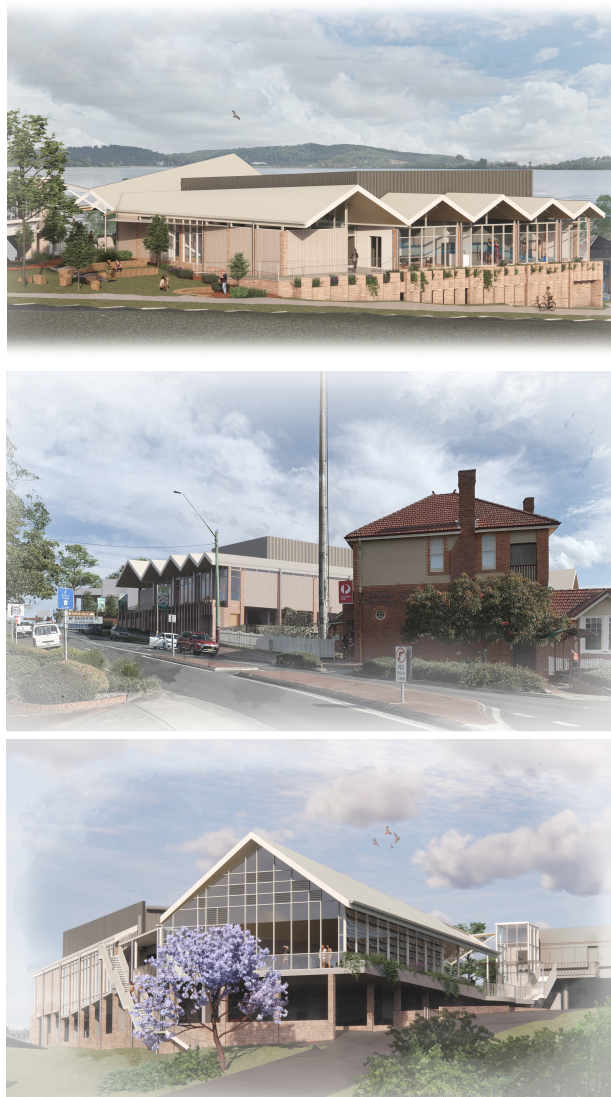
Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the key points to be established are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary.
- Demonstrating that the impact anticipated by the numerical control is comparable to the impacts associated with the non-compliance.
- Demonstrating consistency with the E1 Local Centre Zone.
- Establishing compliance is unreasonable and unnecessary.
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

Figure 6: The proposed community hall



4. ADDRESSING CLAUSE 4.6 PROVISIONS

A detailed discussion against the relevant provision of Clause 4.6 is provided below.

Clause 4.6 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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.*

Each of these provisions is addressed individually.

CLAUSE 4.6(3) (A) OBJECTIVES OF THE STANDARD

In *Wehbe v Pittwater* [2007] NSWLEC 827 ('**Wehbe**'), Preston CJ identified a variety of ways in which it could be demonstrated that compliance with a development standard is unreasonable or unnecessary in the case. This list is not exhaustive. It states, inter alia:

"An objective 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 the compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

While *Wehbe* relates to objections made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

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 objectives 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 at least 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 one and two for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objectives or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

- *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.*

It is sufficient to demonstrate **only one** of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

The objectives of the standard are to be achieved notwithstanding non-compliance with the standard.

This Clause 4.6 variation statement establishes that compliance with the maximum building height development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objectives of the standard are achieved despite the non-compliance with the numerical standard.

The development proposal remains consistent with the objectives of Clause 4.4 Standard based on the following:

	Objectives	Comments
a)	<i>to maintain the low scale character of towns and villages in the Clarence Valley,</i>	<p>The proposal is located within the Civic Precinct of the town centre. The proposal has a low scale appearance, generally of single storey character when viewed looking southwards from River Street. Areas of non-compliance are largely due to the cross-fall slope of the site which prevents a community hall building from achieving compliance with height standards.</p> <p>The proposal is also consistent with the intent of the area as a Civic Core of the Maclean Town centre. In this regard, it replaces a detracting building with a structure more in keeping with the desired future character of the area. In this regard, and with reference to its design, the building sits comfortably within the streetscape, therein maintaining the low scale character of the town.</p> <p>With regard to its form, the bulk and scale of the proposal is minimised through the openness of</p>

		<p>the building undercroft, ensuring that the design can continue to be read as a single storey structure.</p> <p>Accordingly, the single storey nature of the building, its design language in remaining largely open undercroft, along with its location within the civic core of the town centre, ensures that the low scale character of Maclean is retained.</p>
b)	<p><i>to protect the amenity of neighbouring properties by minimising visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public land.</i></p>	<p>The proposal replaces a detracting community hall and replaces it with a modern structure that complements, rather than detracts from neighbouring buildings.</p> <p>There will be no amenity impacts, including loss of views, privacy and solar to nearby non-residential, residential development and public land.</p>

