



Mixed Use / Residential Development
588-592 Princes Highway Rockdale
Revised Clause 4.6 Request

Prepared on behalf of Moweno Pty Ltd
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COVER

Proposed development viewed from Princes Highway.

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1 Introduction

This report has been prepared to supplement the Statement of Environmental Effects (SEE) for the proposed mixed use residential development at 588-592 Princes Highway Rockdale, to request a variation to the height of building development standard under Clause 4.6 of Rockdale Local Environmental Plan 2011 (RLEP).

The proposed variation will enable the re-massing of the development of the site in accordance with design excellence considerations, to facilitate a planning agreement to dedicate the local road reservation to widen Lister Avenue to Council free-of-cost.

1.1 DEVELOPMENT OVERVIEW

The proposed development comprises of a 12 and 10 storey mixed use residential flat building containing a podium accommodating 408 m2 ground floor commercial premises with 101 apartments above and serviced by 4 levels of basement. It also includes the dedication of a local road reservation to widen Lister Avenue to improve pedestrian movements.

Acceptable re-massing of gross floor area (GFA) to enable the dedication of local road reservations by way of a planning agreement is in keeping with established planning mechanisms to facilitate public land acquisitions as part of precinct urban rejuvenation schemes.

These approaches to secure public benefits reflects the mechanism available within the Rockdale LEP under clause 4.6(8)(ca) which allows requests for height variations *“for a demonstrable public benefit, such as the provision of pedestrian links”* that assists Council to achieve improvements to the Rockdale town centre’s public domain network.

Achieving the public benefit is also dependent on achieving an appropriate planning and design outcome from the development in consideration of the planning and physical context of the site, which is demonstrated in this request.

Further details of the development proposal and site context are contained within the SEE and accompanying documentation.

1.2 LEGAL FRAMEWORK

This request has been prepared under Clause 4.6 of RLEP 2011 to justify the departure from the development standard for height of building within clause 4.3 of RLEP.

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 request is required under clause 4.6(4) to adequately address the matters required to be demonstrated by clause 4.6(3) which are:

- (a) that compliance with the development standards is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standards.*

As detailed further below, under clause 4.6(8)(ca), a variation of the height of building development is not available to the consent authority “*unless it is for a demonstrable public benefit, such as the provision of pedestrian links*”.

This report aims to satisfy the requirements of clause 4.6 having regard to the provisions of RLEP 2011 and current Case Law as summarised below.

Case law (*Winten V North Sydney Council*, *Wehbe V Pittwater*, *Four2five V Ashfield Council*) provides guidance when considering an exception to development standards as follows:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
 - *Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives.*
 - *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
 - *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
 - *Has Council by its own actions, abandoned the development standard.*
- Is compliance with the development standard consistent with the aims of Cl 4.6?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
- Are there sufficient environmental planning grounds (specific to the site and particular to the circumstances of the proposed development) to justify contravening the development standard?

- Is the objection well founded whereby Preston J provided five potential ways in which this may be established (*Wehbe V Pittwater Council (2007) NSW LEC 827*) of which the following is relevant in this case:
 - *the objectives of the development standard are achieved notwithstanding non-compliance with the standard*

Recent case law (*Micaul Holdings v Randwick City Council, Moskovich v Waverley Council and Initial Action Pty Ltd v Woollahra Municipal Council*) has also established that:

