

**Updated clause 4.6 variation request – Height of buildings
Residential flat building development
Lot 1, DP 973520, 17 Shirley Road, Roseville
Lot 1, DP 972422, 19 Shirley Road, Roseville
Lot 1, DP 972554, 21 Shirley Road, Roseville
Applicant: Lindfield Estate Pty Limited**

1.0 Introduction

This updated clause 4.6 variation request has regard to the following amended Architectural plans prepared by MX Architects:

DRAWING NO.	DRAWING TITLE	DATE ISSUED	REVISION NO.
AR 001	Cover Page	12/09/2025	3
AR 002	Site Plan	29/07/2025	2
AR 003	Demolition Plan	29/07/2025	2
AR 005	Location Plan	29/07/2025	2
AR 006	Site Analysis	12/09/2025	3
AR 006A	Site Analysis	29/07/2025	1
AR 007B	Basement 1m Height Above NGL	08/08/2024	1
AR 008	LEP Height Compliance	01/09/2025	5
AR 008A	LEP Height Compliance	12/09/2025	1
AR 009	Landscape Compliance	29/07/2025	2
AR 010	Deep Soil & C.O.S Compliance	12/09/2025	3
AR 011	Excavation Plan	10/04/2025	1
AR 012	Environmental Site Management Plan	10/04/2025	1
AR 014	Site Coverage	29/07/2025	1
AR 021	Shadow Diagrams - Winter (0900-1200)	29/07/2025	2
AR 022	Shadow Diagrams - Winter (1300-1500)	29/07/2025	2
AR 024	Shadow Comparison Diagrams - 21 June, 1pm	29/07/2025	1
AR 025	Sun Path Diagrams - Winter (0900-1200)	29/07/2025	2
AR 026	Sun Path Diagrams - Winter (1300-1500)	29/07/2025	2
AR 028	Site Photos	10/04/2025	1
AR 100	Basement 3 GA Plan	12/09/2025	10
AR 101	Basement 2 GA Plan	12/09/2025	10
AR 102	Basement 1 GA Plan	12/09/2025	11
AR 103	Ground Floor GA Plan	12/09/2025	10
AR 104	Level 1-3 (Typical) GA Plan	12/09/2025	8
AR 105	Level 4 GA Plan	12/09/2025	8
AR 106	Level 5-6 (Typical) GA Plan	12/09/2025	8
AR 107	Roof Terrace GA Plan	12/09/2025	8
AR 108	Roof Plan	09/09/2025	2
AR 400	Building Elevations - North & East	12/09/2025	3
AR 401	Building Elevations - South & West	12/09/2025	3
AR 410	Schedule of Finishes & Sample Board	10/04/2025	1
AR 420	Photo Montage 1	10/04/2025	1
AR 421	Photo Montage 2	10/04/2025	1
AR 601	Building Section	11/09/2025	3
AR 610	Loading Dock & Parking Entry	05/08/2025	2
AR 900	Glazing Type Schedule	09/09/2025	2
AR 950	Storage Schedule	12/09/2025	1
AR 990	Notification Plan - Site Plan	10/04/2025	1
AR 991	Notification Plan - Elevations	10/04/2025	1
AR 992	Notification Plan - Elevations	10/04/2025	1

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements 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, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 State Environmental Plan Policy (Housing) 2021 (SEPP Housing)

2.1 Chapter 5, clause 155(2) – Maximum building height

Pursuant to clause 155(2) of SEPP Housing the maximum building height for a residential flat building in a Transport Oriented Development (TOD) Area is 22m. The subject site is located within a mapped TOD Area.

Building height is defined in the standard template LEP as follows:

***building height (or height of building)** means the vertical distance between ground level (existing) and 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.*

Ground level (existing) is defined as follows:

***ground level (existing)** means the existing level of a site at any point.*

It has been determined that the western and southern edges of the Level 6 floor plate breach the height standard by a maximum of 3.660m (16.6%) whilst the northern edge of the Level 6 floor plate breaches the standard by a maximum of 1.35m (6.1%). The majority of the eastern and northern edges of the level 6 floor plate are compliant with the standard.

The roof top communal facilities and communal open space breach the height standard by a maximum of 7.26m (33%) at its southern end and 4.95m (22.5%) at its northern end. The location and extent of building height breaching elements are depicted on the 22m height blanket diagrams and sections on plans AR 008(5) and AR 008A(1) extracts of which are over page.