CLAUSE 4.6 (3) (B) ENVIRONMENTAL PLANNING GROUNDS

Clause 4.6(3)(b) of the CLEP 2011 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening. The Land and Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018 provides assistance in relation to the consideration of sufficient environmental planning grounds, whereby Preston J observed that:

... in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

... there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development

In this regard, the aspect or element of the contravention is the building height, which, though a larger structure being a community hall, is consistent with the how developments have addressed site constraints such as slope within Mclean. Though breaching the numerical standard, the proposal remains consistent with key objectives of the LEP and DCP relating to retaining a low scale character within the town centre.

Accordingly, the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

CLAUSE 4.6 (4) (A) THE PUBLIC INTEREST

As the provisions of Clause 4.6(4)(ii) requires, the Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard, and
2. the objectives for development within the zone in which the development is proposed to be carried out.

In respect of the first matter, it has already been established above that the proposal achieves the objectives of the maximum building height development standard.

In respect of the second matter, the objectives of the E1 Local Centre Zone are as follows:

- *To provide a range of retail, business and community uses that serve the needs of people who live, work or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community, and other non-residential land uses on the ground floor of buildings.*
- *To reinforce and support the central business districts of Maclean, Iluka and Yamba as the commercial centres for these towns.*
- *To minimise conflict between land uses within the zone and land uses within adjoining zones.*
- *To enable other land uses that are compatible with and do not detract from the viability of retail, business, entertainment and community uses within the zone.*
- *To reinforce the neighbourhood centres of Coutts Crossing, Glenreagh, Lawrence and Ulmarra as the locations for commercial premises.*

In accordance with the provisions of Clause 4.6(4) the Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the

public interest as it remains consistent with the objectives of the zone objectives as shown in the table below.

E1 Local Centre Zone Objectives	Comments (in addition to the comments made above)
<i>To provide a range of retail, business and community uses that serve the needs of people who live, work or visit the area.</i>	The proposal provides a community facility, which is permissible in the zone and supports a wide range of activities, currently not achievable in Maclean. In providing the new community facility, the proposal will provide a building that meets the needs of those living, working and or visiting Maclean.
<i>To encourage investment in local commercial development that generates employment opportunities and economic growth</i>	The community facility provides the opportunity for visiting artists and performers to use a venue that meets their needs. In turn, this acts as an attractor for Maclean, bringing people into the town centre and stimulating economic activities. This provides opportunities for Maclean to consolidate its role within the Northern Rivers area as an important town centre for employment.
<i>To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.</i>	Not relevant to this proposal.
<i>To encourage business, retail, community, and other non-residential land uses on the ground floor of buildings.</i>	The building is a single storey structure that has ground floor entry.
<i>To reinforce and support the central business districts of Maclean, Iluka and Yamba as the commercial centres for these towns.</i>	The proposal provides a community hall in the Maclean Town Centre, reinforcing its status as an important town centre.
<i>To minimise conflict between land uses within the zone and land uses within adjoining zones.</i>	The proposed use is permissible within the zone and is located within the Civic Core.
<i>To enable other land uses that are compatible with and do not detract from the viability of retail, business,</i>	Not relevant to this proposal

<i>entertainment, and community uses within the zone.</i>	
<i>To reinforce the neighbourhood centres of Coutts Crossing, Glenreagh, Lawrence and Ulmarra as the locations for commercial premises.</i>	The proposal achieves the intent of this objective

The proposal is directly in the public's interest as it provides for a community hall within the Maclean Town Centre that is consistent with the intent of the zone, and existing use of the subject site. Importantly, the community need is met by providing a facility that is inclusive of all members of the community and can adapt to different roles and needs of the community over time.

CLAUSE 4.6(4)(B) CONCURRENCE

The Secretary (of the Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of the Department of Planning Circular PS 20–003 '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 points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- a) The contravention of the maximum height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique site attributes associated with the subject site.
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal as:
 - the proposal is consistent with the underlying objectives of the control.
 - the non-compliance does not lead to view loss or any impacts to the amenity of the public domain and neighbouring properties in terms of solar access and wind impacts
 - the proposal does not set an undesirable precinct, being consistent with how sloping sites have been addressed in Maclean.

- c) There are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting the concurrence, should it be required.

Hence compliance with the standard is unnecessary and unreasonable in the circumstances.

5. CONCLUSION

For the reason set out above, the Applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of Clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objective of the E1 Local Centre Zone.

The variation is well founded and should be upheld.