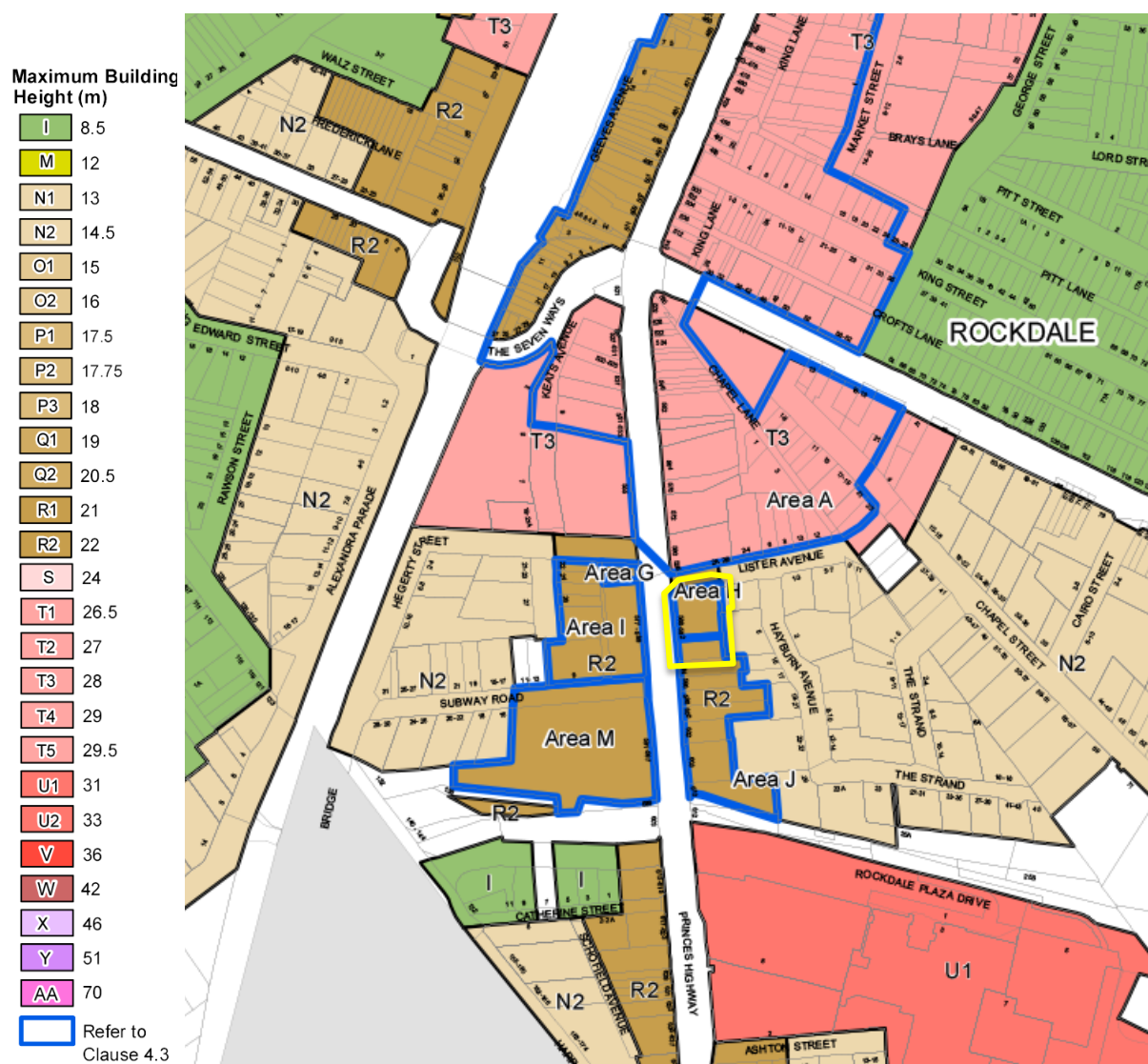
- the written request has to adequately address everything necessary in clause 4.6(3), rather than the consent authority being “satisfied directly”;
- the consent authority must be personally satisfied that development will be “consistent with” the objectives of the zone and the development standard;
- being “consistent with” these objectives is not a requirement to “achieve” them but that development be “compatible” with them or “capable of existing together in harmony”;
- establishing that “compliance with the standard is unreasonable or unnecessary” does not always require that the objectives of the standard are achieved but also that it may not be achieved or would be thwarted by a complying development;
- clarification that while it may be desirable, it is not a requirement to achieve a better environmental planning outcome than a development that complies with the development standard in *Initial Action Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*.

2 Proposed Variation

2.1 HEIGHT OF BUILDING DEVELOPMENT STANDARD

The site remains subject to the Rockdale Local Environmental Plan 2011 (RLEP 2011) despite being repealed, pursuant to clause 1.8A of the Bayside Local Environmental Plan 2021.

The subject land is identified as R2 on the RLEP 2011 *Height of Buildings Map* which permits a building height of 22m.



Extract of RLEP 2011 height of Buildings Map with subject land circled in yellow.

