



PACIFIC PLANNING

Pacific Planning

Property | Planning | Project Management

T 0437 521 110

E info@pacificplanning.com.au

ABN 88 610 562 760

Clause 4.6 Exception to Development Standard – Building Height

**STAGE 1 WORKS DA
54-68 Hampstead Road and 276-282 Parramatta
Road, AUBURN, NSW, 2144**

**Submitted to City of Cumberland Council
Revised September 2023**

Table of Contents

Contents

Clause 4.6 – Exceptions to Development Standards	1
1.0 Introduction	1
1.1 Written request under clause 4.6(3) of Cumberland Local Environmental Plan 2021.....	1
1.2 The Site	3
1.3 The Proposed Development	5
1.4 Development Details	7
1.5 Height of Buildings under clause 4.3(2)	7
2.0 Overview of Provisions	9
2.1 Overview of Variation	10
2.2 Overview of Clause 4.6	11
3.0 Assessment of Proposed Variation - Height	13
3.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))	13
3.1.1 The Objectives of the Height of Buildings standard are achieved notwithstanding non- compliance with the standard.....	15
3.1.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.	17
3.1.3 The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	17
3.2 There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))	17
3.2.1 The nature of the variation of the control.....	17
3.2.2 The environmental context	18
3.2.3 Justification.....	18
3.2.4 Consistency with the Act	19
3.3 The Public Interest	20
3.3.1 Objectives of the Standard	20
3.3.2 Meeting the Objectives of the zone	20
3.3.3 Meeting the Aims of the LEP	23
3.4 Other Concurrence Considerations	23

3.4.1	Whether contravention of the development standard raises any matter of significance for State or regional environmental planning	24
3.4.2	Is there public benefit in maintaining the development standard?.....	24
4.0	Conclusion.....	25

LIST OF TABLES

TABLES	NAME
1	Request overview
2	Site details and areas
3	Proposed development land uses
4	Description of Planning Instrument, Development Standard and Proposed variation
5	Summary of height breaches

LIST OF FIGURES

FIGURE	NAME
1	Site Description and staging
2	Site context
3	Aerial view of the subject site
4	Aerial view of existing development
5	Exploded Axonometric Diagram (source Smith & Tzannes Design Report)
6	Massing Axonometric (source Smith & Tzannes Design Report)
7	Cumberland LEP 2021 Maximum Height of Buildings Map
8	Height of Building 'FOG' diagram

Prepared by:

This report has been prepared by:

James Matthews

Contact:

Pacific Planning Pty Ltd

Level G, 16 Leavesden Place
Sylvania
NSW 2224

M 0437 521 110
E jmatthews@pacificplanning.com.au
ABN: 88 610 562 760

Prepared for:

Raad Property Acquisition No. 65 Pty Ltd

Document Control

Version	Date	Prepared
v.1.0	September 2022	TS
v.2.0	1 August 2023	JM
v.3.0	5 September 2023	JM

All Rights Reserved. No material may be reproduced without prior permission of Pacific Planning Pty Ltd. Pacific Planning Pty Ltd while working on this project has tried to ensure the accuracy of the information in this publication, it accepts no responsibility or liability for any errors, omissions or resultant consequences including any loss or damages arising from reliance in the information in this publication.

Clause 4.6 – Exceptions to Development Standards

1.0 Introduction

1.1 Written request under clause 4.6(3) of Cumberland Local Environmental Plan 2021

Summary of Proposed Variation	
Address:	54-68 Hampstead Road and 276-282 Parramatta Road, Auburn, 2144
Proposal:	The proposal seeks consent for demolition of existing buildings and the construction of the first stage of the development against the approved Concept under DA/2020/0310. The first stage includes three levels of basement parking, a level for flood storage, 8,816sq.m of hotel accommodation and 9,050sq.m of specialised retail premises.
EPI applicable:	Cumberland LEP 2021
Zoning:	E3 Productivity Support
Standard to be varied:	Height of buildings: Clause 4.3
Numeric measure of variation	<u>Maximum allowed:</u> <i>(2A) The maximum height of office premises and hotel or motel accommodation in the “Parramatta Road Precinct”, shown edged orange on the Height of Buildings Map, is <u>27 metres</u>.</i> <u>Proposed:</u> 29.23 metres (to lift overrun):
Total maximum variation on site	Proposed maximum height of building breach 2.23 metres (8.26%)

Table 1: Request overview

The Applicant requests under clause 4.6 of the *Cumberland Local Environmental Plan 2021* (LEP) that the stage 1 works application for a commercial mixed-use development be granted development consent notwithstanding that the approved development will exceed the development standard for maximum height of building of 27 metres applying under clause 4.3(2A) of the LEP. The proposal will have a maximum height of 29.23 metres, which is an 8.3% increase on that development standard.

As anticipated by clause 4.6, this request sets out below:

- (a) why requiring compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, including the planning context of the proposal, and
- (b) the environmental planning grounds that are sufficient to justify contravening the development standard.

Primarily, there are strong planning reasons why an increased height of building exceeding the 27 metre standard is appropriate on this site. Those reasons in summary are:

- (a) The site does not have a density control, and therefore the built form has been informed by architectural response to the site and the proposed future uses, within a height limit of 27 metres. The lift overrun and roof top servicing are the only items to exceed the 27 metre height limit which do not contain any 'density'.
- (b) All bulk of future development is within the 27 metre height limit. The lift overrun and roof services are required to enable the development. These elements have no visual impact, but are necessary to support the development and urban renewal of a site in a key area.
- (c) The site forms part of an urban renewal area, being within the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Corridor. The maximum building height under that strategy is 28 metres, 1 metre more than the maximum building height under the Cumberland LEP 2021. The scale of the proposed development is therefore consistent with the future desired character of the area.
- (d) the bulk and form of future development is within the height limit
- (e) The rooftop services and lift overruns have been well set back from the two main streets that the site is located on, to minimise any visual impact and ensure limited exposure or visibility to building elements that exceed the height limit.
- (f) The solar impact to surrounding properties has been carefully considered. The lift overrun and other elements that result in a height breach do not create any discernible additional solar impacts to surrounding properties and the adjoining public open space.
- (g) The justification for the height breach has demonstrated how the proposed development has achieved the height objectives and compliance with the zone and LEP objectives.
- (h) For those reasons, variation of the height control of 27 metres to permit the proposed development is consistent with the objectives of the Cumberland LEP 2021.