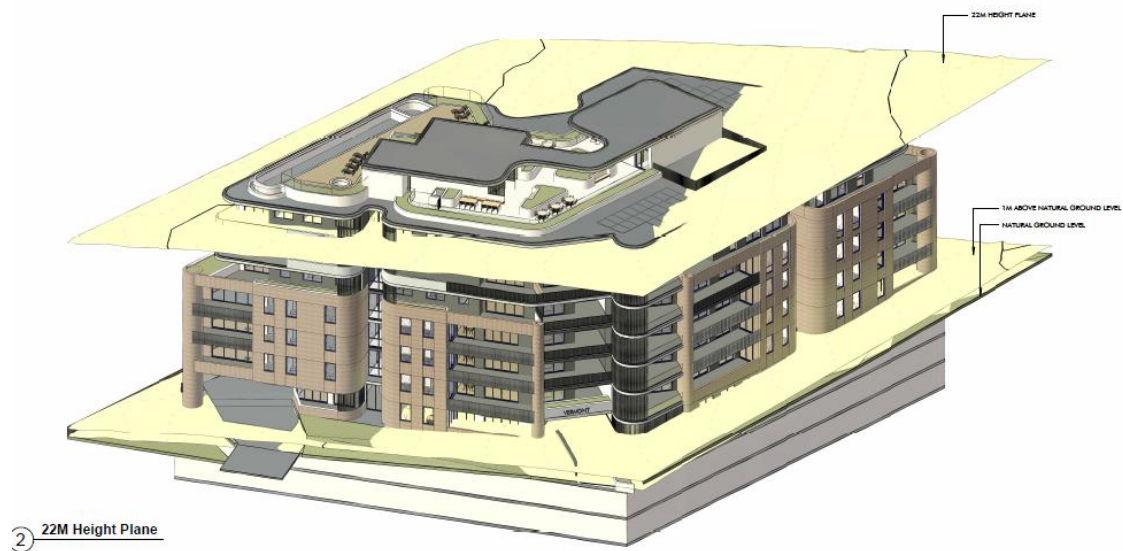


Figure 1 - Height blanket diagram extract showing building height breaching elements as viewed from the south-east.

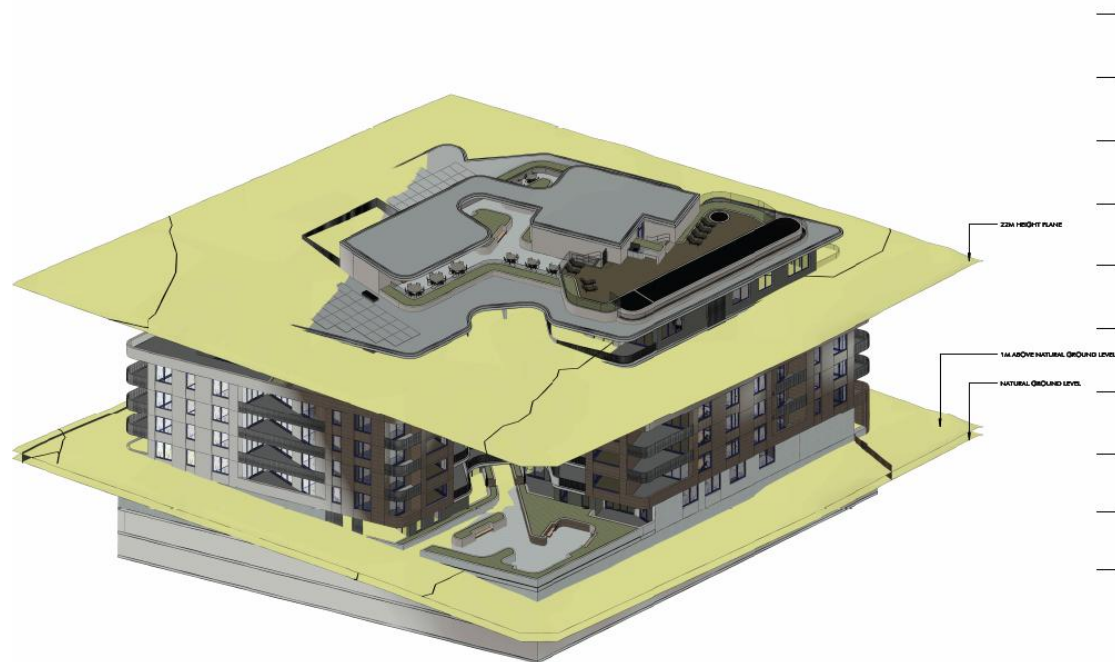


Figure 2 - Height blanket diagram extract showing building height breaching elements as viewed from the north-west.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of KLEP 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 the 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 KLEP provides:

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 155(2) of SEPP Housing maximum building height development standard.