The *Height of Buildings Map* also indicates the land being partly within 'Area H' for the former Lot 1 DP 840863 and partly within 'Area J' for the former Lot 11 DP590046 for which clause 4.3 (2A) applies as follows.

(2A) *Despite subclause (2), the height of a building may exceed the maximum height shown for the land on the Height of Buildings Map by an additional:*

- (g) *12 metres—if the building is in Area H identified on the Height of Buildings Map and on a lot having an area of at least 2,000 square metres.*
- (i) *9 metres—if the building is in Area J identified on the Height of Buildings Map and on a lot having an area of at least 2,000 square metres.*

Since the lot size is greater than 2,000m², the respective height of building standards for the site are 34m on the former Lot 1 area (Area H) and 31m on the former Lot 11 area (Area J).

Clause 4.6(8) precludes its use when clause 4.3 (2A) has been applied “*unless it is for a demonstrable public benefit, such as the provision of pedestrian links*”.

As previously advised by Council, the dedication free of cost to Council of land within the site reserved for road widening to permit a proper pedestrian link on Lister Avenue is considered to be a demonstrable public benefit and therefore, the clause may be applied in the circumstance.

2.2 NATURE OF THE CONTRAVENTION

An offer to enter a Planning Agreement now accepted by Council accompanies the development application and undertakes to dedicate the 88m² local road widening reservation on the site’s Lister Avenue frontage free of cost to Council.

The ability to dedicate the road widening is dependent on the proper determination of a development application that facilitates the transfer of gross floor area (GFA) that would be permitted on the reservation land should it not be reserved, onto another part of the site.

In turn, the transfer of gross floor area is dependent on a well-founded variation of the building height controls, enabled by the provision of a public benefit under clause 4.6(8)(ca), and justified on planning, urban design and architectural terms in meeting the objects of the clause.

Quantification of the appropriate amount of GFA required to be transferred in the absence of floor space ratio controls has been advised by Council as 823 m² which it derived by comparing the ADG and DCP ‘compliant’ development potential of the site with and without the affectation of the road reservation so as to represent ‘before and after scenarios’.

As outlined in the SEE and the Design Statement by MAKO Architects, the development has also adopted a ‘tower and tail’ design strategy from remassing GFA derived from the DCP setback and LEP height controls, and which has

generally been endorsed by the Design Excellence Jury and Panel as well as Council officers in consultation.

In order to realise the re-massing strategy to achieve the 'tower and tail' form:

- the compensatory GFA of 823 m² calculated by Council for the road dedication is firstly transferred to form the tower element at the corner; and
- the setbacks and building heights have then been 'pushed and pulled' without increasing the GFA that would be permitted if the setbacks and building height complied with the development controls.

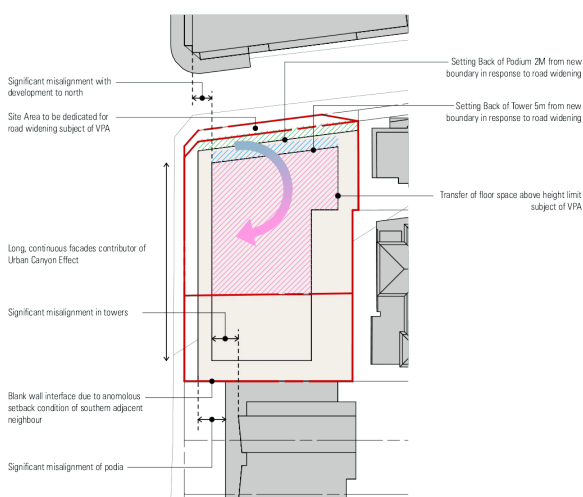
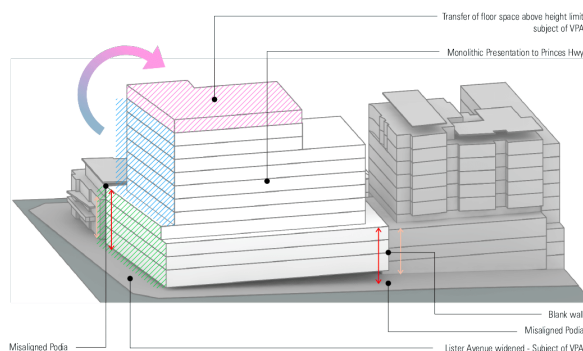
A detailed explanation of the re-massing is provided in the architectural plan 1724 – DA2 0002 which also shows that no GFA advantage is achieved through the process.

