

## Clause 4.6 Variation: Building Height

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Residential Apartment Buildings  
60 Pelican Road, Schofields



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*Document Date:* 25 October 2023  
*LGA:* Blacktown City Council

Table of Contents

Background to Building Height.....2

Figure 8: Height of Building Map Extract.....2

Relevant Case Law.....5

The Variation & Design Response .....7

Address of Clause 4.6 Provisions.....9

Background to Building Height

Clause 4.3 of Appendix 7 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 16m for the majority of the subject site - as indicated on the height of building map extract below. Noting the ‘O’ notation reflects the area showing the 16m building height limit.

The site is within the Alex Avenue and Riverstone Precinct, reflected in Appendix 7 of the Growth Centres SEPP 2006.

Figure 8: Height of Building Map Extract



The development application plans that accompany this Clause 4.6 departure illustrate that a portion of the buildings exceeds the mapped 16m height control.

The extent of departure is limited to the roof structure and lift over-runs, and roof structure/shade structure associated with the rooftop communal open space area associated with Building C. The habitable areas of the building remain below the height limit, other than for a small portion of Building B and C where there are limited areas of habitable floor space over the height limit where the topography falls away and creates a minor departure to these habitable areas.

The variation to the height standard is a function of a number of elements:

- The roof slab elements, and minor areas of habitable space to Building C and B exceed because of the cross-fall of the land and the desire to provide a suitable level of address to the ground floor public domain areas and street frontages, rather than 'cutting in' the building to achieve strict compliance with the 16m height control for the 5 storeys buildings. It is noted that the 16m height standard has been regularly applied as a 5 storey height limit and hence the height in storeys is appropriate and the breach of the height reflects the desire to provide a suitable design response on the land.
- The lift over-run and fire-stair exceedance arises from the need to provide lift access to all levels of the building and these are necessary for accessibility and to meet BCA standards for fire egress.
- The lift over-run to Building C also breaches the height limit to the rooftop communal open space- in addition to the pergolas designed to provide shade and is a preferred outcome. The reason for this is that the provision of communal open space at the roof level provides good amenity for occupants of the building and there is limited ground floor communal open space available because of the need to provide garbage collection from the basement which creates a very long and driveway ramp that precludes quality communal open space at the ground floor of Building C.

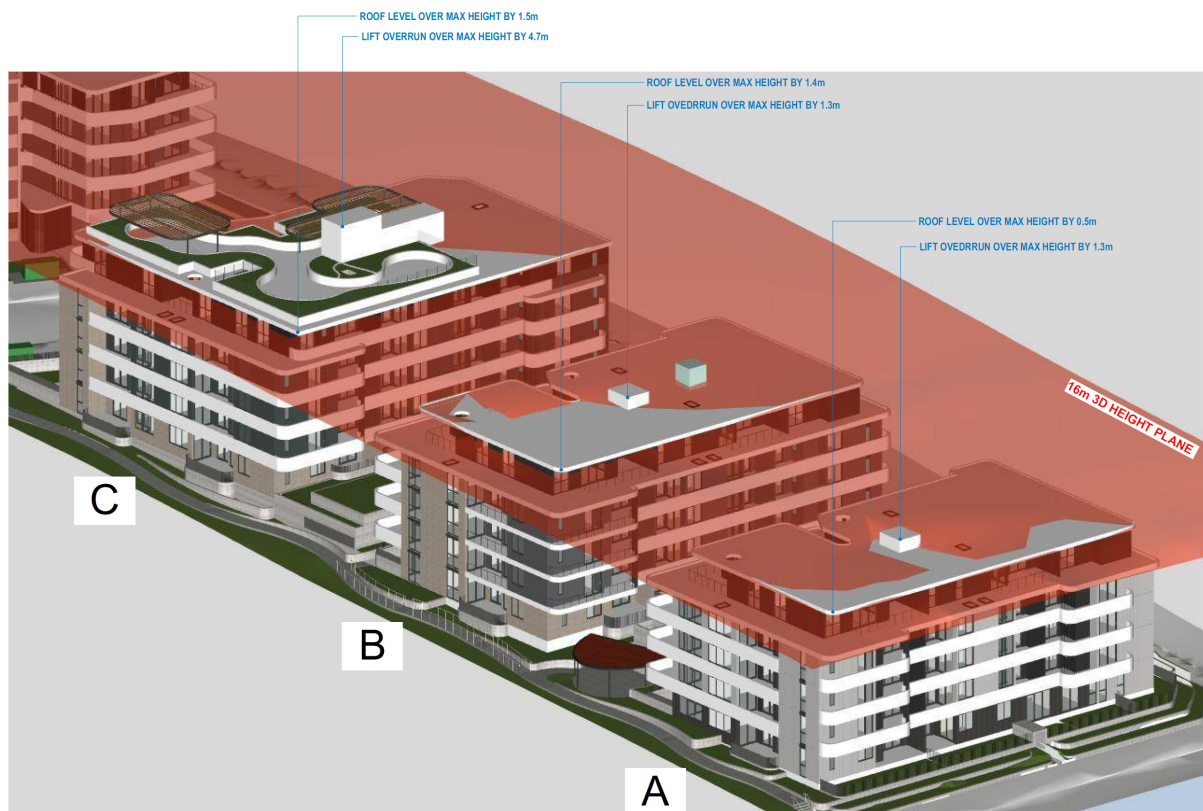
The elements over the height limit are recessed centrally to the building, or pulled in from the outer edges of the floors below, such that they are not 'read' in the streetscape, noting that the encroachment associated with the roof structure are negligible from the public domain.