Taking those matters into account, and as expanded upon below, this variation request demonstrates the following:

- (a) that compliance with the development standards is unreasonable or unnecessary in the circumstances of the case,
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard,
- (c) the height of proposed development has been studied pursuant to the requirements of the SCC issued on 19 July 2016 in relation to the site,
- (d) There are substantial public benefits of the affordable housing development proceeding, such that it is in the public interest to allow a departure from the numerical standard in this case.

1.2 The Site

The land to which this stage 1 works DA applies is located at 276-282 Parramatta Road and part of 60-68 Hampstead Road. The site is on the southern side of Parramatta Road on the western side of the intersection with Hampstead Road. The site has two street frontages and contains old industrial warehousing and building supplies land uses.

The site is part of a larger site for which Concept approval has been granted. Specifically, Stage 1 applies to the area of land to the north of the stormwater easement that traverses the site. This is the location of proposed 'Building A', of the overall approved concept. The area of the site, subject to the Stage 1 is all land to the north of the stormwater easement and includes the two-storey brick building at Lot D, which covers part of the site known as 60-68 Hampstead Road. This will be subject to demolition as part of the consent.

Overall, the site subject to the concept approval comprises eleven (11) lots. The table below provides the legal description and identifies land subject to the Stage 1 and Stage 2 Works.

Address	Lot details	Area (m ²)	Stage
280-282 Parramatta Road	Part Lot B in DP 26290	1,835.5	1
276-278 Parramatta Road	Part Lot B and Lot C in DP 26290	2,308	1
60-68 Hampstead Road	Lot D in DP 26290	1,849.9	Part 1 and part 2
	Lot E in DP 26290	1,713	2
	Lot 16 in DP 2867	339.9	2
	Lot 17 in DP 2867	341.3	2
54-58 Hampstead Road	Lot 11 in DP 2867	333.4	2
	Lot 12 in DP 2867	334.7	2
	Lot 13 in DP 2867	336	2
	Lot 14 in DP 2867	337.3	2
	Lot 15 in DP 2867	338.6	2
Total Area		10,081.3	

Table 2: Site details and areas

The site has a frontage of approximately 70 metres to Parramatta Road and 172 metres to Hampstead Road. The site currently contains a variety of commercial and warehouse type land uses, including one and two storey brick and fibro shops with metal roofs, a concrete block factory, and bitumen sealed storage areas.



Figure 3: Aerial view of the subject site



Figure 4: Aerial view of existing development

1.3 The Proposed Development

The project is subject to an approved Concept application for a mixed-use commercial employment generating development including specialised retail, hotel and motel accommodation, office space, child care facilities

and a cafe in accordance with the zone objectives and permissible uses within the B6 Enterprise Corridor zone of Cumberland LEP 2021.

The subject stage 1 application includes three levels of basement parking, a level for flood storage, 8,816sq.m of hotel accommodation and 9,050sq.m of specialised retail premises. Note: the modification application currently before council seeks minor rearrangement of the land uses from that contemplated in the approved Concept application, and determination of the Stage 1 works application will follow determination of the modification.

The application proposes to construct a seven-storey mixed use specialised retail and hotel building on the corner of Parramatta Road and Hampstead Road. The design proposes two predominant forms which delineate between the separate uses of the specialised retail and the hotel.

The retail form, define the street wall of the precinct, with a scale similar to other commercial buildings in the area. The circular form of the hotel, seeks to provide a functional and aesthetic response to the site, providing clear circulation, amenity, outlook and a distinct visual point of difference.

The design rationale, strategy, massing, articulation and performance is outlined in the attached Design Report prepared by Smith & Tzannes.

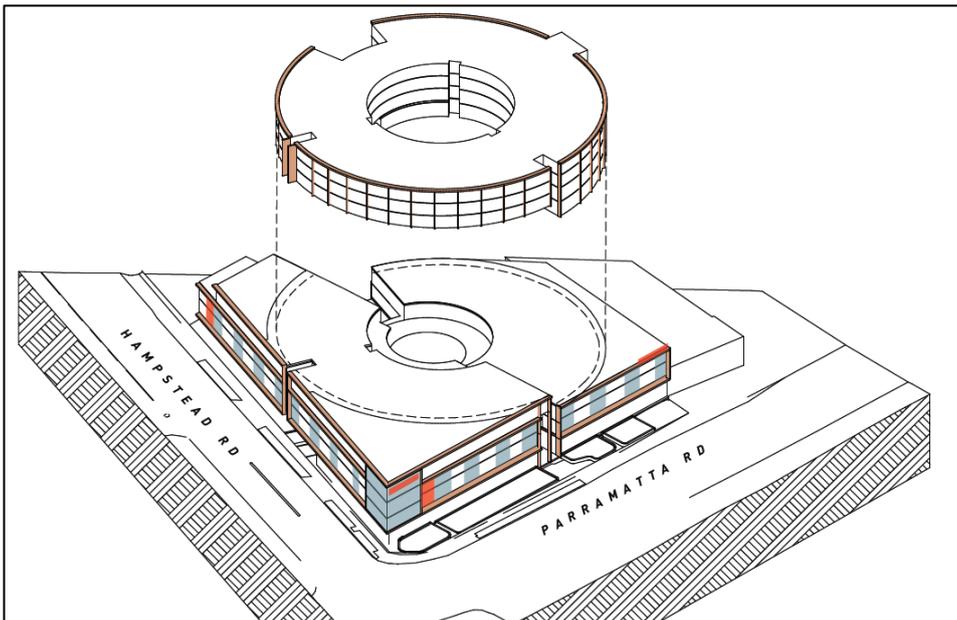


Figure 5: Exploded Axonometric Diagram (source Smith & Tzannes Design Report)