Effect of Road Widening + Compliance

The VPA sets out transfer of yield lost from road widening to floor space above height limit at Northern portion of site.

Adopting Rockdale Town Centre setbacks (DCP 2011 Arterial Edge and Local Edge conditions) setbacks and LEP Height limits (34m and 31m) results in a form which interfaces unsympathetically with existing and approved adjacent development.

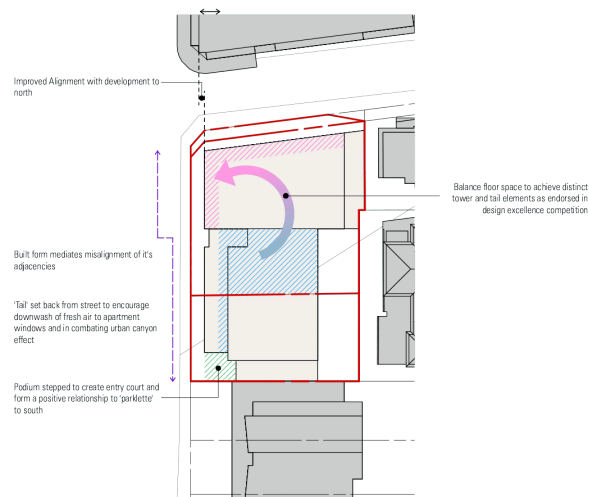
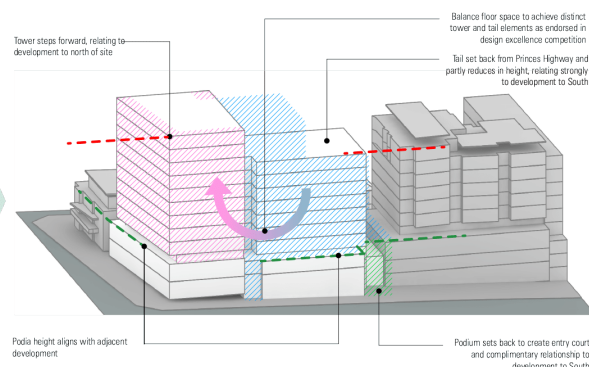
Envelope Area = 13,596sqm Approx GFA = 9,795sqm



'Tower and Tail'

The Tower and Tail form proposal was endorsed by jurors of the design excellence competition as the key formal response to the site. The approach has been adopted by transferring and balancing envelope mass and enhanced further by:
1) sympathetically adjoining approved development to south in which anomalous setbacks have been proposed;
2) relating more directly to Northern adjacent development; and
3) ensuring podia heights are consistent with adjoining datum.