Therefore the height departure reflects a specific design response for the site and the proposal meets other key planning controls including density, landscaped area and setbacks and hence the height breach is not a means of attempting to achieve greater density on the site but to provide a suitable balance between urban design outcomes and building height.

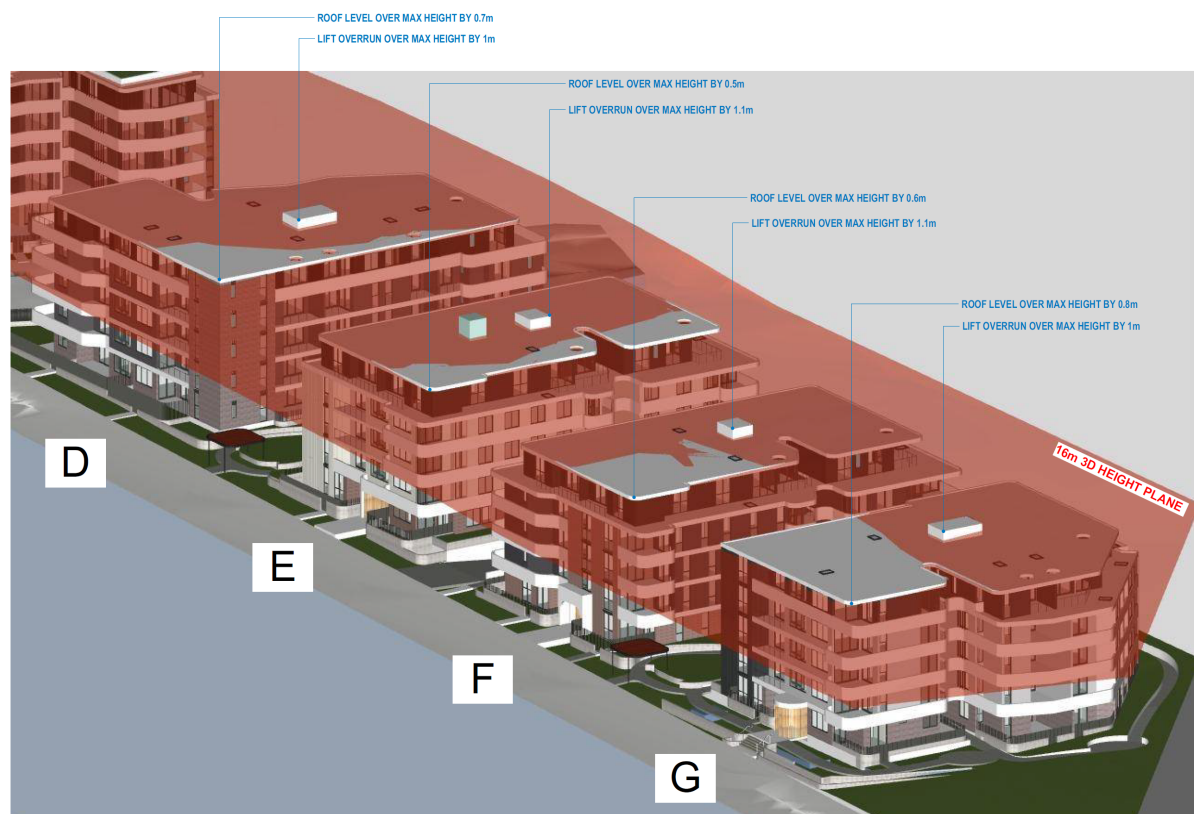
3D extracts of the extent of departure are provided over the page for context.



