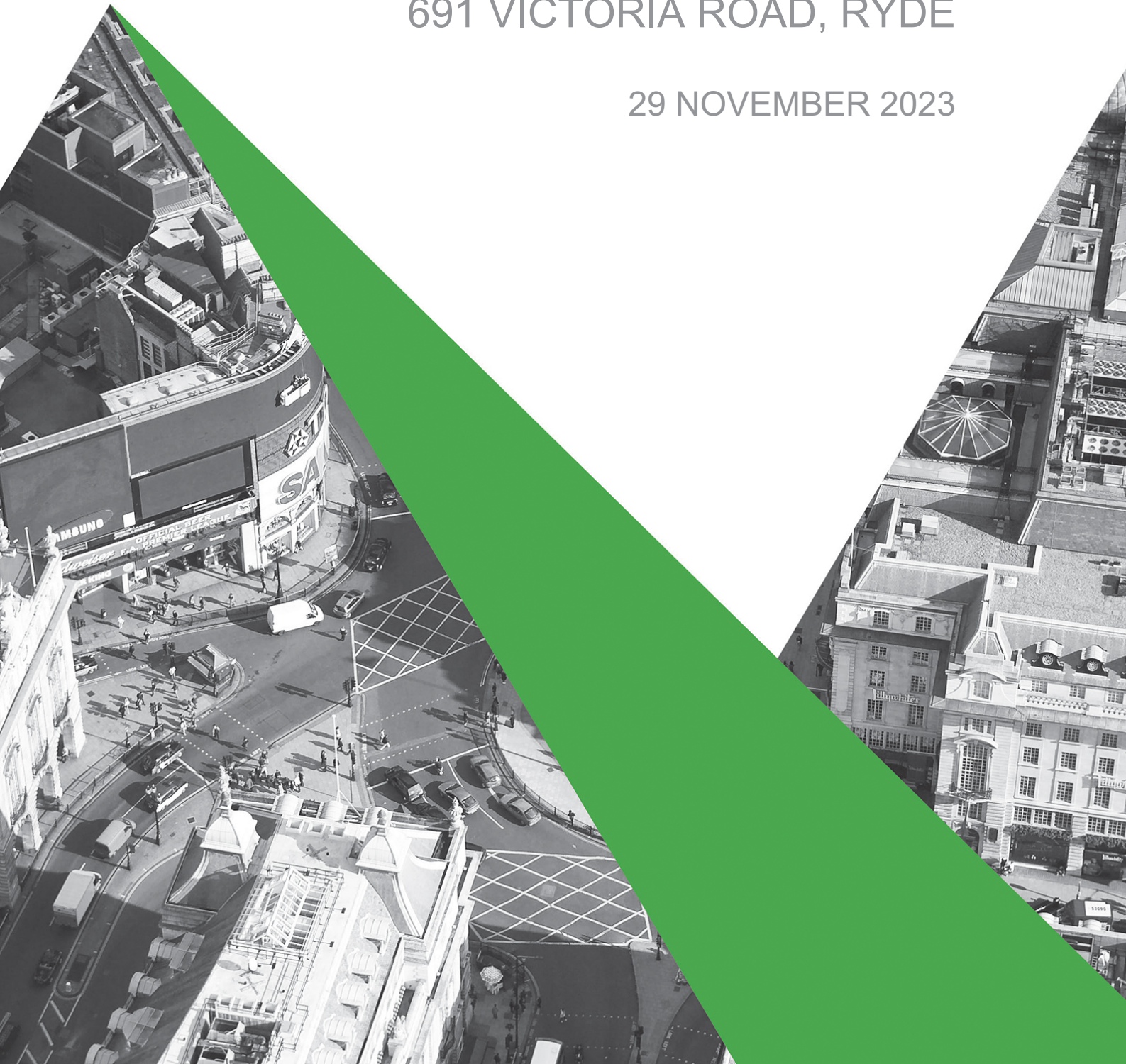


# Clause 4.6 Variation Request Building Height

691 VICTORIA ROAD, RYDE

29 NOVEMBER 2023



| QUALITY ASSURANCE |                         |
|-------------------|-------------------------|
| <b>PROJECT:</b>   | Clause 4.6 – Height     |
| <b>ADDRESS:</b>   | 691 Victoria Road, Ryde |
| <b>COUNCIL:</b>   | City of Ryde            |
| <b>AUTHOR:</b>    | Think Planners Pty Ltd  |

| Date          | Purpose of Issue | Rev   | Reviewed | Authorised |
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## CLAUSE 4.6 DEPARTURE – HEIGHT

### BACKGROUND

This Clause 4.6 departure has been prepared in support of a development application that seeks approval for demolition, tree removal and construction of a mixed use development at 691 Victoria Road, Ryde.