Envelope Area = 12,649sqm (7% reduction) Approx GFA = 9,112sqm



Extract of 'Built Form Development' Plan 1724 – DA2 0002. MAKO Architects

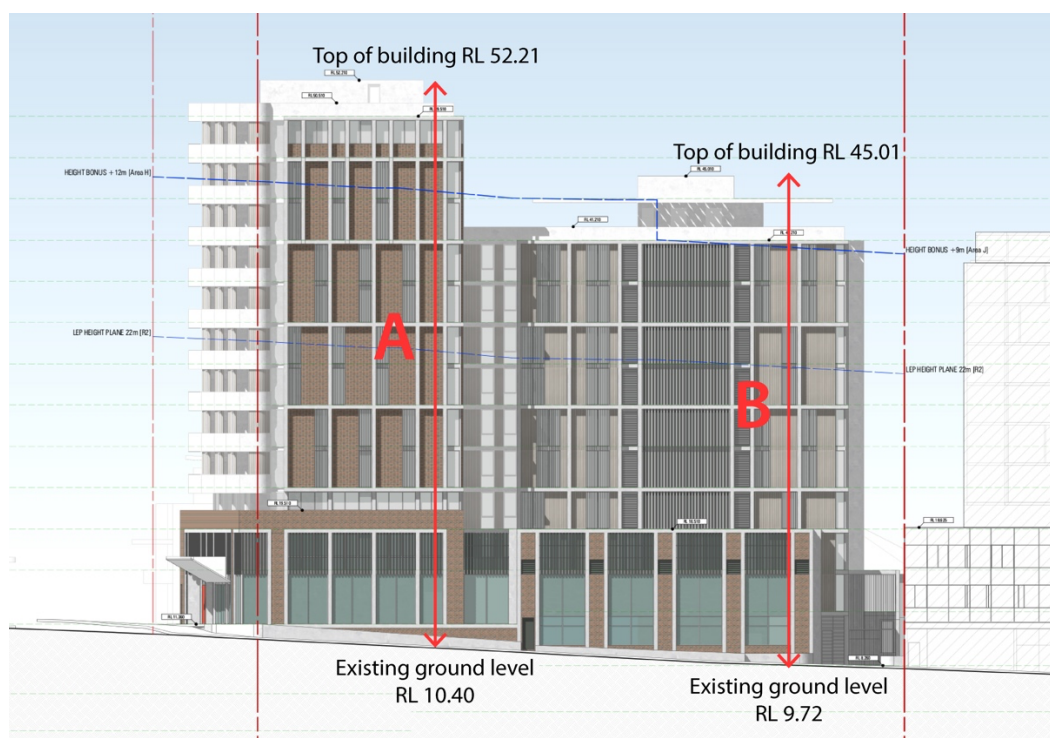
2.3 DETAIL OF PROPOSED VARIATION

The non-compliance is the result of two separate aspects of the proposed re-massing as reflected in design excellence considerations:

- the transfer of the GFA from the road dedication to form the tower element and which is the primary variation; and
- the transfer of GFA to complete the tower and form a slender 'tail' to the building distinct from the tower element to reduce overall perception of building mass.

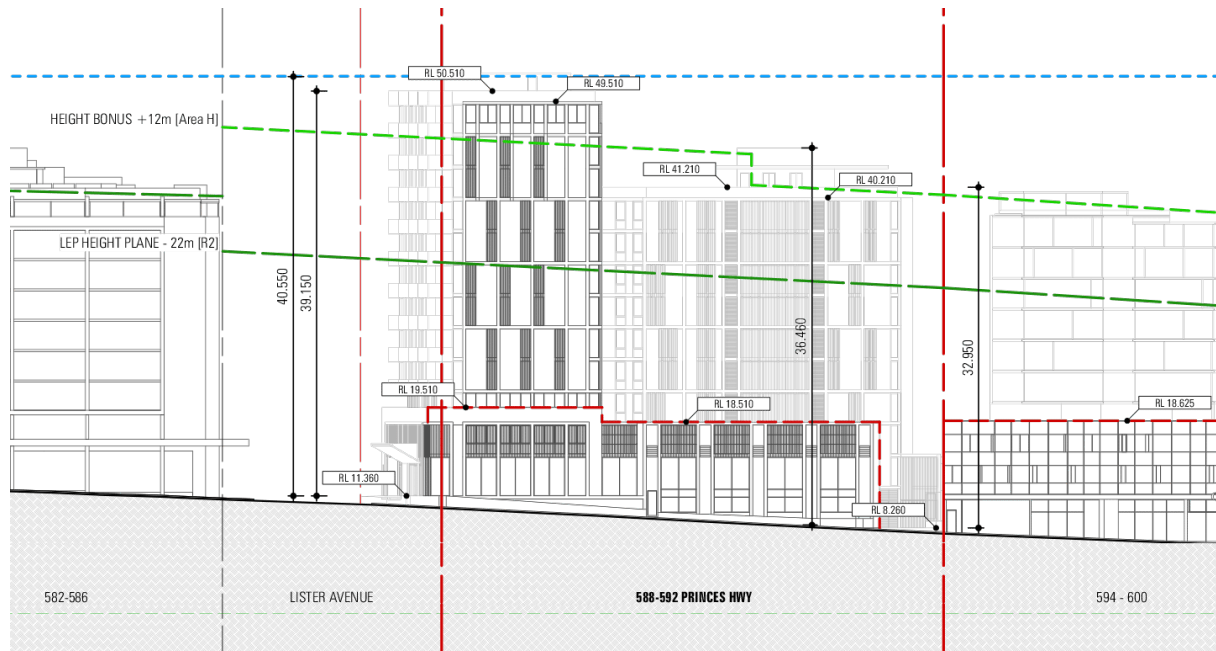
The proposed maximum building height of the tower element to the top of the lift overrun at its highest point above existing ground level (shown 'A' on the elevation extract below) is approximately 41.8m (RL 52.21 m). This exceeds the 34m maximum building height under RLEP 2011 by 7.81m at its greatest extent, representing a variation of exceeding 20% above the development standard but which is limited to a floorplate size that is a quarter of the site area and containing only one complete additional residential floor.