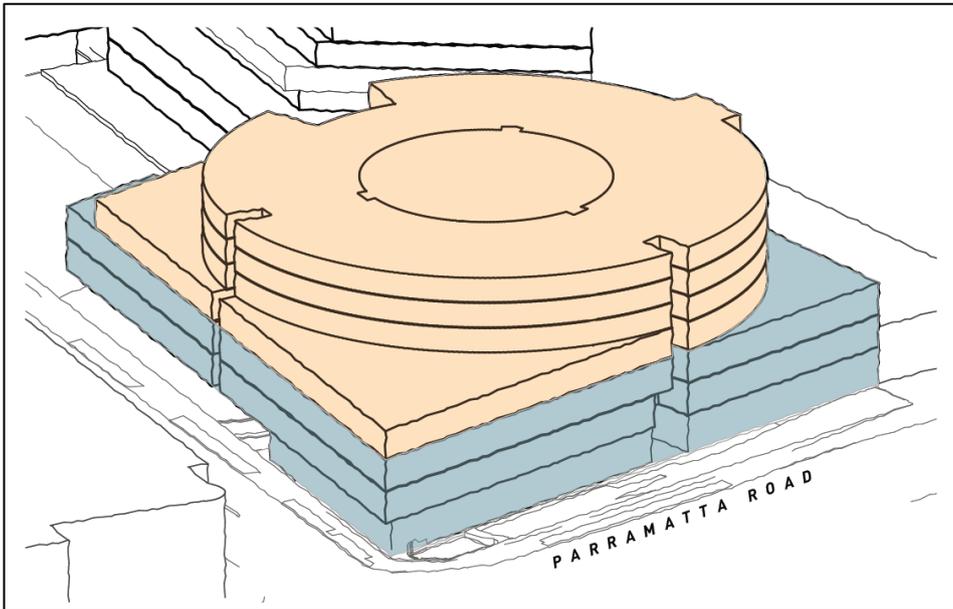


Figure 6: Massing Axonometric (source Smith & Tzannes Design Report)

1.4 Development Details

The northern development includes a seven-storey building incorporating specialised retail premises, hotel and motel accommodation, and ancillary café/restaurant and function room facilities. The table below indicates the land uses per level and areas.

Level	Land Uses	Area (sq.m)
Ground	Specialised Retail Premises	2,565
	Hotel lobby, café, office and WC's	243
1	Specialised Retail Premises	3,207
2	Specialised Retail Premises	3,278
3	47 hotel rooms	2,669
	Hotel restaurant, café and bar	
	Lounge	
	Function Space	
	Hotel Gym	
	Central garden with atrium glass roof	
4	51 Hotel rooms	1,968
5	51 Hotel rooms	1,968
6	51 hotel rooms	1,968

Table 3: Proposed development land uses

1.5 Height of Buildings under clause 4.3(2)

Under the Cumberland LEP 2021, the maximum height of building control does not apply to the subject site. The site is mapped within the 'Parramatta Road Precinct' on the Height of Buildings Map to which Clause 4.3(2A)(a) of the LEP applies.

Clause 4.3(2A) states:

(2A) The maximum height of office premises and hotel or motel accommodation in the “Parramatta Road Precinct”, shown edged orange on the Height of Buildings Map, is 27 metres.



Figure 7: Cumberland LEP 2021 Maximum Height of Buildings Map

2.0 Overview of Provisions

Summary of Legal Context and Proposed Variation	
EPI applicable:	Cumberland Local Environmental Plan 2021
Zoning:	Land Use Zone E3 Productivity Support
Objectives of the zone:	<ul style="list-style-type: none"> To provide a range of facilities and services, light industries, warehouses and offices. To provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres. To maintain the economic viability of local and commercial centres by limiting certain retail and commercial activity. To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones. To provide opportunities for new and emerging light industries. To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.
Standard being varied:	<p>Clause 4.3 Height of Building</p> <p><i>(2A) The maximum height of office premises and hotel or motel accommodation in the “Parramatta Road Precinct”, shown edged orange on the Height of Buildings Map, is <u>27 metres</u>.</i></p>
Numeric measure of variation:	Proposed maximum height of building (to lift overrun): 29.23 metres (8.26%)
Objectives of development standard:	<p>(1) The objectives of this clause are as follows—</p> <ul style="list-style-type: none"> (a) to establish a maximum height of buildings to enable appropriate development density, (b) to ensure that the height of buildings is compatible with the character of the locality, (c) to minimise the visual impact of development, (d) to ensure sufficient solar access and privacy for neighbouring properties.

Table 4: Description of Planning Instrument, Development Standard and Proposed variation

2.1 Overview of Variation

The lift overrun is the highest point of the development, measuring 29.23 metres. This constitutes a 2.23 metre or 8.3% variation to the maximum building height standard.

There are also a number of other breaches, associated with the roof, parapet and rooftop services. Some of the breaches are due to the sloping nature of the site. Further, key elements of the building are well below the maximum height, due to the circular design and form of the hotel, which seeks to provide a function and aesthetic response to the site, providing clear circulation, amenity, outlook and a distinct visual point of difference.