Clause 4.6(3) of KLEP provides:

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 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.*

The proposed development does not comply with the height of buildings provision at clause 155(2) of SEPP Housing which specifies a maximum building height across the land however strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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 155(2) of SEPP Housing 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

4.0 Request for variation

4.1 Is clause 155(2) of SEPP Housing a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision 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, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 155(2) of SEPP Housing prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 155(2) of SEPP Housing is a development standard.

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 are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, 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.

First way - Consistency with objectives of the standard

There are no stated objectives associated with the clause 155(2) height of buildings standard although the aims of Chapter 5 of SEPP Housing are as follows:

- (a) to increase housing density within 400m of existing and planned public transport,*
- (b) to deliver mid-rise residential flat buildings, seniors housing in the form of independent living units and shop top housing around rail and metro stations that—*
 - (i) are well designed, and*
 - (ii) are of appropriate bulk and scale, and*
 - (iii) provide amenity and liveability,*

- (c) to encourage the development of affordable housing to meet the needs of essential workers and vulnerable members of the community.*

The building height breaching elements do not compromise the development's ability to achieve the aims of the Chapter as outlined. In fact, approval of the variation will facilitate the provision of roof top communal facilities and communal open space which will receive exceptional levels of solar access and amenity throughout the day and in doing so contribute to exceptional amenity and liveability.

Further, the building height breaching elements will not compromise the developments ability to appropriately increase housing density within 400m of the Roseville Station in a building form which is well designed, of appropriate bulk and scale and which provides affordable housing to meet the needs of essential workers and vulnerable members of the community.

Notwithstanding the building height breaching elements the aims of the Chapter are achieved.

I also consider it appropriate to assess the proposed building height against the objectives of the height of building standard contained at clause 4.3 KLEP to the extent that they do not derogate from Chapter 5 provisions of SEPP Housing.

An assessment as to the consistency of the proposal when assessed against the objectives of clause 4.3 KLEP are as follows:

- (a) to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*

Comment: Pursuant to clause 155(2) of SEPP Housing the maximum building height for a residential flat building in a Transport Orientated Development Area is 22m. This standard applies to the subject development notwithstanding the recent exhibition of the draft Preferred Scenario for Transport Orientated Development LEP (the draft LEP) because as the development application was lodged prior to 13 June 2025 it is saved.

Notwithstanding, to understand the scale of surrounding development within and around the Roseville Centre reference is made to the draft LEP zoning and building height map extracts over page.

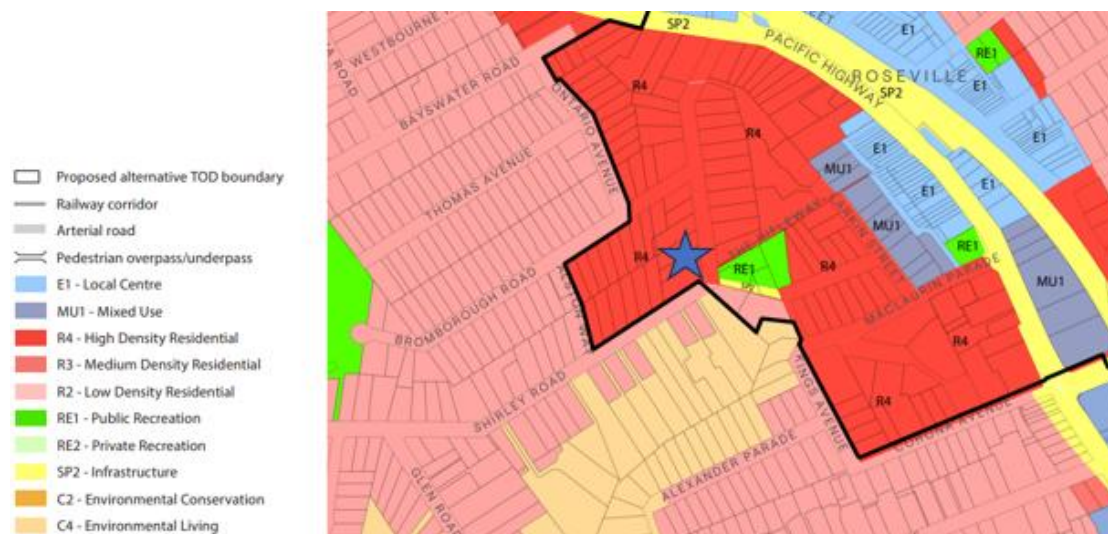


Figure 3 – Draft LEP zoning map extract with subject site depicted by blue star.