The proposed maximum building height of the tail element to the top of roof facilities shown 'B' on the elevation extract, is 35.29m (RL 45.01 m). This exceeds the 31m maximum building height by 4.29 m, representing a variation of 13% above the development standard but which contains only a notional amount of GFA, which is more than balanced by the part of the building under the height limit that could be used for a residential floor.



Above: Princes Hwy elevation extract showing maximum height of buildings.

It should be noted that the site is subject to varying slopes and as a consequence, the building height plane is variable and the height standard lines shown on elevations may be misleading. An 'averaged' view of the permitted height plan is best shown on the Streetscape Elevation Plan DA2 - 4002.



Extract of plan DA2 4005 showing maximum height contraventions (MAKO Architecture)

Clause 4.6 (8) precludes the use of the clause when clause 4.3 (2A) has been applied “*unless it is for a demonstrable public benefit, such as the provision of pedestrian links*”. The dedication free of cost to Council of land reserved for road widening to permit a proper pedestrian link on Lister Avenue is considered to be a demonstrable public benefit and therefore, the clause may be applied in the circumstance.

3 Clause 4.6 Assessment

3.1 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD?

The planning controls in Clause 4.3 relating to maximum building height is a development standard under the definition within the *Environmental Planning and Assessment Act 1979* as follows (*EP&A Act, Part 1 Section 4. Definitions*)

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including,

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point ...*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

3.2 ASSESSMENT AGAINST THE PURPOSE/OBJECT OF THE STANDARD

The objectives of the Height of Building (HOB) development standard are as follows:

- (a) *to establish the maximum limit within which buildings can be designed and floor space can be achieved,*
- (b) *to permit building heights that encourage high quality urban form,*
- (c) *to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,*
- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The relevant objectives of the building height standard to “encourage high quality urban form” and “provide an appropriate transition in built form and land use intensity” are directly and adequately addressed in the response to the relevant Principles of State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development (SEPP 65) by Mako Architects as follows.

Context and Neighbourhood Character

The scheme is principally a response to context. It is derived by contributing to more comfortable and healthy public domain and a legible future character.

Primary issues addressed are as follows:

1. *Greater building articulation and setbacks to assist the avoidance of ‘Urban Canyon Effect’ on Princes Highway*

2. *Acknowledging road widening of Lister Avenue to create a more comfortable precinct for active frontages directly adjacent to Princes Highway*
3. *Specific augmentations of podium setbacks and height to relate more sympathetically with existing/proposed adjacent development*

Built Form and Scale

The built form strategy reacts positively to the site and surroundings by;

1. *Presenting as a prominent corner, marking the transition from the 'green gateway' to the Rockdale Central Business District;*
2. *Splitting an otherwise bulky form into 'prominent tower' and 'recessive tail' elements, enhancing sense of proportion and relief; and*
3. *Incorporating of a significant setback to the 'tail' element, contribute to the air quality of Princess Highway by encouraging fresh air flow and avoiding 'Urban Canyon Effect'. The street wall is held and reinforced by a commercial podium and highly articulated, civic scaled acoustic screen harbouring podium level terraced gardens.*

Aesthetics

The proposal's aesthetic proposition is that the mass of the building is broken into three main, contrasting elements which come together as a cohesive composition, these being:

1. *The podium facade takes on the role of acoustic barrier and formal base. It protects the lower west facing apartments from road noise and captures fresh air downwash. The angled soffit of the southern podium and angled awning of the northern podium hint at spaces within the building and form civic scaled gestures.*

The podium's brickwork facade with concrete articulation loosely refers to remnant and disenfranchised interwar brick buildings interspersed along Princes Highway. Infill glazing takes on the 'zig zag' profile often used to graphically convey noise and consequently benefits occupants by naturally dispersing sound and avoiding privacy breach via reflection during the night time. The alignment and height of podium expression mediates the convoluted context including awkward setback of the neighbouring building to the south as well as the dramatic shift in scale to the east.