The proposal incorporates a child care centre and a total of 194 residential apartments.

The site is identified by Ryde LEP 2014 as having a mapped height of 18.5m and then Clause 4.3A (1) identified a further 3m height where by the proposal is a mixed use development on a lot at least 900sqm and a development with a new laneway- which is the case with this scheme.

Therefore the maximum height permitted is 21.5m to the development.

It is noted that the development is seeking to vary this control with portions of the communal open space and associated roof element and lift overrun exceeding the maximum height limit.

Given that the 21.5m height control is a development standard a clause 4.6 departure is required to seek to vary this standard.



## THE DEVELOPMENT STANDARD TO BE VARIED

As illustrated below, the site is identified by Ryde LEP 2014 Height map Sheet HOB\_006 as having a mapped height of 18.5m.

Figure 1: Ryde LEP Height Map HOB\_006 extract (Source E Planning 2022)



As set out above the site is subject the following building height:

- The Height base is 18.5m based on the mapping;
- Clause 4.3A Area F permits a further 3m as shown in the extract below.



#### 4.3A Exceptions to height of buildings

- (1) The maximum height for a building on land in an area shown in Column 1 of the table to this subclause that is permitted by clause 4.3 is increased by the additional height specified opposite the area in Column 2, if the land and the development meet the specifications shown opposite the area in Column 3.

| Column 1   | Column 2                   | Column 3   |
|--|----------------------------|--|
| Area identified on <a href="#">Height of Buildings Map</a> | Additional building height | Specifications relating to the Area  |
| Area A   | 6 metres                   | The lot on which the building is sited has an area of at least 800 square metres   |
| Area B   | 2 metres                   | The lot on which the building is sited has an area of at least 1,200 square metres   |
| Area C   | 6 metres                   | The lot on which the building is sited has an area of at least 1,200 square metres   |
| Area D   | 6 metres                   | The lot on which the building is sited has an area of at least 2,000 square metres   |
| Area E   | 3 metres                   | The development is a mixed use development and provides laneway access that is not a private driveway or private laneway   |
| Area E   | 6 metres                   | The lot on which the building is sited has an area of at least 900 square metres and the proposed development is a mixed use development and provides laneway access that is not a private driveway or private laneway |
| Area F   | 3 metres                   | The lot on which the building is sited has an area of at least 900 square metres and the development is a mixed use development and provides laneway access that is not a private driveway or private laneway          |

- (2) Despite clause 4.3, the maximum height of a dual occupancy (attached) and a multi dwelling housing on land in Zone R2 Low Density Residential is 5 metres for any dwelling that does not have a road frontage.

- The proposal is a mixed use development and provides laneway access.
- This permits a maximum height of 21.5m for the development.

A height blanket and section drawings are provided overleaf to demonstrate the nature of the departure and the portion of the buildings that exceed the height control.