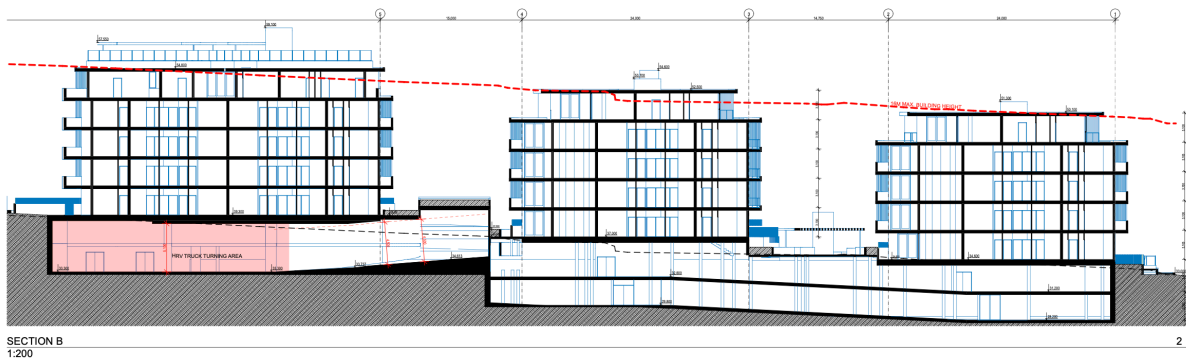
Extract of 3D Height Plane 1 – North East View



Extract of 3D Height Plane 2 – South West View



## Section Extract B



## Relevant Case Law

There are a number of recent Land and Environment Court cases 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 recent 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.

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 keys 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 consistency with the R3 zoning;
- 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.

## The Variation & Design Response

Clause 4.3 of Appendix 7 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006 stipulates a maximum building height of 16m for the subject site.

The 3d Height Diagram identifies that the maximum roof encroachment is 1.5m and the maximum lift-overrun encroachment is 4.7m, however the average lift-over run encroachment excluding Building C which is to accommodate a rooftop communal open space and as such is required a higher lift overrun is approximately 1.13m. There is also an area of habitable space over the height limit of 1.4m to Building B and 1.5m to Building C.

A breakdown of the height encroachment per building is provided below for an understanding of the proposal noting the highest breach is associated with Building C because this building accommodates the rooftop common open space.

| Building   | Roof Encroachment                                     | Lift Overrun Encroachment | Departure |
|------------|---|---------------------------|-----------|
| Building A | 0.5m  | 1.3m                      | 8.1%      |
| Building B | 1.4m to Roof + Area of habitable floor space of 600mm | 1.3m                      | 8.1%      |
| Building C | 1.5m + Area of habitable floor space of 700mm         | 4.7m                      | 29.3%     |
| Building D | 0.7m  | 1.0m                      | 6.2%      |
| Building E | 0.5m  | 1.1m                      | 6.8%      |
| Building F | 0.6m  | 1.1m                      | 6.8%      |
| Building G | 0.8m  | 1.0m                      | 6.2%      |

The areas of departure result in a preferred planning outcome as compared to strict compliance noting the following:

- The proposal adopts a series of five (5) storey buildings and the 16m height control is regularly applied as a 5 storey height limit and the prior DA for the site also breaches the height standard by a similar margin noting the planning controls remain the same for the site as were applied to the prior DA approval on the land.
- The roof slab exceedances and habitable floor space areas could be removed by 'sinking' the buildings down into the site rather than having a ground floor that matches or sits higher than the street level- which is desirable to achieve vs strict compliance that would 'cut in' a number of the buildings further for the sake of strict compliance.