Figure 4 – Draft LEP height of buildings map extract with subject site depicted by arrow.

I note that all surrounding land is proposed to be zoned R4 High Density residential with the subject development site having a proposed maximum prescribed building height of between 18.5m and 29m. Development to the north and east has an anticipated building height of 29m and development to the south 18.5m.

The building height breaching elements do not contribute to overall building height to the extent that the development is inconsistent with the height provisions or will be perceived as inappropriate or jarring having regard to the desired future high-density residential context in which it is located and the height of development anticipated by the draft LEP.

Notwithstanding the building height breaching elements the proposal satisfies this objective.

- (b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*

Comment: Although the subject property adjoins R2 Low Density Residential zoned land to the west this land is proposed to be up zoned to R4 High Density Residential pursuant to the draft LEP as depicted in the zoning extract at Figure 4.

In any event, the building height breaching elements do not contribute to the scale of the development to the extent that it is rendered inappropriate having regard to its spatial relationship to the adjoining lower density residential zoned land. The building height breaching elements will not give rise to residential amenity impacts in terms of views, shadowing or privacy.

Notwithstanding the building height breaching elements the proposal satisfies this objective.

- (c) to enable development with a built form that is compatible with the size of the land to be developed.*

Comment: The building height breaching elements do not contribute to overall building height to the extent that the development will be perceived as inappropriate or jarring having regard to the draft LEP high-density residential context in which it is located.

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 overall height of the development, in particular the contribution made by the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably be concluded that, notwithstanding the building height breaching elements the development is capable of existing together in harmony with surrounding and nearby development.

Notwithstanding the building height breaching elements the resultant development is compatible with the size of the land to be developed and satisfies this objective.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as a development compliant with the standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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:

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.

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

Ground 1 - Topography

The topographical characteristics of the site which falls away towards its south-western corner contribute towards the extent of height breach particularly in relation to the Level 6 floor plate breaching elements.

Ground 2 – Absence of unacceptable impact

I am satisfied that the building height breaching elements do not contribute to building height or massing to the extent that the overall building will be incompatible with the desired future character of the precinct as anticipated by the Chapter 5 TOD provisions of SEPP Housing and the draft LEP.

I am also satisfied that the building height breaching elements will not give rise to adverse streetscape or residential amenity impacts. Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [2021] NSW LEC 1242, the absence of impacts consequential of the departure constitutes an environmental planning ground as it promotes good design and amenity of the development in accordance with the objects of the EP&A Act.

Ground 3 – Aims of Chapter 5 SEPP Housing

The building height breaching elements do not compromise the development's ability to achieve the aims of the Chapter. In fact, approval of the variation will facilitate the provision of roof top communal facilities and communal open space which will receive exceptional levels of solar access and amenity throughout the day and in doing so contribute to exceptional amenity and liveability.

Further, the building height breaching elements will not compromise the developments ability to appropriately increase housing density within 400m of the Roseville Station in a building form which is well designed, of appropriate bulk and scale and which provides affordable housing to meet the needs of essential workers and vulnerable members of the community.

Ground 4 - Objectives of the Environmental Planning and Assessment Act 1979

Approval of the variation to the building height standard will enable the development to achieve the FSR anticipated by the TOD provisions and in doing so promote the orderly and economic use and development of the land consistent with objective 1.3(c) of the Act.

Approval of the building height breaching elements will promote the delivery of affordable housing consistent with objective 1.3(d) of the Act.

Approval of the variation to the building height standard facilitates the provision of communal rooftop facilities and communal open space which will contribute significantly to the design quality and amenity of the overall development. Accordingly, approval of the variation will promote good design and amenity consistent with objective 1.3(g) of the Act.

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

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's 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 height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

15.9.25