The figure below illustrates the breaches, and the table provides specific details of the overall breaches. The figure is also included at Appendix A.

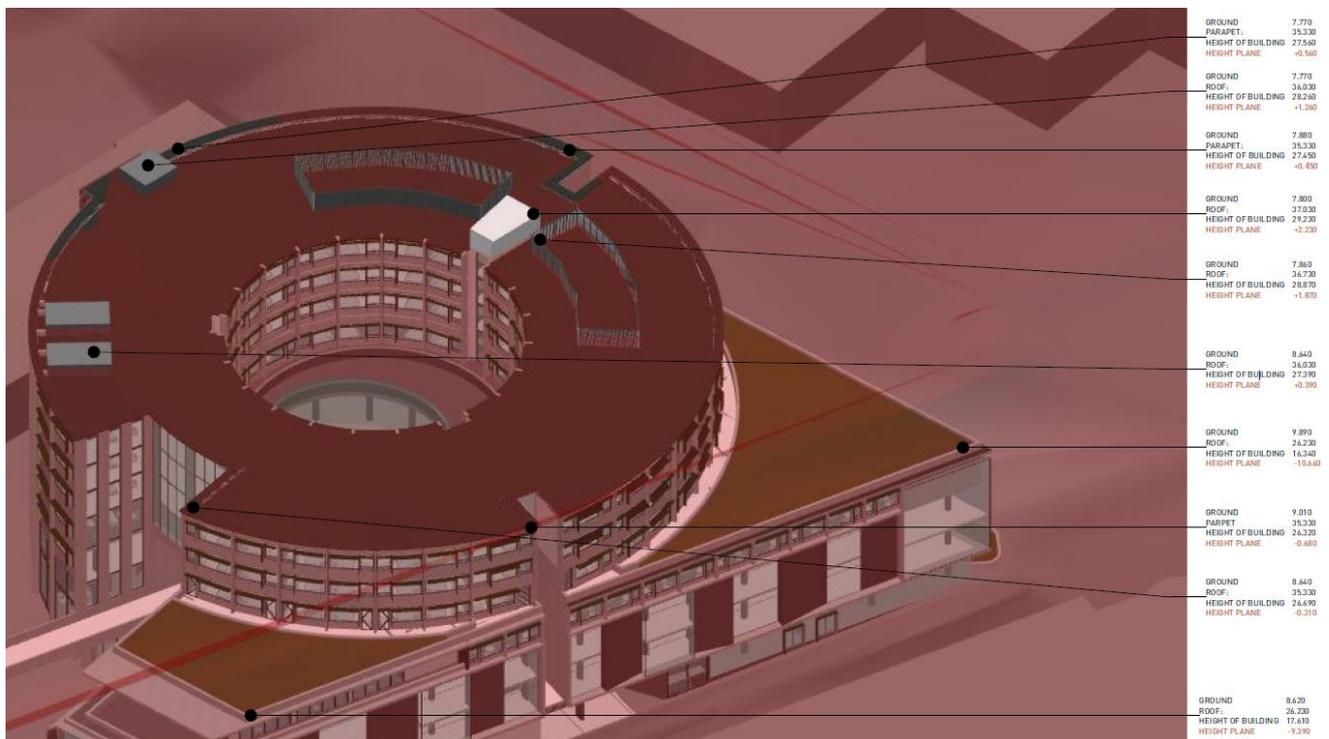


Figure 8: Height of Building 'FOG' diagram

Location	Max. HOB	Proposed HOB	Height Variance	%age variation
Stair overrun	27m	29.23m	+2.23	8.3%
Rooftop services	27m	28.87m	+1.87	6.9%
Lift overrun	27m	28.26m	+1.26	4.7%
Parapet	27m	27.56m	+0.56	2%
Parapet	27m	27.45m	+0.45	1.7%
(note: this non-compliance results from a dip in the existing ground level)				
Lift overrun	27m	27.39m	+0.39	1.4%

Table 5: Summary of height breaches

2.2 Overview of Clause 4.6

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards.

The Objectives of Clause 4.6 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.*

Clause 4.6(3)(a) and 4.6(3)(b) require that 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.*

Clause 4.6(4) require that 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 Secretary has been obtained.*

Clause 4.6(5) requires that the in deciding whether to grant concurrence, the Secretary must consider:

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

The following principles have been considered in preparing this cl 4.6 request:

- The consent authority must *“be satisfied that:*
 - The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),

- The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),
- The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and
- The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).”
- (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], citing *Initial Action Pty Ltd v Woollahra Municipal Council* (2008) 236 LGERA 256).
- The consent authority must “in fact” be satisfied of the matters in the first two dot points above, in reliance only on matters set out in the relevant cl 4.6 request (*SJD DB2* at [32], citing *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130), but may satisfy itself as to the public interest matters in the last two dot points (*SJD DB2* at [34]).
- Cl 4.6(4)(b) requires the consent authority to be satisfied that the concurrence of the Planning Secretary has been obtained, which concurrence may be assumed pursuant to a written notice dated 21 February 2018 attached to Planning Circular PS18-003 (*SJD DB2* at [34] citing *Initial Action*).
- “Development standards are not ends in themselves but means of achieving ends” (*Wehbe v Pittwater Council* (2007) 156 LGERA 446 at [43])
- The common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary are:
 - (a) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
 - (b) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
 - (c) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
 - (d) the development standard has been abandoned by the council;
 - (e) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers). (*SJD DB2* at [35], citing *Initial Action*)
- The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*SJD DB2* at [35] citing *Initial Action*).
- Consistent means compatible or capable of existing together in harmony, or not antipathetic (*Moskovich v Waverley Council* [2016] NSWLEC 1015 at [53]).
- A proposed development does not have to have zero impact or less impact, but rather achieve the intent of the relevant objective (*Initial Action* at [87]).

