Clause 4.6 variation request –Exception to Development Standards in relation to Clause 4.3(2) Height of buildings, of the Hornsby Local Environmental Plan 2013.

Height of Buildings

1.0 Introduction

This clause 4.6 variation request has been prepared having regard to the NSW Land and Environment Court and NSW Court of Appeal judgments in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Hornsby Local Environmental Plan 2013 (HLEP)

2.1 Clause 4.3(2) - Height of buildings

Pursuant to Clause 4.3(2) HLEP 2013:

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

A maximum building height of 8.5m applies in accordance with Clause 4.3(2) as shown on the Height of Buildings Map in the HLEP.

Also of relevance are the following standard definitions:

> ***building height*** *(or* ***height of building****) means—*
>
> *(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
>
> *(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
>
> *including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

The objective of this control is:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

Details of the non-compliance

A maximum building height of 8.5m applies in accordance with Clause 4.3(2).

The proposed development is approximately 12.5m high to the parapet line (RL 191.1) and approximately 14.5m to the top of the rooftop plant screen (RL 192.75). The height of the proposal is designed to be consistent with the neighbouring Rosewood Centre, with the respective parapet heights closely aligned with no discernible difference when viewed from the ground.

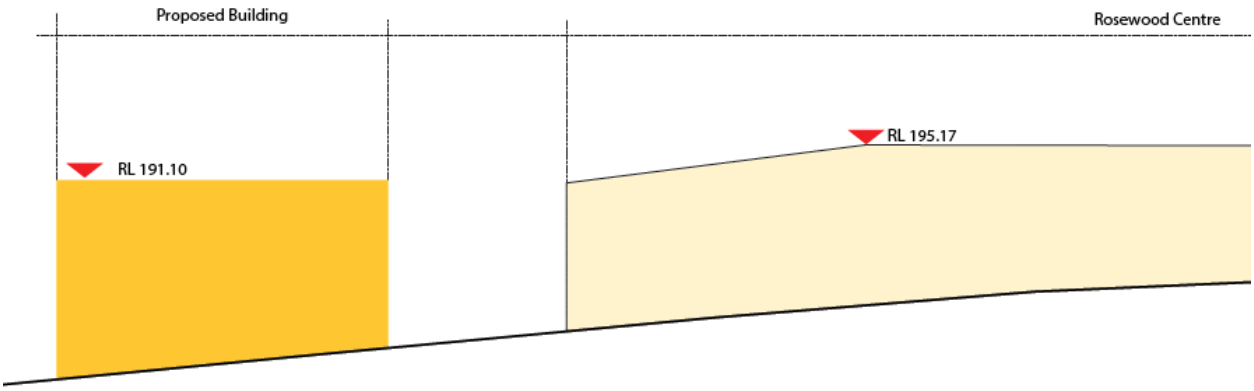

Figure 1. Section diagram showing the relationship between the proposed development and the Rosewood Centre (source: page 13, Design Report, Architectus)

Figure 1 above shows that the maximum RL of the parapet of the proposed development is RL191.1, approximately 4m lower than the maximum height of the Rosewood Centre at RL 195.17.

The proposal will exceed the 8.5m building height standard by approximately 4m (where the building height is measured to the roof) and 5.5m (to the rooftop plant screen). The maximum building height will therefore be 14.5m, however, the majority of the proposed development will have a building height of approximately 12.5m representing a 47% departure as depicted in Figure 2 below.