2. *The northern 'tower' element is intentionally prominent. Balconies to the north are wavering and horizontal to maximise oblique views and solar penetration, whereas, the western facade is defensive and rectilinear, cutting down noise and heat gain from this orientation.*

Materials include brick facings smooth concrete and finely ribbed concrete. The concrete is proposed to be finished with extremely low sheen mineral stains, which give the impression of natural, deep and varied off form finish without the batching and damage risk associated with unfinished off-form concrete, nor the maintenance risk and 'flattening' effect of acrylic paint.

3. *The southern 'tail' element sets back significantly, formally recessing and echoing the defensive infilled grid treatment of the tower*

As an overall composition, the proud tower and recessive tail have the effect of animating built form into smaller, more dynamic components.

Therefore, the proposed variation to the height control is consistent with the objectives of the development standard as the proposed development represents a high quality urban form which has been subjected to design excellence processes and maintains floor space that would apply to the site if it were not affected by a road widening reservation.

The adopted building heights will be consistent with the pattern of heights being applied to the Rockdale town centre that then stepdown southwards along Princes Highway, thereby maintaining an appropriate transition in built form and land use intensity adopted in the LEP.

The proposed building height will not undermine the achievement and maintenance of a satisfactory sky exposure and daylight to surrounding buildings and the public domain as shown in the shadow and sunlight analysis drawings while there are no identified key areas within the locality that could be affected.

Accordingly, it is considered that the proposed building heights are consistent with the desired future character of the Rockdale and satisfies the objectives of the height standard.

3.3 IS COMPLIANCE CONSISTENT WITH THE REQUIREMENTS OF CL 4.6?

The aims 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 HOB development standard has been adopted to implement the planning aim of the applicable the B4 Mixed Use zone objectives:

- *To provide a mixture of compatible land uses.*

- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

The proposed development will facilitate development informed by design excellence processes, as well as a needed road widening for pedestrian use, that is consistent with the zone objectives in allowing suitable mixed use development “*in accessible locations so as to maximise public transport patronage and encourage walking and cycling*”.

The zone objectives anticipate development of an intensity as proposed to best utilise its close proximity to public transport infrastructure and general services and facilities, in an urban form derived from design excellence processes. Accordingly, the resultant variation is for the purpose of implementing the zone objectives and is not incompatible with them.

Accommodating the transfer of GFA from the road reservation while achieving design excellence enables it to be dedicated to the Council without cost to the community while appropriately preserving the density of the site that would otherwise be available for housing and business in a highly accessible location.

The proposed development is therefore a case where flexibility in the application of the development standards is justified in order to achieve public benefits while implementing the objectives and intent of RLEP and remain consistent with the overarching urban design strategy for Rockdale town centre and the achievement of design excellence.

3.4 IS COMPLIANCE UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES?

Strict compliance with Clause 4.3 of the RLEP 2011 is considered unreasonable and unnecessary in the circumstances of the case especially as the development proposal has been informed by design excellence processes which confirmed the appropriateness of the re-massing design strategy in response to site conditions and context in achieving a public benefit.

Compliance with the building height standard would preclude the implementation a well-considered and supported design strategy, and deny the achievement of a significant public benefit of the dedication of land for a needed improvement to the public domain free of cost to the community.

Therefore, compliance would

- impede the achieving of a better planning, design and public benefit outcomes;

- unnecessarily defeat the objectives for the zone and the building height development standard; and
- needlessly reduce the capacity to help meet local needs for ideally located housing and employment as well the metropolitan planning objectives in supporting town centres and sustainably managing travel demand.

As demonstrated in the Statement of Environmental Effects, the development as proposed has limited additional potential adverse effects and given its demonstrated design appropriateness and public benefits, it is considered that strict compliance with the building height development standard would be unreasonable and unnecessary in the circumstance.