3.0 Assessment of Proposed Variation - Height

In *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 at [46], Moore J identified the requirements an Applicant needs to establish for consent to be granted to development that contravenes a development standard. These findings were upheld on appeal to the NSW Court of Appeal. The consent authority must be satisfied that:

- (1) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposed development (cl 4.6(3)(a) and cl 4.6(4)(a)(i)); and
- (2) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)); and
- (3) The proposed development will be in the public interest because it is consistent with the objectives of the standard in question - set out in cl 4.3 of the LEP (cl 4.6(4)(a)(ii)); and
- (4) The proposed development will be in the public interest because it is consistent with the objectives of the relevant zone (cl 4.6(4)(a)(ii)).

Each of those matters is addressed below. In particular, the request:

- (a) sets out why compliance is unreasonable or unnecessary in the circumstances of the DA,
- (b) explains why there are sufficient environmental planning grounds to justify contravening the development standard (as required by clause 4.6(3)); and
- (c) describes why it is in the public interest because it is consistent with the objectives of both the standard and the zone.

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

Case law highlighted that this can be demonstrated by 5 non exhaustive means known as the *Wehbe* tests:

- by showing that the objectives of the development standard are achieved despite a noncompliance with the development standard;
- by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary;
- by establishing that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable;
- by illustrating that the Council itself has granted development consent that departs from the standard, and arguing from this that the development standard has been 'virtually abandoned or destroyed', rendering it unnecessary and unreasonable; and

In this case, the objectives of the height development standard within the LEP will be met through careful design, as will the objectives of the LEP overall and the objectives of the E3 Productivity Support zone.

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 gives a good overview of what is required to meet this jurisdictional test:

“23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. 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].”

Consistent with the assessment encouraged by that Court directive, there are strong planning grounds to support the building height exceeding the 27 metre standard in the LEP to support the provision of a lift overrun and roof top services. In particular:

- (a) The built form has been informed by an architectural response to the site and the proposed future uses, within a height limit of 27 metres. The lift overrun and roof top servicing are the only items to exceed the 27 metre height limit which do not contain any ‘density’.
- (b) All bulk of future development is within the 27 metre height limit. The lift overrun and roof services are required to enable the development. These elements have no visual impact, but are necessary to support the development and urban renewal of a site in a key area.
- (c) The site forms part of an urban renewal area, being within the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Corridor. The maximum building height under that strategy is 28 metres, 1 metre more than the maximum building height under the Cumberland LEP 2021. The scale of the proposed development is below the maximum height under the strategy, with the exception of the lift and stair overrun and is therefore consistent with the future desired character of the area.
- (d) the bulk and form of future development is within the height limit
- (e) The rooftop services and lift overruns have been well set back from the two main streets that the site is located on, to minimise any visual impact and ensure limited exposure or visibility to building elements that exceed the height limit.
- (f) The solar impact to surrounding properties has been carefully considered. The lift overrun and other elements that result in a height breach do not create any discernible additional solar impacts to surrounding properties and the adjoining public open space.
- (g) The justification for the height breach has demonstrated how the proposed development has achieved the height objectives and compliance with the zone and LEP objectives.

- (h) For those reasons, variation of the height control of 27 metres to permit the proposed development is consistent with the objectives of the Cumberland LEP 2021.

3.1.1 *The Objectives of the Height of Buildings standard are achieved notwithstanding non-compliance with the standard*

The objectives of Clause 4.3 are:

- (a) *to establish a maximum height of buildings to enable appropriate development density,*
- (b) *to ensure that the height of buildings is compatible with the character of the locality,*
- (c) *to minimise the visual impact of development,*
- (d) *to ensure sufficient solar access and privacy for neighbouring properties.*

The context for assessment:

While it is noted that in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 the Court deal with a different development standard, it is also noted that the objective of the FSR control in this case was to “*regulate the density of development*” (among other things). In the subject case for land on Parramatta Road, the underlying driver behind the building height objectives is similar, in that it intends to regulate development *density* by ensuring appropriate built-form, suitable scale and compatible hierarchy.

The Court held (at [49]) that the regulation of density, or the achievement of a planned density, in this case, is not and should not be treated as, an end in itself. Regulation of density, or setting a planned density to be achieved, is what the clause does, however this is not the “end” that the clause intends to achieve. Rather, it is a *means* to achieve other goals.

In *Baron*, it was held that those goals were the other expressed-objectives of the control. Essentially, *Baron* found there was work required to locate the specific goals that the objective of “planned density” intends to achieve.

In this case, the four height objectives work together to determine the specific goals to regulate an appropriate building form, suitable scale and density. The height objectives actually so provide clear performance-based objectives which must be achieved in order to demonstrate that the objectives of the height control have been achieved.

Comments

Consistency with zone objectives demonstrates the satisfactory achievement of the underlying objectives of the building height control. A review of the objectives is considered below:

- **to establish a maximum height of buildings to enable appropriate development density,**

While the site does not have a density control applied to it, the built form has been specifically designed to accommodate the future uses being specialised retail on the lower levels and hotel accommodation on the higher levels. The design proposes two predominant forms which delineate between the separate uses of the Retail and Hotel.

The retail form defines the street wall of the precinct, with a scale similar to other commercial buildings in the area. The circular form of the hotel, seeks to provide a function and aesthetic response to the site, providing clear circulation, amenity, outlook and a distinct visual point of difference.

Therefore, given the site does not have a density control, the built form has been informed by architectural response to the site and the proposed future uses, within a height limit of 27 metres. The lift overrun and roof top servicing are the only items to exceed the 27 metre height limit which do not contain any 'density'.