- The development is designed to enable the entry of the very large waste vehicles that necessitates a larger opening through the basement ramp to meet Councils waste requirements.
- The roof structure associated with the rooftop communal open space associated with Building C could be removed but would remove shade and amenity to future residents.
- The lift over-run to the rooftop communal open space associated with Building C could be reduced but it eliminates the ability to access the rooftop for all persons. This could be replaced with only a stair access provided with a platform lift which would eliminate this departure however this would lead to an inferior access arrangement to the rooftop common open space than that currently proposed. It would erode ease of access to the space noting the rooftop communal open space is a preferred planning outcome to enable high quality communal open space areas that receive excellent solar access and a series of functional and useable spaces for residents. The provision of lift access to this area is fundamental to ensuring suitable access to the space by all residents.

It is also noted that the extent of departure is minor in the context of the broader development and they are limited when considering the surface area of the roof.

## Address of Clause 4.6 Provisions

A detailed discussion against the relevant provisions of Clause 4.6 are 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 are addressed individually in the following pages.

### Clause 4.6(3)- Compliance Unreasonable and Unnecessary

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as:

- The underlying objectives of the control are achieved.

In addition, it is noted that the 16m numerical requirement has been regularly applied as a 5 storey maximum height control. This sets the desired future character for development in the R3 zone in the immediate locality, and this development is a 5 storey built form consistent with the desired future character. It is also consistent with the height in storeys of the prior approval on the site.

### ***Underlying Objectives are Satisfied***

In *Wehbe v Pittwater* it was set out that compliance can be considered unreasonable or unnecessary where:

*(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard*

It is considered that this approach can be followed in this instance. The objectives of the Height development standard are stated as:

- (a) to establish the maximum height of buildings for development on land within the Alex Avenue and Riverstone Precincts,*
- (b) to protect the amenity of adjoining development and land in terms of solar access to building and open space,*
- (c) to facilitate higher density development in and around the local centre, the neighbourhood centres and major transport routes while minimising impact on adjacent residential commercial and open space areas,*
- (d) to provide for a range of building heights in approximately locations that provide a high quality urban form.*

The proposal, despite the numerical non-compliance identified, remains consistent with the objectives based on the following:

- Objective (a) is explanatory in what is sought to be achieved by the numerical standard. The proposal provides an appropriate building form that is consistent with the desired future character of the locality and is reflective of the objectives for the zone and locality generally. The proposal is consistent with the intended maximum height limit for the locality, being 5 storeys;
- At the outset the variation is minor, to the extent that the non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties- noting the recessed nature of the roof structure associated with the rooftop communal open space associated with Building C and lift over-run elements which are also recessed centrally to the site.