Figure 2: Height Blanket

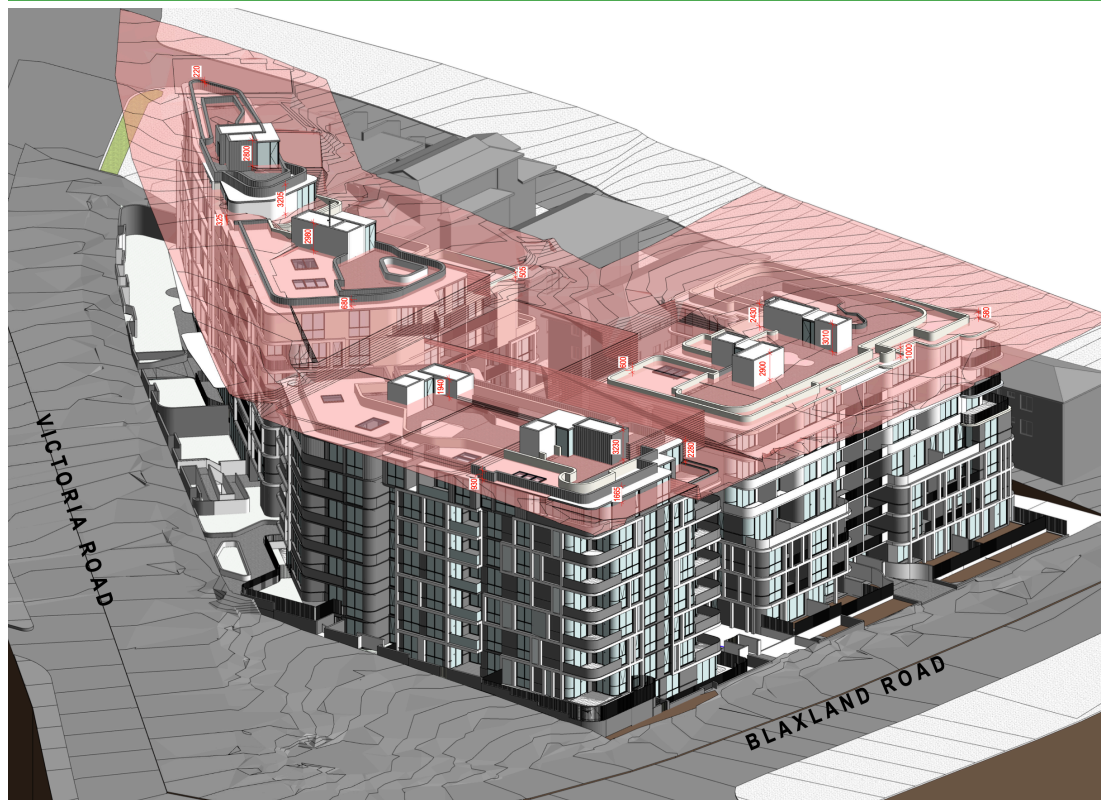


Figure 3: Height Blanket

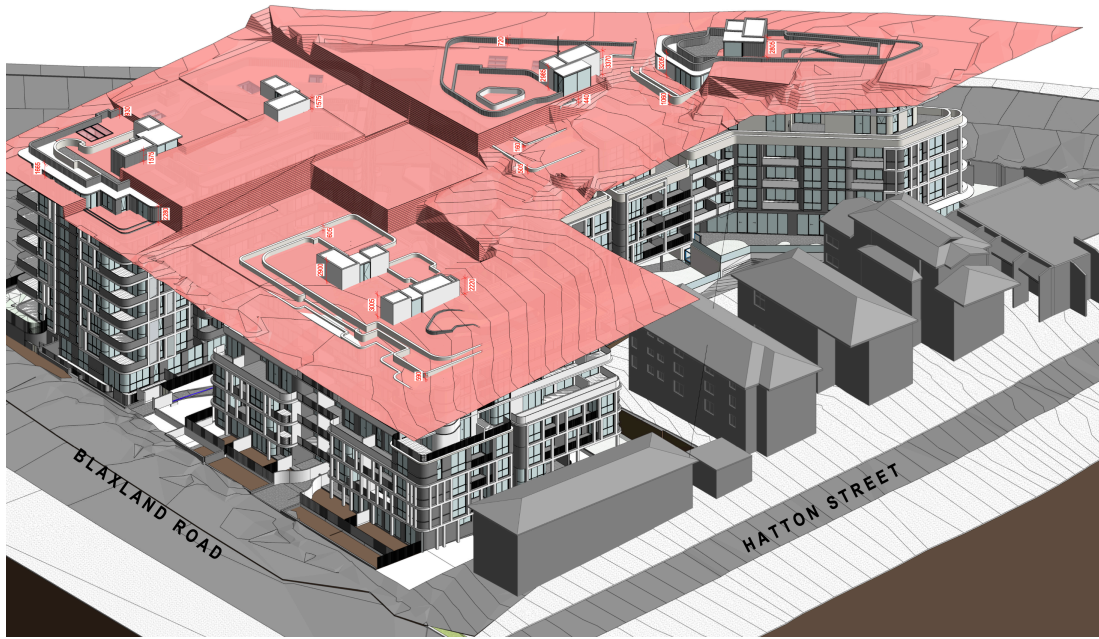
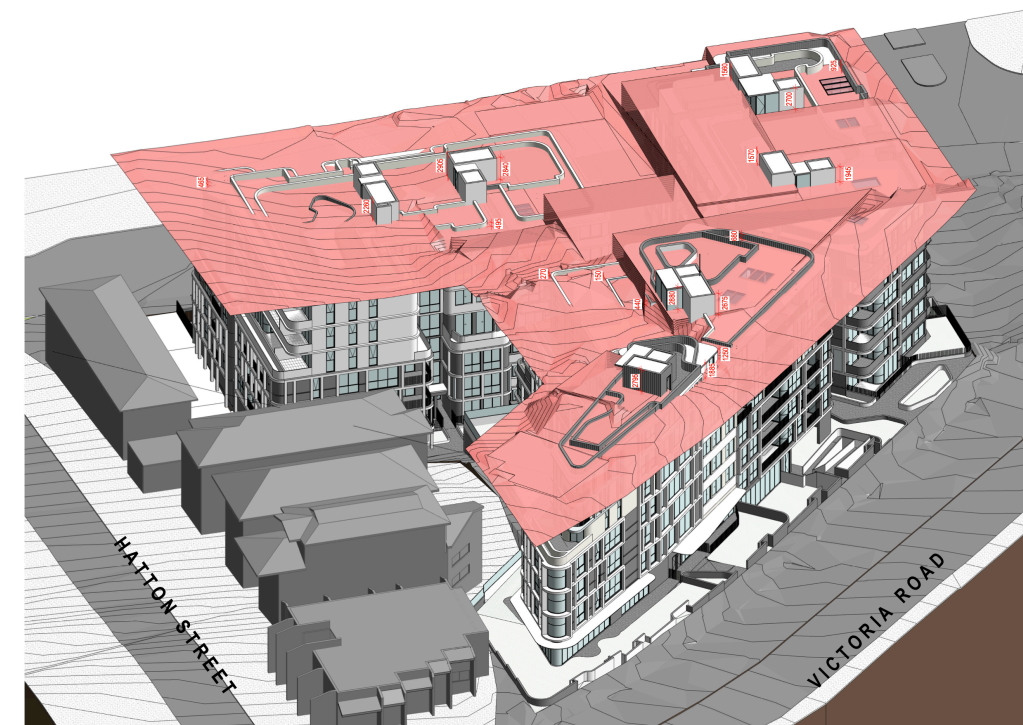