3.5 ARE THERE SUFFICIENT GROUNDS TO JUSTIFY CONTRAVENTION?

As discussed in Section 3.2 above, the contravention to the height of building standard is justified firstly in properly addressing its objectives as well as the Principles of SEPP 65 informed by design excellence processes.

As discussed in Section 2.2 and outlined in the SEE and the Design Statement by MAKO Architects, the development has adopted a ‘tower and tail’ design strategy from re-massing GFA derived from the DCP setback and LEP height controls, and which has generally been endorsed by design excellence processes.

In order to realise the re-massing strategy to achieve the ‘tower and tail’ form:

- the compensatory GFA of 823 m² calculated by Council for the road dedication is firstly transferred to help form the tower element at the corner; and
- the setbacks and building heights have then been ‘pushed and pulled’ without increasing the GFA that would be permitted if the setbacks and building height complied with the development controls.

(A detailed explanation of the re-massing is provided in the architectural plan 1724 – DA2 0002 which also shows that no GFA advantage is achieved through the process.)

Two distinguishable building elements are thereby created that reduce the potential adverse visual effects of an overly solid mass that would otherwise be permitted under the development controls.

Given that the proposed height variations allow for a significant public benefit simultaneously with an improved urban design outcome, it is considered that there are sufficient planning, design and public benefit grounds to justify the contravention of the building height standard in the circumstance.

3.6 IS THE REQUEST WELL FOUNDED?

The request is considered to be well founded in accordance with Court guidance in that the objectives of the building height standard are achieved notwithstanding the non-compliance, and that the underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore, compliance would be unreasonable.

In particular, the relevant objectives of the building height standard to “encourage high quality urban form” and “provide an appropriate transition in built form and land use intensity” are directly and adequately addressed in the response to the SEPP 65 Principles by Mako Architects in regard to Context and Neighbourhood Character, Built Form and Scale, and Aesthetics (refer to 3.2 above).

The acceptance of the offer to enter a planning agreement to dedicate the Lister Avenue local road reservation affecting the site, free of cost to Council, meets the requirement for the use of RLEP clause 4.6 under subclause (8)(ca) which is prohibited “*unless It is for a demonstrable public benefit, such as the provision of pedestrian links*”.

The underlying object and purpose of the building height standard applying to the site is achieved when considering that development as proposed will:

- implement an architectural scheme informed by design excellence processes while simultaneously allowing a local road reservation to be dedicated to Council free of cost to the community;
- provide for a high quality development with a density anticipated in the planning controls that is appropriate in a highly accessible and well serviced location;
- be compatible with adjoining built forms while preserving an appropriate transition in built form and land use intensity from the Rockdale town centre southerly along the Princes Highway;
- implement the principles of SEPP 65 and satisfy the provisions of the ADG;
- be acceptable and consistent with the characteristics of the site and the expectation for the zone, urban design and building heights for the Rockdale town centre and site as confirmed by the design excellence process;
- not result in a significant increase in potentially adverse impacts;
- achieve better planning, design and public benefit outcomes while satisfying the objectives for the zone and development standard; and
- maintain the capacity of the site to help meet local needs for suitable housing and employment as well the metropolitan planning objectives in supporting town centres and sustainably managing travel demand in general.

3.7 CONCLUSION

Having regard to the above, it is concluded that the proposed contraventions of the height of building standard is consistent with, and does not undermine or frustrate its underlying objectives.

The contravention does not give rise to any significant adverse environmental impacts but provides for an enhanced development outcome with substantive public benefits informed by design excellence processes while compliance with the standard would result in a diminished urban outcome.

It is considered that the request is well-founded and consistent with clause 4.6; that strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances of the case; and that there are sufficient environmental planning grounds to justify contravening the development standard .

It is further considered for the purposes of RLEP clause 4.6(4) that this written request has adequately addressed the matters required to be demonstrated by subclause (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height standard and the objectives for development within the zone in which the development is proposed to be carried out while securing a tangible public benefit.

Accordingly, it is concluded that the proposed contravention of the building height development standard as requested should be supported by the consent authority.