- **to ensure that the height of buildings is compatible with the character of the locality,**

The site forms part of an urban renewal area, being within the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Corridor. The maximum building height under that strategy is 28 metres, 1 metre more than the maximum building height under the Cumberland LEP 2021.

The proposed height of the building is consistent with the desired future character of the area, but under the current controls of the LEP and the state corridor strategy. The height exceedance, being only lift overrun and roof services will not impact the character of the locality, and in fact supports the urban renewal of the site, achieving the objectives and aims of the state strategy and the councils own local strategic planning statement.

- **to minimise the visual impact of development,**

Noting that the bulk and form of future development is within the height limit, the northern part of the site subject to this stage 1 works application, has been designed to provide a strong corner presence achieved with protruding triple height glazing on the junction on the lower retail levels and a segmented circular form, vertically expressed with concrete blades, at the corner of Hampstead and Parramatta Road.

The rooftop services and lift overruns have been well set back from the two main streets that the site is located on, to minimise any visual impact and ensure limited exposure or visibility to building elements that exceed the height limit.

- **to ensure sufficient solar access and privacy for neighbouring properties.**

The solar impact to surrounding properties has been carefully considered, particularly as it relates to the park on the eastern side of Hampstead Road, opposite the site.

The proposed northern building, subject to the stage 1 works application, and *View from the Sun* diagrams illustrate that the built form will have a good amenity outcome for the dwellings and park on Hampstead Road. The proposal ensures the existing dwellings and park to the east achieves minimum 2 hours of solar access.

Views from the sun analysis have been taken to show:

- 21 Jun 9am -No overshadowing to dwellings and park
- 21 Jun 10am - No overshadowing to dwellings and park
- 21 Jun 11am - No overshadowing to dwellings and park
- 21 Jun 12pm - No overshadowing to dwellings and park
- 21 Jun 1pm - No overshadowing to park
 - Overshadowing to No. 75, 77, 79 Hampstead Rd.

- 21 Jun 2pm - No overshadowing to park
 - Overshadowing to No. 75, 77, 79 Hampstead Rd and partially no.73
- 21 Jun 3pm - Overshadowing to park
 - Overshadowing to No. 73, 75, 77, 79 Hampstead Rd.

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

The standard's purpose and objectives remain relevant.

3.1.3 *The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.*

The primary purpose of the underlying objective relates to facilitating development to enable an appropriate density that is compatible with the character of the area and is in a form that minimises visual impact and solar impacts to nearby development.

The lift/stair overrun and roof plant equipment is required to service the building, enabling employment generating floorspace at an appropriate density. The circular form of the upper hotel levels has been designed to partly create variety in built form and visual interest, and also to maximise opportunities for daylight and outlook while providing efficient circulation. The lift/stair overrun are required as a function of the hotel and specialised retail facilities and the roof services are required for the building to function.

The rooftop features have been located away from the Hampstead Road frontage and the corner with Parramatta Road to ensure no additional overshadowing and visual impact. In this context, strict compliance would thwart the achievement of the underlying purpose of the objectives.

3.2 *There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))*

3.2.1 *The nature of the variation of the control*

The lift overrun is the highest point of the development, measuring 29.23 metres. This constitutes a 2.23 metre or 8.3% variation to the maximum building height standard.

There are also a number of other breaches, associated with the roof, parapet and rooftop services. Some of the breaches are due to the sloping nature of the site. Further, key elements of the building are well below the maximum height, due to the circular design and form of the hotel, which seeks to provide a function and aesthetic response to the site, providing clear circulation, amenity, outlook and a distinct visual point of difference.

Height breaches and locations are shown in the height plane diagram at Figure 8, with a summary of the breaches detailed in Table 5, both on page 10.

3.2.2 *The environmental context*

The site is on the southern side of Parramatta Road on the western side of the intersection with Hampstead Road. The site has two street frontages and contains old industrial warehousing, building supplies and specialised retail outlet land uses.

The site has a frontage of approximately 70 metres to Parramatta Road and 172 metres to Hampstead Road. The site currently contains a variety of commercial and warehouse type land uses, including one and two storey brick and fibro shops with metal roofs, a concrete block factory, and bitumen sealed storage areas.

The Stage 1 DA works forms part of the larger development site which is a rectangular-shaped block containing a number of lots with a variety of historical uses. The broader development site is within an identified urban renewal corridor, being the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Strategy.

The proposal aligns with the strategy in that it seeks to generate significant employment opportunities as per the vision of the strategy which are permissible within the existing zone. While the LEP provides for a height limit of 27 metres, and the Strategy a height limit of 28 metres, the bulk of the building is contained within the height limit. The roof elements are simply an outcome of the function of the building and required to realise the outcomes of the strategy.

3.2.3 *Justification*

Sufficient environmental grounds exist to justify contravening the development standard, in this case. In relation to the extent of non-compliance and the form of development it is noted that:

1. The variation is relatively minor and primarily relates to roof structure and lift overrun, as noted on the plans and height plane diagram.
2. Due to the careful location of the roof structures, there is no overshadowing caused by the breach or visual impact to main public areas around the site.
3. The bulk and floorspace associated with the building is all below the height limit.
4. The future anticipated and desired character and scale of development is 28 metres. While this height is still breached, it is even more minor than the LEP breach, noting the elements above the 28 metres is just the lift/stair overrun.

A development proposal that was forced to be compliant with the standard fails to recognise that:

1. The development requires the rooftop elements to function and operate.
2. There are no significant environmental benefits that would result from strict compliance.
3. The location of the built form provides for employment floorspace in an urban renewal area, and in doing so has enabled significant areas of open space, through links and public domain, to the benefit of not only the future employees, but also existing employees and residents in the area.