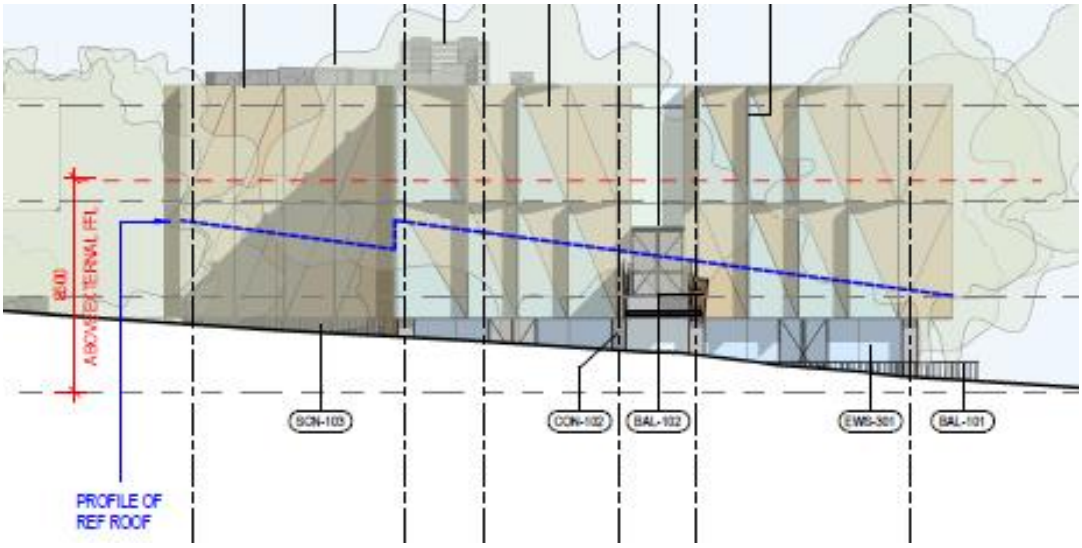

Figure 2. North elevation showing 8.5m building height (dotted red line) (source: Architectus).

The 8.5m development standard, adopted for the Hornsby R2 zone, reflects the building height typically applied to low density residential development and is not appropriate to an institutional building within a large campus setting.

The scale of buildings across the campus varies considerably from 1 – 5 storeys and the proposed 3-storey maths and student Hub is designed to be consistent with the institutional scale of the educational buildings already constructed around the Avenue.

The Design Statement, prepared by Architectus, at pages 12 and 13, provides a context overview of the site including a comparison of surrounding building heights. Three diagrammatic site sections are provided, comparing the scale of the proposed building with the scale of the educational buildings already constructed around the Avenue. The analysis shows that the proposed development is consistent with the heights of the surrounding buildings, both in terms of maximum RLs and number of storeys.

It is noted that the Education SEPP permits as complying development school buildings up to 22m in height as acceptable building heights for educational establishments (refer to clause 3 of schedule 2 of the Education SEPP) including those in R2 low density residential zones.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of HLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better

environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of HLEP provides:

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

This clause applies to the clause 4.3(2) Height of Buildings Development Standard.

Clause 4.6(3) of HLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development does not comply with the building height provisions at clause 4.3(2) of HLEP which specify a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of HLEP provides:

(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.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3(2) of HLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

   (b) there are sufficient environmental planning grounds to justify contravening the development standard

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the clause 4.3(2) standard and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3(2) of HLEP?

4.0 Request for variation

4.1 Is clause 4.3(2) of HLEP a development standard?

I am of the opinion that the clause 4.3(2) of HLEP height of buildings is a development standard to which clause 4.6 of HLEP applies.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary is set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the building height standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

(a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.

Response:

It is demonstrated that the proposed development is appropriate within its context of a large school campus.

The scale of buildings across the campus varies considerably from 1 – 5 storeys and the proposed 3-storey maths and student Hub is designed to be consistent with the institutional scale of the education buildings already constructed around the Avenue.

The Design Statement, prepared by Architectus, at pages 12 and 13, provides a context overview of the site including a comparison of surrounding building heights. The three diagrammatic site sections provided, compare the scale of the proposed building with the scale of the educational buildings already constructed around the Avenue. The analysis shows that the proposed development is consistent with the heights of the surrounding buildings, both in terms of maximum RLs and number of storeys.

The proposed building height is appropriate to the site constraints and the development potential and infrastructure capacity of the locality. The proposal in fact contributes to the infrastructure capacity by providing an upgrade to the existing school facilities to meet the needs of the school population.

Despite breaching the building height development standard, the central location of the proposed development within the context of the broader school campus, eliminates overshadowing, privacy and visual impacts for the neighbouring properties. The closest residential dwellings are over 160m away.

There are no public views available over the site or adjacent properties that will be impacted by the proposed development.

Accordingly, the consent authority can be satisfied that a view sharing scenario is maintained between adjoining development consistent with the view sharing principles established by the Land and Environment Court in the matter of Tenacity Consulting v Warringah [2004] NSWLEC 140. The proposal is therefore consistent with this objective.