- All habitable spaces, other than for a minor part of Building B and C where the topography falls away, are contained below the prescribed maximum building height which indicated that the encroachment is not simply a means of achieving additional development yield on the site, but a by-product of the design scheme addressing the site's topography by providing a built form that is to follow the natural contours of the site, with the lift cores being essential requirement to service the buildings. The extent of the minor non-compliance associated with the rooftop communal open space associated with Building C could be reduced by the removal; however, this would be a poorer design outcome with the removal of shade elements to the communal area, access via lift to the rooftop, and the architectural treatment of the frame element.
- The development is consistent with the intent of the maximum height control and will present a series of 7 contemporary buildings that appropriately addresses the surrounding public roads and public spaces and the height departure does not result in adverse visual impacts owing to the recessed nature of those elements that exceed the height limit and the 5 storey built form which is consistent with the intended built form character. In addition the breach of the height standard does not impact on the amenity of adjoining development and land in terms of solar access to buildings and open space as after the development of planned road it will reside within its own island.
- In relation to objective (b) the additional overshadowing that results from the height non-compliance is limited owing to the size of the lot and after planned road networks are built will reside within its own island and also that the minor extent of the height breach.
- In relation to objective (c) the proposal is for a form of high density development permitted in the R3 zone and the site is in proximity to the local centre which is immediately to the west of the site and Schofields Railway Station is 500m to the west of the development site. Hence the proposed density outcome is suitable given the proximity to public transport and the Schofields Local Centre.
- In relation to objective (d) the proposal adopts a five (5) storey building height consistent with the desired building height associated with the 16m height limit and the proposal contributes to a range of building heights and the height breach does not materially change the contribution to the desired building heights for the site. The building height, and the breach to the height, facilitates a high quality urban form through adoption of suitable finished levels at the ground plane that interface well with the public domain to maximise amenity and provide a suitable urban design response to the site.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable.



### ***Sufficient Environmental Planning Grounds & Design Response***

The points in the following page demonstrate suitable environmental planning grounds exist to justify contravening the height development standard and further demonstrates that the height departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- At the outset the variation is minor, to the extent that the non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties.
- The roof slab elements and part of the habitable area to Building B and C exceed because of the cross-fall of the land and the desire to provide a suitable level of address to the ground floor public domain areas and street frontages, rather than 'cutting in' the building to achieve strict compliance with the 16m height control for the 5 storeys buildings. It is noted that the 16m height standard has been regularly applied as a 5 storey height limit and hence the height in storeys is appropriate and the breach of the height reflects the desire to provide a suitable design response on the land. A reduction in height could be achieved by 'cutting in' the buildings however this would be a poor design response and lead to poor amenity outcomes to the ground floor units.
- The lift over-run and fire-stair exceedance arises from the need to provide lift access to all levels of the building and these are necessary for accessibility and to meet BCA standards for fire egress.
- The lift over-run to Building C also breaches the height limit to the rooftop communal open space- in addition to the pergolas designed to provide shade and is a preferred outcome. The reason for this is that the provision of communal open space at the roof level provides good amenity for occupants of the building and there is limited ground floor communal open space available because of the need to provide garbage collection from the basement which creates a very long and driveway ramp that precludes quality communal open space at the ground floor of Building C.

In relation to Building C the extent of the minor non-compliance could be reduced by the removal of communal rooftop communal open space associated with Building C; however, this would be a poorer design outcome through removal of shade elements to the communal rooftop area, reduced accessibility if the lift did not continue to the rooftop. It is noted that the rooftop communal open space areas are high quality and well-designed spaces with good solar access and the provision of lift access increases the useability and functionality of the space for residents.

- Accordingly the minor departure enables a better design outcome, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

*(g) to promote good design and amenity of the built environment,*

Therefore, the current proposal is a preferred outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design response on the site which demonstrates sufficient environmental planning grounds to support the departure.

#### Clause 4.6(4) Zone Objectives & The Public Interest

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) for the reasons set out previously.

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the R3 zone, being:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.*

Consistency with the objectives is evident as –

- The proposal contributes to the creation of housing supply that will serve the communities demand for apartments within a medium density residential environment and the proposal will provide a variety of apartment types.
- The proposal complements and enhances the existing and future local streetscape by virtue of the careful siting of the development, ground floor presentation and the landscape embellishment work within the sites setbacks.
- The design concept recognises the key site attributes and provides for an attractive built form that relates to the existing and future site context.
- The development provides for the delivery of a variety of housing types in a high density residential environment. The development also provides for a high level of residential amenity, provides for additional housing to contribute to housing supply and affordability and reflects the desired future character and dwelling densities of the area.

On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the building height standard, and the objectives of the R3 zone and the numerical departure from the building height control facilitates a better design outcome on the site.

#### **Clause 4.6(5)**

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and the nature and height of approved developments in the locality.

#### **Conclusion**

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.