3.2.4 Consistency with the Act

The Environmental Planning Grounds must, by their nature, be grounds that relate to the subject matter, scope and purpose of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) (including section 1.3 of the EPA Act).

As set out in Section 1.3, the objectives of the Act are: -

- a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- c) *to promote the orderly and economic use and development of land,*
- d) *to promote the delivery and maintenance of affordable housing,*
- e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- g) *to promote good design and amenity of the built environment,*
- h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- j) *to provide increased opportunity for community participation in environmental planning and assessment.*

The proposed variation satisfies the above stated objectives of the Act:

- It is an orderly and economic use of the site. It is an appropriate and permissible form of development on an underutilised site.
- It supports the urban renewal of land within an identified urban renewal corridor.
- It demonstrates a high standard of architectural and urban design, with expert input from the Cumberland Design Excellence Panel.
- It provides public open space for the existing and future communities to access and enjoy.
- It supports the future urban renewal of adjoining land by providing future links and connections, supporting connectivity and permeability within the broader urban renewal area.

This proposed variation to the standard will not hinder the objects of the Act.

The 'grounds' put forward as justification for the requested variation are within the subject matter, scope and purpose of the Act.

3.3 The Public Interest

As set out in *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712, the proposed development will be in the public interest if 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.

3.3.1 Objectives of the Standard

Refer to section 3.1.1.

3.3.2 Meeting the Objectives of the zone

The concept application was determined, and the subject development application was lodged when the land was zoned B6 Enterprise Corridor prior to the commencement of the employment zones reform, which commenced on 26 April 2023 and replaced the existing zoning with the E3 Productivity Support zone.

For completeness, and noting the savings provision, both zone objectives are considered below:

B6 Enterprise Corridor Zone

The objectives of the B6 Enterprise Corridor zone include:

- *To promote businesses along main roads and to encourage a mix of compatible uses.*
- *To provide a range of employment uses (including business, office, retail and light industrial uses).*
- *To maintain the economic strength of centres by limiting retailing activity.*

Comments

- **To promote businesses along main roads and to encourage a mix of compatible uses.**

The subject site is at the corner of Parramatta Road and Hampstead Road. The site is within the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Corridor, a key urban renewal corridor. The strategy is to be delivered over the next 30 years and will facilitate a high quality multi-use corridor with improved transport choices, better amenity and balanced growth of housing and jobs. The full urban transformation of the corridor will deliver in the vicinity of 27,000 additional dwellings, 56,000 new residents and 50,000 new jobs.

The proposal achieves the key objective of the zone by facilitating new business located along Parramatta Road; a main road within the Cumberland LGA and a key corridor under the state governments urban regeneration programme.

The stage 1 works application seeks to facilitate a the first mix of uses, being specialised retail, hotel/motel accommodation, function centre facilities and a café.

- **To provide a range of employment uses (including business, office, retail and light industrial uses).**

The B6 zone permits a variety of employment generating land uses. The approved concept proposal directly achieves this objective, supporting the provision of the following land uses:

- 14,536sq.m of Specialised Retail floorspace;
- 12,562sq.m of office space;
- 7,756sq.m of hotel and motel accommodation;
- 998sq.m of child care; and
- Café of 173sq.m.

The stage 1 works application facilitates the first stage of the uses including specialised retail businesses, a café, hotel/motel accommodation and a hotel restaurant and ancillary employment generating uses.

- **To maintain the economic strength of centres by limiting retailing activity.**

The proposal does not seek to deliver retail uses, rather supporting the provision of and 9,050sq.m of specialised retail premises.

Variation of the Height of Building standard is in the public interest because it will facilitate the development of a mixed-use employment generating development on a key urban renewal corridor in Sydney. The variation will facilitate the development of the first stage of works against the approved concept application and ultimately the provision of 8,816sq.m of hotel accommodation and 9,050sq.m of specialised retail premises.

E3 Productivity Support zone

The objectives of the E3 Productivity Support zone include:

- *To provide a range of facilities and services, light industries, warehouses and offices.*
- *To provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres.*
- *To maintain the economic viability of local and commercial centres by limiting certain retail and commercial activity.*
- *To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones.*
- *To provide opportunities for new and emerging light industries.*
- *To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.*

Comments

- **To provide a range of facilities and services, light industries, warehouses and offices.**

The E3 Productivity Support zone permits a variety of employment generating land uses. The approved concept proposal directly achieves this objective, supporting the provision of the following land uses:

- 14,536sq.m of Specialised Retail floorspace;
- 12,562sq.m of office space;
- 7,756sq.m of hotel and motel accommodation;
- 998sq.m of child care; and
- Café of 173sq.m.

The stage 1 works application facilitates the first stage of the uses including specialised retail businesses, a hotel café, hotel/motel accommodation and a hotel restaurant and ancillary employment generating uses.

- **To provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres.**
- **To maintain the economic viability of local and commercial centres by limiting certain retail and commercial activity.**

The proposal does not seek to deliver retail uses, rather supporting the provision of and 9,050sq.m of specialised retail premises.

Variation of the Height of Building standard is in the public interest because it will facilitate the development of a mixed-use employment generating development on a key urban renewal corridor in Sydney. The variation will facilitate the development of the first stage of works against the approved concept application and ultimately the provision of 8,816sq.m of hotel accommodation and 9,050sq.m of specialised retail premises.

- **To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones.**

The broader proposal includes other land uses and facilities to meet the needs of the local business and existing communities. While some of those will be subject to future applications, including child care facilities and ground floor cafes, the future proposal also includes significant areas of public open space and through site links, supporting the future redevelopment of adjoining sites as per the desired future character in accordance with the Parramatta Road Corridor Urban Transformation Strategy.