The proposal provides for an appropriate transition between the contemporary design of the Rosewood Centre and the heritage buildings on the school site. The proposed development complements the range and form of buildings within the school campus. The bulk and scale of the proposal is consistent with the desired character of the locality and provides an intensity of development that is commensurate with the existing and planned infrastructure.

The integrated site landscape regime (approved with the ground level Cafeteria development) will soften and screen the building when viewed from within the site. The proposal will have limited visibility from outside the site.

The building height will not give rise to any inappropriate or jarring visual impacts, when compared to the built form characteristics of existing development within the school.

Having considered the characteristics of the school, the following observations are made:

- The sloping topography of the whole school campus ensures the height of the proposed development is consistent with the levels of the heritage buildings to the north, allowing for views to heritage items to be maintained.

- The proposal provides for superior architectural detailing and finishes.

- The proposal is complementary to the architectural diversity of the area with an appropriate scale and massing for an institutional scale building within a large school campus.

- The proposal provides for complementary and compatible building heights and setbacks.

- The building is well modulated with form and scale compatible with the existing topography. There will be no streetscape impacts. The proposal will not be visually dominant when viewed from outside of the site.

- The proposed flat roof form adopts a parapet level consistent with the established height of the Rosewood Centre.

The height, bulk, scale and roof form proposed are entirely consistent with the built form characteristics established by adjoining Rosewood Centre and development generally within the site's visual catchment.

The proposal is consistent with the objective for building height.

The proposed development has been designed to reduce the effects of bulk and scale with the use of highly articulated facades which avoid a bulky appearance. as shown in Figure 3 below.

Figure 3. Western elevation with Rosewood centre to the right (source: Architectus)

The use of elements such as offsets, modulation, landscaping and varied materials and colours, all contribute to minimising building bulk.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

Accordingly, it can be reasonably concluded that the proposal is compatible with its surroundings when viewed from within the site, the public domain and surrounding residential properties. Having regard to the matter of *Veloshin v Randwick City Council [2007] NSWLEC 428* this is not a case where the difference between compliance and non-compliance is the difference between good and bad design.

The Maths and Student Hub is approximately 12.5m high to the parapet line and 14m to the top of the rooftop plant screen. The height of the proposal is designed to be consistent

with the neighboring Rosewood Centre, with the respective parapet heights closely aligned so as not to be discernable from the ground (this is shown in Figure 4 below).

The proposal is consistent with the objective for building height.

Having regard to the above, the non-compliant component of the building (being the upper section of level 3) will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments' consistency with the objectives of the standard, strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of HLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the R2 zone are as follows:

- ***To provide for the housing needs of the community within a low density residential environment.***

  Response: The proposed development is centrally located within the existing school grounds.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

  Response: Educational establishments are a permitted use in the R2 Low Density Residential zone.

  The proposed development improves the provision of facilities and services to meet the day to day needs of the community by improving the amenity of the school and increasing the vitality of the campus.

  The proposal satisfies the objectives for development in the zone.

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the building height development standard has been demonstrated to be is unreasonable and unnecessary.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

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].

Sufficient environmental planning grounds exist to justify the building height variation namely the provision of a three storey building reduces site coverage, increases landscaped area and allows for better efficiencies in building sustainability.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment).*

Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3(2) and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*
>
> *If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As demonstrated in this request, the proposed development is consistent with the objective of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.5 Secretary's concurrence

By Planning Circular PS 20-002, dated 5 May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an independent hearing and assessment panels (IHAP) is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater public scrutiny that the IHAP process and determinations are subject to, compared with decisions made under delegation by Council staff.

As the Capital Investment Value (CIV) of the project exceeds $5M, the Sydney North Planning Panel will be the consent authority rather than the Hornsby Council Local Planning Panel. However, the Secretary's concurrence (pursuant to the circular) still applies as the consent authority is separate to Council and not on behalf of Council.

5.0 Conclusion

Having regard to the clause 4.6 variation provisions, I have formed the considered opinion:

- that the contextually responsive development is consistent with the zone objective, and
- that the contextually responsive development is consistent with the objectives of the building height standard, and
- that there are sufficient environmental planning grounds to justify contravening the development standard, and
- that having regard to the points above, compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case, and
- that given the development's ability to comply with the zone and building height standard objectives, its approval would not be antipathetic to the public interest, and
- that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

> *(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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a building height variation in this instance.

Danielle Deegan
Director
D.M Planning Pty Ltd
6 November 2020