Figure 3: Height Blanket





As illustrated above the departure predominantly relates to the roof, communal open space and lift overrun exceeding the 21.5m height control. These are primarily non-habitable components of the development proposal necessary to provide accessibility and the rooftop COS provides amenity to future residents.

The proposal presents the following departures to the 11.5m height control:

| Building Element             | Maximum Height        | % Exceedance |
|------------------------------|-----------------------|--------------|
| Lift Over-run and fire stair | 2.905m maximum breach | 13.5%        |
| Parapet element              | .925m breach          | 4.3%         |
| Unit 901 Upper level         | 1.885m breach         | 8.7%         |

Clause 4.6 of the Ryde LEP 2014 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.

The applicant asks that the Consent Authority consider this request, and grant development consent to the proposal, despite the departure from the control, for the reasons stated below.

## PROVISIONS OF CLAUSE 4.6

Clause 4.6 of the Ryde LEP 2014 provides that development consent may be granted for development even though the development would contravene a development standard. That clause is in the following terms:

Clause 4.6 of the Ryde Local Environmental Plan 2014 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:

### **4.6 Exceptions to development standards**

*(1) The objectives of this clause 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.*

*(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.*

*(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

### **Note—**

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*



(5) *(Repealed)*

Clause 4.6 does not restrain the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following:*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4,*

## **RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6**

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

*this request has adequately addressed the matters required to be demonstrated by subclause (3), namely that:*

- a. compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b. there are sufficient environmental planning grounds to justify contravening the development standard<sup>1</sup>;*

The request deals with each relevant aspect of clause 4.6 on the following pages.

## NSW CASE LAW

This request also addresses several relevant Land and Environment Court cases including, *Micaul Holdings Pty Ltd v Randwick City Council*, *Moskovich v Waverley Council* and *Initial Action Pty Ltd v Woollahra Municipal Council*.

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*;
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate *that there are sufficient environmental planning grounds to justify contravening the development standard*, and
- The proposal is required to be in ‘the public interest’.

It is important to note that the Chief Judge of the Land and Environment Court in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not.

An extract of this judgment is provided below:

*Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.*

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the height standard;
- Demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard;
- Satisfying the relevant provisions of Clause 4.6.

These matters are addressed overleaf, noting that the proposal has a bulk and scale that is consistent with the emerging built form in this high density residential area and the height breach is a necessary component of this type of development.

## COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the reasons which follow.

Compliance with the objectives of the development standard and the zone are achieved despite non-compliance with that standard. The objectives of the height development standard are stated as:

*(1) The objectives of this clause are as follows—*

*(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,*

*(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*

*(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,*

*(d) to minimise the impact of development on the amenity of surrounding properties,*

*(e) to emphasise road frontages along road corridors.*

The current development proposal remains consistent with the objectives of the clause and is a more appropriate outcome on the site because of the following:

- The development proposal is consistent with the intent of the maximum height control and will provide an attractive series of 7 storey building that addresses the site's frontage to Victoria Road and Blaxland Road and provides a streetscape that is in proportion and in character with nearby development given the observed forms of development in the locality and the location of the breach is located centrally to the building and is not visually prominent from the public domain or adjoining properties.
- The non-compliance is minor in nature with the majority of the building being compliant with the building height control and only a small portion of the building encroaches upon the prescribed height control and as such its impact to the streetscape is negligible as it will be visually unnoticeable when viewed from the street level, noting that the structures to the COS are recessive and the location of the additional massing is not highly visible from the public domain and the breach largely arises from the lift-override and fire stair and then balustrading to the COS area.

- The proposed height is consistent with the desired future character being 7 storey residential flat buildings in this part of the Ryde Town Centre Precinct.
- The departure of the height control is a result of providing communal open space for the residents and improve amenity and not a result of increasing yield for the scheme because the elements over the height standard are relates to the COS and associated access elements including the lift and there is limited habitable space above the height limit.
- The departure will not unreasonably impact on the solar access of adjoining properties or the public areas in the vicinity of the site particularly noting that the southern portion of the building complies with the height control.
- Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard it is noted:
  - The variation will have no adverse impact on the physical bulk, height or scale of the development, noting the small scale nature and location of the point encroachment.
  - The variation will not lead to a significant reduction in solar penetration on site or to adjoining properties nor will it lead to any unacceptable sunlight loss or overshadowing.
  - The proposed variation will not lead to view loss or interrupt views to and from the site.
  - The proposed variation will not lead to a reduction in privacy afforded to existing residents or future residents of the proposal.
- The proposal has been designed to ensure that privacy impacts are mitigated and that the proposal will not obstruct existing view corridors.
- The proposed variation is minor in nature with the majority of the buildings being compliant with the building height control and the variation is also due to the extensive undulation of the site and to provide residential amenity. The extent of non-compliance will also not be a visually prominent element in the streetscape;
- 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- noting the uneven topography is the key driver of the height variation rather than a desired to achieve greater yield on the site;
- The additional height does not generate any additional amenity impacts given the location of the breeches and the surrounding site context;

- The proposal has been designed to ensure that privacy impacts are mitigated against and that the proposal will not obstruct existing view corridors;
- Given the sites orientation, and the minor height departure the additional height will not have any additional adverse overshadowing impacts on nearby developments that incorporate residential components;
- The development proposal is consistent with the intent of the maximum height control and has a bulk and scale that is not discernible from a development that complies with the control;
- The proposal has been designed to ensure that privacy impacts are mitigated that the proposal will not obstruct existing view corridors with appropriate setbacks provided to promote view sharing opportunities;
- The non-compliance to the height control has no unacceptable impact on the setting of any items of environmental heritage or view corridors;
- The proposal will sit comfortably in the streetscape relative to the desired future character of the locality; and
- The development will not exceed the infrastructure capability of the locality.

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



## ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the floor space ratio development standard. For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.

- The form and presentation of the development maintains an appropriate visual relationship to adjoining properties and does not present a bulk and scale from the street or adjoining properties that is detrimental to the existing and desired future character of the area;
- The building is compatible with the desired future character of the area in terms of the building presentation to the street, the materials, and the relationship to surrounding properties.;
- The design and provision of the rooftop communal rooftop terrace that necessitates balustrading, lift cores and fire stairs which protrudes beyond the permitted height plane. The proposal as designed seeks to maximise amenity for future occupants via the provision of this communal rooftop open space area. Proposed rooftop structures i.e. lift overrun, lobby, seating, bbq facilities are directly correlated to the design, function and intended use of the rooftop communal open space area which forms an integral part of the proposed development. The structures service the rooftop communal open space area which has been provided to benefit the future occupants of the site. The non-compliance relates to features of the property which will significantly improve the amenity of the occupants and the primary breach is from the shade structure over the COS- noting its removal would substantially reduce the height breach but also substantially reduce the design merit of the COS and amenity for the users of the space.
- The departure to the height standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
  - To promote the orderly and economic use and development of land
  - To promote good design and amenity of the built environment through the provision of the rooftop common open space area.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

## CONCLUSION

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 proposal promotes the economic use and development of the land consistent with its zone and purpose.

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

Strict compliance with the prescriptive maximum height requirement is unreasonable and unnecessary in the context of the proposal and its 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 objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including the departure to the maximum height control.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the subject area. The proposal promotes the economic use and development of the land consistent with its zone and purpose. The Consent Authority is requested to invoke its powers under Clause 4.6 to permit the variation proposed.