The subject Stage 1 works is the first part of the broader development, which overall will significantly assist to meet needs of the community, businesses and industries in an area on Parramatta Road, that may not be suited to other zones such as the E1 Local Centre zone or the E2 Commercial Centre zone.

- **To provide opportunities for new and emerging light industries.**

The proposal facilitated by the approved concept application seeks to deliver a number of employment generating uses. It is noted that the concept application which was designed to facilitate specialised retail premises, office space and hotel and motel accommodation in part, was zoned B6 Enterprise Corridor at the time the proposal was considered and determined. The B6 zone did not include this objective which was included when the zoning was changed to E3 Productivity Support.

Notwithstanding, emerging industries are an important part of the future health of the Cumberland economy and creation of employment generating opportunities for the local population. It is noted that the proposal seeks to deliver important job creating uses within the development.

- **To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.**

As discussed above, the stage 1 proposal seeks to facilitate over 9,000sq.m of specialised retail floorspace that provides a service to support the sale of goods of a larger size and weight.

3.3.3 Meeting the Aims of the LEP

The Aims of the Cumberland LEP 2021 are:

- (aa) to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts,*
- (a) to provide a comprehensive planning framework for the sustainable development of land in Cumberland,*
- (b) to provide for a range of land uses and development in appropriate locations to meet community needs,*
- (c) to facilitate economic growth and employment opportunities within Cumberland,*
- (d) to conserve and maintain the natural, built and cultural heritage of Cumberland,*
- (e) to provide for community facilities and services in Cumberland to meet the needs of residents, workers and visitors,*
- (f) to promote development that is environmentally sustainable.*

Comments:

This justification has been underpinned by detailed evidence that also support the objectives of the LEP. Given the amount of overlap, and to avoid repetition, this justification is only briefly summarised below:

- It provides a range of employment generating land uses and opportunities for employment within an urban renewal corridor supporting the economic growth of Cumberland.
- The open space provides a communal area for workers, visitors and surrounding residents to the benefit of the broader community.
- As the minor variation relates to rooftop services and the overruns, the minor variation will not result in any impact to the nearby residential dwellings and adjoining open space, and has no visual impact to surrounding streets due to the careful placement and design of the rooftop elements.

This proposal supports the objectives of the LEP.

3.4 Other Concurrence Considerations

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and sub-clause (5) outlines the required considerations.

3.4.1 Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The contravention of the development standard in this case will not raise an issue of State or regional planning significance as it relates to local and contextual conditions, and is minor in the context of the overall development.

The development delivers and facilitates the outcomes and desired future character of the primary strategic planning document, being the Parramatta Road Corridor Urban Transformation Strategy, which seeks a higher maximum height of building than that currently identified under the Cumberland LEP 2021.

3.4.2 Is there public benefit in maintaining the development standard?

There is no benefit in maintaining strict compliance with the standard.

This justification has demonstrated that it is consistent with the desired character of the area and the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Area. All bulk of future development is within the 27 metre height limit and 28 metre identified height limit under the strategy. The lift overrun and roof services are required to enable the development. These elements have no visual impact, and have been located away from the road interfaces; but are necessary to support the development and urban renewal of a site in a key area.

4.0 Conclusion

Clause 4.6(4) establishes preconditions that a Consent Authority must be satisfied of, before it can grant a variation to a development standard. This written request has addressed all of these required matters:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances; and
2. Sufficient environmental planning grounds to justify contravening the development standard; and
3. The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the zone.

This submission has addressed each precondition for considering any variation. It has been structured so that all relevant tests established by Land & Environment Court judgments have been addressed and the application can be determined.

The objectives of clause 4.6 are —

- 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 proposal supports Objective (b) by providing employment generating uses on an underutilised site, in need of urban renewal in an urban renewal precinct. There are no *additional* impacts to any neighbouring site that would exceed those arising from a compliant building as the variations are from roof structures.

The justification for the height breach has demonstrated how the proposed development has achieved the height objectives and compliance with the zone and LEP objectives.

Strict compliance with the development standard is unreasonable and unnecessary in this instance and it would thwart the “better outcomes” noted in support Objective (b) of Clause 4.6 (noted above).

The use of the flexibility provided by the objectives of Clause 4.6 is available to the consent authority in this instance.

As discussed in this report, there are strong planning reasons why an increased height of building exceeding the 27 metre standard is appropriate on this site. Those reasons in summary are:

- (a) The site does not have a density control, and therefore the built form has been informed by architectural response to the site and the proposed future uses, within a height limit of 27 metres. The lift overrun and roof top servicing are the only items to exceed the 27 metre height limit which do not contain any ‘density’.
- (b) All bulk of future development is within the 27 metre height limit. The lift overrun and roof services are required to enable the development. These elements have no visual impact, but are necessary to support the development and urban renewal of a site in a key area.

- (c) The site forms part of an urban renewal area, being within the Auburn Precinct under the Parramatta Road Corridor Urban Transformation Corridor. The maximum building height under that strategy is 28 metres, 1 metre more than the maximum building height under the Cumberland LEP 2021. The scale of the proposed development is therefore consistent with the future desired character of the area.
- (d) the bulk and form of future development is within the height limit
- (e) The rooftop services and lift overruns have been well set back from the two main streets that the site is located on, to minimise any visual impact and ensure limited exposure or visibility to building elements that exceed the height limit.
- (f) The solar impact to surrounding properties has been carefully considered. The lift overrun and other elements that result in a height breach do not create any discernible additional solar impacts to surrounding properties and the adjoining public open space.
- (g) The justification for the height breach has demonstrated how the proposed development has achieved the height objectives and compliance with the zone and LEP objectives.
- (h) For those reasons, variation of the height control of 27 metres to permit the proposed development is consistent with the objectives of the Cumberland LEP 2021.

